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Recommended Citation
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Three Theories of Discrimination in the Brown Collar Workplace

Leticia M. Saucedo†

In the immigrant workplace, tough working conditions and bad wages are often explained as simply exploitative conditions characteristic of low-wage workplaces. It is not typical to characterize the conditions of low-wage immigrant workplaces as the result of discriminatory practices for several reasons. First, in an anti-discrimination framework that focuses on barriers to entry and promotion, immigrant workers have jobs, so they should have little to complain about.¹ Second, the anti-discrimination framework is subject to highly contested debates about what rights, if any, immigrant workers—especially undocumented workers—have in the workplace.² Third, discrimination frame-

† Professor of Law, Wm. S. Boyd School of Law, University of Nevada, Las Vegas; J.D., 1996, Harvard Law School. I thank Stephen Befort, Devon Carbado, Martha Charambas, Matthew Finkin, Tristin Green, Jeff Hirsch, Cristina Morales, Ann McGinley, Vicki Schultz, Charles Sullivan, Michelle Travis, Michael Waterstone, Deborah Widiss and Michael Zimmer for their insightful comments on earlier drafts of this article. Thanks also to participants of The University of Chicago Legal Forum Symposium, the Yale Workplace Theory and Policy Seminar, The UCLA Critical Race Theory Seminar, the Seton Hall Labor and Employment Law Scholars’ Forum, and the University of San Francisco Law Review Symposium for their excellent feedback, suggestions and comments.

¹ In fact, much legal scholarship and case theory focuses on those locked out of jobs by discriminatory practices, even in the low-wage sector. See, for example, Jennifer Gordon and R.A. Lenhardt, Rethinking Work and Citizenship, 55 UCLA L Rev 1161 (2008) (discussing differing perspectives on low-wage employment opportunities for African American and Latino immigrant workers); Katherine V.W. Stone, From Widgets to Digits 157–68 (Cambridge 2001) (discussing the ways in which women and minorities have been excluded from jobs historically and in today’s workplace); EEOC v Consolidated Service Systems, 989 F2d 293, 237–38 (7th Cir 1993) (challenging the discriminatory hiring practices of a Korean-owned business).

² This was the underlying rationale of the employer’s argument in Hoffman Plastic Compounds, Inc v NLRB, 535 US 137 (2002), in which the Supreme Court held that undocumented workers’ remedial rights were limited in unfair labor practice cases under the NLRA. While undocumented workers continue to be considered workers under the NLRA, the Hoffman ruling limits their ability to enforce remedial rights such as back pay and reinstatement. Id at 150. Another employer, Agri Processor Company, recently made a similar argument in challenging a successful union election in which the majority of the workers who voted for a union were undocumented. Agri Processor Co, Inc v NLRB, 514 F3d 1, 7–8 (DC Cir 2008). The DC Circuit affirmed the lower court ruling that undocu-
works aside, the popular imagination in the United States accepts the existence of bad, low-wage jobs that are exploitative or substandard for all workers who hold them, regardless of race, national origin, gender, or other protected status. While it may be the case that not all exploitative conditions in low-wage workplaces can be remedied through anti-discrimination law, there may be a specific set of conditions resulting from employer targeting of immigrants that can be characterized as discriminatory. Focusing on such conditions and how they arise out of discriminatory practices may provide us a unique perspective on how discriminatory practices manifest themselves, even if not everyone in the workplace is a member of a protected class.

In this Article I aim to apply three discrimination theories to the immigrant workplace setting. The three theories of discrimination I discuss here are alternatives proposed by legal scholars and others to the traditional disparate treatment and disparate impact theories of workplace discrimination. I apply these theories in the low-wage immigrant workplace context because I want to challenge the assumptions that immigrant workers—who have a tenuous right to these jobs—should not be able to use anti-discrimination law to improve bad working conditions. The dynamics of the employment relationship, and their effects on immigrants provide a unique lens through which to examine how seemingly neutral practices may be discriminatory once a population is targeted for a set of jobs or occupations. By focusing on discrimination theories in the immigrant workplace, moreover, I aim to expand the limited concepts of discrimination to include the remediation of bad working conditions, especially when they exist in segregated workplaces.

Several legal scholars have begun to question the emphasis in anti-discrimination law on formal barriers to entry and promotion, and have started to look at what happens in the workplace “after inclusion.” These scholars argue that anti-discrimination law should pay more attention to how well workers are integrated into the workplace after they are hired. I focus in this Article on the works of legal scholars of three discrimina-

3 See, for example, Devon W. Carbado, Catherine Fisk, and Mitu Gulati, After Inclusion, 4 Ann Rev L & Soc Sci 83 (2008) (analyzing discriminatory practices operating in tandem with workplace inclusion in certain jobs); Tristin K. Green, A Structural Approach as Antidiscrimination Mandate: Locating Employer Wrong, 60 Vand L Rev 849 (2007) (arguing for a structural approach to employment discrimination that would include employers' subtle discriminatory workplace decisionmaking).
tion theories, as a way to explain some of the discriminatory dynamics in low-wage immigrant workplaces that prevent real integration. I draw on the work of legal scholars who have applied structuralist theories, performance identity theories, and masculinities theories to workplace environments. These three theories focus on distinct but interrelated aspects of discrimination: how the employer structures the workplace (structuralist approaches); how employees respond to workplace structures in order to fit in (performance identity); and how workers create narratives amongst themselves to maintain their place within the workplace hierarchy and at the same time preserve existing workplace structures (masculinities). Together these theories describe how discrimination manifests itself in the immigrant workplace. Immigrant workplaces operate at the intersection of these three theories, creating a form of discrimination not readily recognized by either the racial animus-based disparate treatment theory, or the neutral policy-based disparate impact theory. My aim in focusing on low-wage, immigrant worker settings is both to dispel the myth that workplace discrimination begins and ends with access to jobs, as well as the myth that biased behavior in low-wage work simply reflects or mirrors biased behavior in larger society. I also aim to highlight the similarities between discrimination in the workplace in general and discrimination in immigrant workplaces, where workers have “questionable rights”

4 See, for example, Vicki Schultz, Telling Stories about Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument, 103 Harv L Rev 1749, 1776–1843 (1990) (analyzing treatment of the “lack of interest” defense in sex discrimination cases and arguing that women’s work preferences do not precede their work, but instead are shaped in response to coercive structural features of the workplace); Susan Sturm, Second Generation Employment Discrimination: A Structural Approach, 101 Colum L Rev 458, 553–67 (2001) (arguing for a structural regulatory approach to discrimination in the workplace that can target “secondary discrimination”—subtle forms of discrimination and exclusion that emerge from complex work relationships, which often rely on amorphous structures for decisionmaking, cooperation, and leadership); Tristin K. Green, Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory, 38 Harv CR-CL L Rev 91, 93 (2003) (laying out a structural legal framework for targeting this new kind of discrimination by holding employers liable for “organizational structures and institutions that unreasonably enable the operation of discriminatory bias in the workplace”); Green, 60 Vand L Rev 849, 851 (cited in note 3).


6 See, for example, Ann C. McGinley, Masculinities at Work, 83 Or L Rev 359 (2004) (analyzing masculinities in the workplace as a means of maintaining male dominance in the workplace and proposing a way to incorporate masculinities theory into Title VII case law).
to jobs. I focus on immigrant workplaces in part to show that discrimination has little to do with the legal "right" to a job, and everything to do with the dynamics that employers create when they develop and structure jobs. The immigrant workplace, because of its segregated and highly contingent character, allows us to deconstruct the dynamics of the workplace, to re-examine the assumption that some workplace conditions are simply exploitative, and to explore discriminatory practices that result in exploitation. The three theories of discrimination, applied separately in other contexts, work together here to aid in that deconstruction.

For the past two years sociologist Cristina Morales and I have conducted a study among immigrant workers in the residential construction field in Las Vegas, Nevada. Interviews with dozens of immigrant construction workers in the residential construction field in Las Vegas revealed a pattern of gendered behavior with respect to the work involved, the safety conditions, and the types of employment arrangements in the field. The gendered differences in response to workplace conditions and the narratives developed around them are instructive for their insight into the effects of workplace structures and dynamics on individual workers as well as for their insight into how workers' responses tend to reify and solidify those structures. If the relationship between workplace structures and workers' responses are all part of a dynamic process, we cannot so easily accept employer arguments that they are not responsible for ameliorating general societal discrimination as it manifests itself in the workplace. Nor can we accept the argument that some workplaces are just bad, low-wage environments not remediable through antidiscrimination frameworks.

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7 I use the immigrant workplace in this article as a way to highlight how seemingly neutral employer practices may actually be discriminatory if the employer has targeted jobs for particular protected groups. I believe the three theories of discrimination intersect in unique ways in the immigrant workplace, although they may also intersect to reveal discriminatory practices in other settings, such as gendered workplaces.

8 I worked closely in collaboration with sociologist Cristina Morales, Associate Professor of Sociology at the University of Texas at El Paso, in an institutional review board ("IRB")-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 follow-up interviews of union leaders and construction workers over a two-year period. Between 2006 and 2007 we interviewed over seventy-five 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. This is one of a series of Articles analyzing the results of that study.
Immigrant workers are themselves refashioning the definition of what a construction worker looks like. After all, the picture of the Las Vegas construction worker was at one time that of an Anglo, blue collar, native-born male. The data we gathered reveal that today the typical residential construction worker is a Latino immigrant male. The demographics demonstrate how an industry can become racialized over time. Because a subset of the workers we interviewed were women, moreover, our study gave us the opportunity to test gendered as well as racialized workplace dynamics in the low-wage immigrant context. If construction work, especially residential construction work, is transforming from Anglo, blue collar, unionized, citizen's work to Latino, brown collar, non-unionized, immigrant work, there is an opportunity to analyze both the dynamics at play in the transformation, and how those dynamics affect the gendered and racial nature of the work. There is also an opportunity to suggest changes in the contours of this work even as it transforms.

Part I of this Article discusses Nancy's story. "Nancy" is a composite character representing the female gender of the workers that we interviewed in our study. Her story reflects the gendered responses to workplace conditions that we gleaned from our interviews. Part II explores the theoretical underpinnings of each of the discrimination theories I use to analyze Nancy's situation. Nancy's story lies at the intersection of the structuralist, performance identity, and masculinities theories. These theories, separately and together, aptly describe discrimination as it manifests itself in the immigrant workplace. Part III applies the theories to examples from Nancy's story. Part IV suggests ways that employers can use the perspectives about discrimination, as discussed here, to effect anti-discriminatory practices in the low-wage workplace.

I. NANCY’S STORY: WORKPLACE DYNAMICS IN A BROWN COLLAR INDUSTRY

Nancy's story and her experiences as an immigrant woman in construction reflect the stories we heard from other women,
and her responses to workplace conditions are juxtaposed with the responses of many of the males on her worksite, whose voices are also represented in Nancy's story.

Nancy works as a touch-up painter, along with a team of industrial painters, all of whom are male, Latino immigrants. She entered the construction field through friends who convinced her that she would make more money in construction than in the service industry. Nancy's job is to follow after the painters and finish the industrial painting work with detailed painting. Her main task is to perform the detail paint work on every house, and her secondary job is to perform industrial clean-up work to prepare a house for delivery to the builder. She does the same work in every house, and she is not allowed to learn the more professional aspects of the painting process on the job. As with other jobs in the industry, her job has been deskillied, or stripped of its skill requirements, and thus downgraded to unskilled work. It is difficult because it is tedious, time-consuming, and endlessly repetitive. Every time she has tried to transfer into an industrial painting job, which pays more and involves less attention to detail, either her co-workers or her supervisors tell her that industrial painting is not the type of work she can do. While some of her fellow painters are sympathetic and have taught her some of the skills she needs to move into industrial painting, there is no viable structure for her to move into an industrial painting position.

The worksite is more dangerous than it should be, according to Nancy, because the employers refuse to abide by Occupational Safety and Health Administration ("OSHA") standards. Workers are asked to work with dangerous fumes without proper masks, for example. Or they are asked to move ladders that are heavier than fifty pounds, violating the safety standards in the industry. Workers who accept the hazardous conditions do so while they explain them away. One male worker described how the company requires everyone's signature on a set of safety guidelines. Everyone agrees to abide by the safety guidelines, while at the same time understanding that jobs must be completed on time and under budget. However, piece rate wage arrangements are dominant in the construction industry, and workers are paid only for what they complete. Those who take safety shortcuts defend their decisions to ignore safety rules by pointing to the heavy time demands of the piece rate system.

Nancy complained about work conditions, the piece rate pay arrangements, and safety conditions. She was shunned by co-
workers, ridiculed by supervisors, and ultimately fired from at least one worksite. Her co-workers responded to her complaints with a narrative that she was simply not strong enough to do the work. Her supervisors ridiculed and humiliated her for complaining, claiming they did not understand how she deserved equal treatment when she needed to be accommodated for her weaknesses as a woman.

Nancy got hurt as a result of some of the safety shortcuts accepted on the job. Because the job is structured as an independent contractor position, she had much trouble trying to get the drywall and painting company who hired her to pay for her medical expenses through workers' compensation. The workers who accepted the independent contractor arrangement as part of the nature of the job also accepted that they would not have access to benefits such as workers' compensation, unemployment, and health insurance. These workers, mostly men, explained that with the opportunities of entrepreneurialism as independent contractors came the risks of owning their own time and labor.

Nancy sought to organize her co-workers into a workers' association when she realized that the workers needed to collaborate to gain leverage with the employer or within the construction industry. She has received mixed responses from her co-workers. Both men and women who have made peace with piece rate wages, independent contractor arrangements, and the safety conditions, and who believe in the pattern of advancement offered by the work-crew model of business in the industry, are not predisposed to a union or collective rights model of advancement. Those who do not perceive the work-crew a viable model for advancement are more receptive to collective organizing initiatives.

To be clear, the residential construction industry of today is very different from the construction industry of twenty years ago. Twenty years ago, the industry was highly unionized, predominantly Anglo, and well-paying, with benefits, workers' compensation, and unemployment systems providing a safety net for what has always been a notoriously unsafe job environment. Over the years, the industry has changed, and it is beginning to reflect the characteristics of low-wage jobs that we see proliferating in the United States. Specifically, these jobs (while better paid than most low-wage occupations) are nonunionized, pay less than in past decades, have few or no benefits, and do not provide the workers' compensation, unemployment or health insurance safe-
ty nets that the jobs provided in past decades. In addition, they are now held by Latino immigrants in large measure.10

We can interpret Nancy's story in at least three ways. In one interpretation, we can say that Nancy is not suited to the type of job that her male colleagues seem to tolerate and even enjoy. We can even go so far as to say that Nancy is the victim of centuries of societal bias against women, for which employers are not responsible. In a second interpretation, Nancy's story is one of classic exploitation of low-wage workers, although not necessarily an example of workplace discrimination. In a third interpretation, we can say that Nancy's story has elements of either gender or national origin discrimination, but it is difficult to see them both operating at the same time in all parts of her story. In this essay I attempt to refute each of these separate characterizations of Nancy's story, and to create a more unified theory of discrimination that fits her whole story. I do this in order to identify as discrimination what has been traditionally characterized in low-wage work simply as exploitation or undesirable work that those at the bottom of the market ladder must perform. I argue that because Nancy's story lies at the intersection of at least the three theories of discrimination I explore here, it is not easily captured by current anti-discrimination frameworks. I use this opportunity to focus on what employers of low-wage immigrants can do to change workplace dynamics, both to avoid Title VII liability and to encourage the inclusivity and humane workplace conditions that Title VII envisioned.

II. THE THREE THEORIES: STRUCTURALISM MEETS PERFORMANCE IDENTITY AND MASCULINITIES IN THE LOW-WAGE IMMIGRANT WORKPLACE

Nancy's story exemplifies the interconnectedness of the theories of discrimination that I focus on in this Article. Much of the literature in the structuralist, performance identity, and masculinities theories focuses on professional work environments. There is little application of any of these theories to the

10 See Ruth Milkman and Kent Wong, Organizing the Wicked City: The 1992 Southern California Drywall Strike, in Ruth Milkman, ed, Organizing Immigrants: The Challenge for Unions in Contemporary California 169 (Cornell 2000) (describing the demographic changes in the southern California construction industry from Anglo, to immigrant labor over a period of several decades); Marc Linder, Wars of Attrition: Vietnam, the Business Roundtable and the Decline of Construction Unions, 16 (Fanpihua 2000) (describing the decline of construction unions and the evolution of nonunion construction, with the encouragement of government and private employers).
low-wage immigrant worker context. I aim to do that here, demonstrating through Nancy's story how the structuralist theory provides an overall framework, and the performance identity and masculinities theories provide the details and nuance for how discrimination operates in the low-wage immigrant workplace.

A. The Structuralist Approach to Discrimination

Structuralist theory focuses on behaviors within the workplace that, at the outset, may seem uncontrollable because they are imported, already formed, into the workplace from the outside. The theory attempts to link exogenous forces such as societal bias—conscious or unconscious—with employer structures in order to respond to the rhetoric that employers should not be held responsible for societal discrimination.11

In her groundbreaking article, Susan Sturm argued that structural discrimination, a more subtle and complex form of workplace discrimination, is as destructive as first generation blatant discrimination because it continues to foster "patterns of interaction among groups within the workplace that, over time, exclude nondominant groups."12 These discriminatory structures have the same exclusionary effect as explicit barriers to entry or promotion. As Sturm notes, "[t]his form of harassment may consist of undermining women's perceived competence, freezing them out of crucial social interactions, or sanctioning behavior that departs from stereotypes about gender or sexual orientation. It is particularly intractable, because the participants in the conduct may perceive the same conduct quite differently."13

For a long time organizational theory did not consider historical, social, political or economic influences on the workplace. New structuralist theorists argue that political, social, and economic factors that seem exogenous actually magnify differences.14 These same factors affect and are affected by employer practices in the workplace. According to these theorists, more attention must be paid to how seemingly exogenous forces operate within workplace organizations. Focusing on the interaction

12 Sturm, 101 Colum L Rev at 460 (cited in note 4).
13 Id at 464–69.
between the outside forces and the structures within the workplace may illuminate how discrimination operates in the workplace today. So, as Sturm argues:

[B]ehavior that appears gender neutral, when considered in isolation, may actually produce gender bias when connected to broader exclusionary patterns. The social impact of particular conduct may vary depending upon the context in which it occurs and the organizational culture shaping the perceptions of the various participants. At the margins, it can be difficult to draw lines between discriminatory harassment and lawful, albeit unprofessional, destructive behavior.¹⁵

Structuralist theory, then, questions whether exogenous forces are truly exogenous, suggesting that employers are doing something in the workplace to solidify or magnify behaviors.

Tristin Green's work on structuralist theory adds an important insight to this literature. Her structuralist approach to discrimination focuses on the dynamics that are created in the workplace through the establishment of employment structures. It focuses on how an employer can or should be held accountable for the existence of subjective decisionmaking processes in the workplace. It provides a set of guidelines for analyzing how and when subjective criteria might have a discriminatory effect or intent in the relationship between employer and employee. In either case, the employer should be held liable for its part in facilitating subjective decisionmaking based on bias in the workplace.¹⁶ Green and others are providing the theoretical framework for analyzing subjective criteria decisionmaking that the Supreme Court held discriminatory in Watson v Fort Worth Bank & Trust.¹⁷

¹⁵ Sturm, 101 Colum L Rev at 469 (cited in note 4).
¹⁶ Green, 60 Vand L Rev at 883–900 (cited in note 3); id at 851 ("A structural approach to employment discrimination law imposes costs on employers that are tied to employers' wrongs against individuals in the workplace. An employer that facilitates discriminatory workplace decisionmaking engages in the wrong of treating individuals differently on the basis of protected group status or characteristics and, perhaps more importantly, is worthy of fault for its role in that wrong.").
¹⁷ 487 US 977 (1988). In Watson, the Supreme Court held that bias that infected the decisionmaking process because of subjectivity was discriminatory. The Court noted that subjective decisionmaking includes those decisions "based on the exercise of personal judgment or the application of inherently subjective criteria." Id at 988. See also Price Waterhouse v Hopkins, 490 US 228 (1989) (finding that bias infecting a subjective partnership decision concerning a female employee described as "macho" and "unfeminine" would be sufficient for employer liability but remanding on other grounds), superseded by
How does the structuralist approach operate to identify possible discriminatory practices? It starts by analyzing the rationale for organizational structures in the workplace. One such rationale involves the relationship between in-group and out-group members. Organization theory demonstrates the effectiveness of affective commitment—buying into the corporate culture—on a company's productivity and on stable workplace relationships. Affective commitment requires strong workplace norms. Green argues that this type of organizational culture engenders discriminatory behavior by allowing in-group bias to become the tool for cohesion and self-esteem. To the extent that an employer sets up structures through which a strong corporate culture is encouraged among employees, it is responsible for any resulting discrimination. In other words, according to Green, because "employers (most often through organizational superiors) make the structural decisions concerning decisionmaking systems, distribution of power, organization of work, and makeup of leadership and work groups, and those structural decisions necessarily shape the context in which employment decisions are made," employers may bear legal responsibility.

With respect to the immigrant workplace, a similar type of characterization may be operating. A structuralist theory reveals that employers who seek subservient workers may be establishing job structures that attract only those workers whose choices are constrained by outside societal forces. Undocumented workers are especially vulnerable to societal and legal constraints which limit their occupational and their advancement opportunities. The structure of the workplace determines which jobs are available, the pay rate, and worker mobility. It is the targeting of these workers that makes a discrimination theory apt.

Structuralist theory, while setting up the framework for locating employer wrong in the structures that the employer establishes, must still confront the argument that if organizational structures are causing discriminatory behavior in the workplace,
the employer should be responsible only for the employer's actions and not for the behavior itself, which is societally driven. So, for example, in *EEOC v Sears Roebuck & Co*, a requirement that Sears must eliminate the "competitiveness" requirement in its job description accommodates women to the extent they are limited by societal views that women are not competitive. Some argue that eliminating certain requirements that seem exogenous to the workplace may exceed the bounds of the anti-discrimination mandate of Title VII. The assumption underlying this argument is that women come to the workplace hard-wired or programmed by society to prefer more "feminine" forms of work. This argument is based on either human capital or neoclassical economic assumptions, which emphasize individual choice and the existence of pre-formulated interests that guide workers into the workplace. The structuralist approach provides a sound and strong framework for challenging what seem to be rational employer responses to societal conditions. Masculinities and performance identity theories provide us with complementary narratives that explain how employees who accept the structures that employers proffer, may not be acting entirely out of a matter of choice. While the structuralist theory assumes that employee choice is constrained by employer practices, masculinities and performance identity theories demonstrate how workers enact or internalize the constraints in order to manufacture their own narratives of choice, even if constrained. In other words, they explain why and how workers may adapt their behaviors to workplace structures. Both theories call the neoclassical economic assumption into question, and add nuance and depth to the debate over how much employers should be accountable for discriminatory practices.

In terms of an anti-discrimination legal perspective, the structuralist theory has been advanced as a response to the racial animus-centered disparate treatment theory currently framing anti-discrimination discourse. It has also been advanced as a remedy for the disparate impact effects of subconscious stereotypes and prejudices that the Court in *Watson* recognized were a

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20 839 F2d 302, 321 (7th Cir 1988).
21 Green, 60 Vand L Rev at 850, 902-03 (cited in note 3).
22 Id.
24 Id at 1898–99; Schultz, 103 Harv L Rev at 1776–1850 (cited in note 4); Schultz and Peterson, 59 U Chi L Rev at 1095–1135 (cited in note 11).
problem. Its strength lies in giving us a perspective from which to understand subconscious stereotypes as enacted through workplace practices and policies. While it encourages courts and employers to explore dynamics beyond individual decisions, it still focuses on organizational dynamics from the employer’s perspective. The other theories address the dynamic from the employee’s perspective.

B. Performance Identity Theory: The Role of Coping Mechanisms in Workplace Discrimination Frameworks

While the structuralist approach focuses on the employer, intersectionality theory (and its subset, performance identity theory) focuses on how employer practices affect employees. The intersectionality approach to discrimination focuses on the special ways that people with multidimensional identities experience discrimination. In other words, racism and sexism intersect to create workplace dynamics that affect those at the intersection. The discrimination at the intersection manifests itself differently from the typical paradigms that exist when one thinks of either race or gender discrimination.

To advance the concept one step further, performance identity theory posits that race or ethnicity is something that is performed as much as, or more than, it is a static, fixed concept. The performance identity theory of intersectionality focuses not just on a person’s status identity but also on the way that a person chooses to perform her differences. This theory says that race discrimination in the workplace “is a dialectical process within

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25 Watson, 487 US at 990–91 (“If an employer’s undisciplined system of subjective decisionmaking has precisely the same effects as a system pervaded by impermissible intentional discrimination, it is difficult to see why Title VII’s proscription against discriminatory actions should not apply.”).


28 Carbado and Gulati, 85 Cornell L Rev at 1262–63 (cited in note 5) (“Racial conduct discrimination derives, not simply from the fact that an employee is, for example, phenotypically Asian American, (that is, her racial status) but also from how she performs her Asian-American identity in the workplace (that is, her racial conduct).”).
which race both shapes, and is shaped by, workplace culture.”

Legal scholars Devon Carbado and Mitu Gulati describe how this theory explains the costs of discrimination in psychological and behavioral terms. They take note of the “race-producing practices reflected in the daily negotiations people of color perform in an attempt to shape how (especially white) people interpret their nonwhite identities.” In other words, people do not come to the workplace already formed by their racial or gendered identities, but instead take their cues from the structures and dynamics they see and experience there. Performance identity theory shares with the structuralist theory the concept of a dialectic in the workplace that forms and reconstitutes racial and gender dynamics that may exist in society in general but that exist in the workplace in specific ways. Performance identity adds to the structuralist discussion by introducing the interplay among workplace actors as part of the larger equation. As Carbado and Gulati explain: “in the context of everyday interactions, people construct—that is, they project and interpret particular images of—race,” as well as class and gender.

Carbado and Gulati give an example of a black woman who can choose to signal that she is not a prototypical or stereotypical black through identity performances that brand her as “unconventionally” black. In their example, how a black woman chooses to style her hair signals to an employer her willingness to assimilate or fit in. Performance identity approaches to workplace discrimination open avenues for thinking about discriminatory practices outside of the traditional Title VII racial or gender animus paradigm.

Carbado and Gulati focus on the costs to employees of performing in such a way as to signal that they are only phenotypically, but not prototypically, of a certain race, ethnicity, or gender. These are costs associated with assimilation or with acting in a manner consistent with the goals of an employer who perceives homogeneity as more efficient than a diverse workplace.

30 Id at 1760.
31 Id at 1771 (“[T]he social meaning of, for example, a black person’s racial identity is a function of the way in which that person performs (presents) her blackness . . . . [R]acial identities are formed in, and produced by, social encounters.”).
32 Id.
33 Carbado and Gulati, 112 Yale L.J at 1771–73 (cited in note 29).
34 Id.
Left unexplored in this literature is the question of the incentives, costs, limitations, and choices involved for an employee in acting in a way that signals a behavior that employers seek. Performance identity theorists argue that anti-discrimination law should explore just how the dynamics in the employer-employee relationship contribute to costs, limitations and choices of employees. Much of the recent literature in the structuralist and performance identity arenas focuses on white collar or professional settings, in which employer structures such as team or collaborative work arrangements exist. The same types of dynamics occur, in the blue collar and low-wage work sectors. The question of incentives, costs, limitations, and choices is as important in the low-wage setting, where statistical discrimination offers for the employer an efficient proxy for creating a reliable, stable, and willing workforce. This is the interesting feature of the immigrant workplace. Much has been written in the low-wage immigrant worker context about how employer preferences for certain characteristics result in statistical discrimination and, in turn, in immigrant workplaces. To the extent employer preferences and statistical discrimination rely on stereotypes and biases based on race, ethnicity, gender, or another protected category, their preference-based behavior is discriminatory. Performance identity theory in the low-wage context helps us ask questions about what types of behaviors employers expect from

35 See, for example, Green, 38 Harv CR-CL L Rev 91 (cited in note 4).

36 See Roger David Waldinger and Michael Ira Lichter, *How the Other Half Works: Immigration and the Social Organization of Labor* 149–54 (California 2003) (explaining that employers, in order to replicate hiring success, may “network hire” and hire friends and associates of incumbent workers, or hire workers with the same characteristics as those of incumbent workers. This statistical discriminatory hiring scheme may result in a homogenous workforce that is more prepared or willing to accept its subordinated position.). See also Stone, *From Widgets to Digits* at 159–62 (cited in note 1). For a general discussion, see Gary Becker, *The Economics of Discrimination* (Chicago 1957).

37 See, for example, Waldinger and Lichter, *How the Other Half Works* at 141–54 (cited in note 36); Saucedo, 67 Ohio St L J 961 (cited in note 19) (discussing employer practices that encourage subservience from immigrant workers, and how employers come to seek subservient workers); Jennifer Gordon, *Transnational Labor Citizenship*, 80 S Cal L Rev 503, 547–61 (2007) (describing some of the reasons why employers strongly prefer to hire immigrant workers: their inability to invoke full legal protections, their willingness to work for lower wages, and their reputation as more subservient and hard working); Gordon and Lenhardt, 55 UCLA L Rev at 1175–1178 (cited in note 1) (contrasting employers’ negative stereotypes of African-American workers with positive ones of immigrant workers and explaining how these hiring preferences can create racially homogeneous niches in the workplace).

38 See Saucedo, 67 Ohio St L J at 978–79 (cited in note 19).
low-wage workers and how employees—in this case, immigrant workers—perform those identities to get and keep their jobs.\textsuperscript{39}

Jennifer Gordon and Robin Lenhardt have applied this performance identity conception of race in the immigrant worker context. They argue that low-wage workers have some agency in how they perform their identities, either downplaying negative stereotypes or exploiting positive stereotypes.\textsuperscript{40} They perform their identities as subservient workers, which arguably make them desirable to low-wage employers. As Gordon and Lenhardt note:

To the extent that new Latino immigrants can maintain employers' view of them as more hardworking, compliant, and reliable than native-born workers, especially African Americans, they advance their position on the path to belonging. This is both because they can push competitors to the side and because their own sense of the dignity and value of their contributions is enhanced.\textsuperscript{41}

Gordon and Lenhardt describe performance identity in the immigrant worker context as exhibiting agency, albeit in a workplace where workers have few choices. In this context, "agency" is less an expression of choice as it is an expression of the dynamic that the employer produces when it requires subservience and complacency for the job. To the extent there is a choice, it lies in the performance of the job, as Carbado and Gulati explain, as well as in the creation of narratives that instill more value in the job than its remuneration, as we shall see in the masculinities section of this essay.

The performance identity theory expands upon the structuralist theory's assumption about constrained choices by revealing just how workers respond to their workplace limitations. It provides insight into how workers adapt their behavior to cope with stereotypes or preconceptions of their abilities, skills, and aspirations in the workplace.\textsuperscript{42} If an employee must work harder to overcome negative stereotypes, or to construct a workplace identity that negates stereotypes, the employee is disproportionately affected by the workplace culture that facilitates the stereotypes. Or, as Gordon and Lenhardt suggest, if an employee conforms to

\textsuperscript{39} See, for example, Gordon and Lenhardt, 55 UCLA L Rev at 1223 (cited in note 1).
\textsuperscript{40} Id, citing Carbado and Gulati, 85 Cornell L Rev at 1264 (cited in note 5).
\textsuperscript{41} Gordon and Lenhardt, 55 UCLA L Rev at 1224 (cited in note 1).
\textsuperscript{42} Carbado and Gulati, 85 Cornell L Rev at 1276 (cited in note 5).
the positive stereotypes (such as immigrants as hard workers) the costs of conforming may be psychic as well as physical. It may lead an individual worker to avoid complaining about working conditions or safety because complaints are at odds with the image of the hard-working, subservient employee that the employer seeks. Identity performance, according to Carbado and Gulati, produces costs that current anti-discrimination law does not capture. It also undermines the ability of the employee who performs a workplace identity to seek redress through anti-discrimination law. Outsiders who perform an identity in order to get hired will have difficulty bringing workplace discrimination claims. This is so because performing an identity that reinforces positive stereotypes also reinforces the notion that an employer who hires minorities or women cannot be motivated by discriminatory reasons in other aspects of the workplace environment. This identity performance illustrates internalized costs of responding to constrained choices.

Determining the costs for immigrant workers who perform the prescribed ethnic and gender identities requires yet another theory of workplace dynamics. Masculinities provide an additional nuanced perspective of how workers perform their workplace identity (subservience, for example) at the same time that they act in ways that create a sense of group dignity and added value to the job. The masculinities behaviors and narratives further isolate and marginalize those who refuse to accept the narratives as descriptive of their workplace condition.

C. Masculinities Theories: The Effects of Coping Mechanisms

Masculinities theories were developed in response to feminist theories in the 1970s and 1980s as a method of studying the

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43 Carbado and Gulati call this the “capture problem.” Id at 1294. The cost to performing an identity that conforms to a given workplace culture, such as a colorblind culture, although difficult to estimate, should be included in the cost of discrimination, according to the authors.

44 Id at 1294–96. Carbado and Gulati argue that someone who adapts to the workplace culture essentially adopts it, and cannot then legitimately claim discrimination. In their example, a black lawyer accepts racial jokes and remarks, even making some himself, to make people feel comfortable with him and to fit into a colorblind culture. He will have trouble seeking redress in a failure to promote case because his behavior has ratified the firm culture. In the immigrant worker context, the immigration debate once again enters the discourse. If the worker has a legally tenuous claim to a job and accepts the conditions requiring subservience, how can the worker now complain?

45 According to Carbado and Gulati, such a narrow application of anti-discrimination doctrine forecloses the possibility that discrimination can be based on a person’s racial conduct, rather than her phenotype. Id at 1297–98.
narratives that maintain gender roles in society. Just as performance identity theory explores the social construction of race and ethnicity, masculinities theories explore the construction of gender in the workplace and throughout society. Masculinity refers to both individuals and to collective or organizational practices. Individually, it refers to how successfully one conforms to expectations of the masculine role. On an organizational level, it refers to how an organization's structures and/or practices preserve male dominance within the organizational hierarchy. Sociologists Robin Ely and Deborah Meyerson have aptly described the interplay between individual and organizational levels as "the organizational structures and practices through which societal images of masculinity are routinely translated into scripts individual men use to negotiate a masculine identity at work."

Masculinities theories cover all aspects of society all over the world. Here I concentrate on studies of workplace masculinities. Early masculinities theorists studied the development of masculinities narratives in the blue and white collar contexts. Their research reveals the existence of an ever-evolving set of narratives that continuously conform to changes in workplace arrangements. These narratives serve a stabilizing function within the workforce to the extent that they allow for behavior that would be considered acceptable on the job, even as it is considered unacceptable elsewhere. They may also serve the employer's desire for the efficiency that comes from a homogeneous workforce, in this case, an immigrant male one. So, for example, a hypermasculine environment in construction is supported by masculinities narratives that emphasize the masculine nature


47 See, for example, Donald L. Collinson, Managing the Shopfloor: Subjectivity, Masculinity and Workplace Culture (Walter de Gruyter 1992); David Collinson and Jeff Hearn, Men and Masculinities in Work, Organizations, and Management, in Michael S. Kimmel, Jeff Hearn, and R.W. Connell, eds, Handbook of Studies on Men & Masculinities 289 (Sage 2005); Paul Willis, Shop Floor Culture, Masculinity and the Wage Form, in John Clarke, Chas Critcher, and Richard Johnson, eds, Working Class Culture 185 (Routledge 1979).

48 Carbado and Gulati explain that the employer's desire for efficiency leads the employer to seek homogeneity in performance, if not in phenotype. This type of discrimination has the same effects as first generation discrimination, in that hiring practices continue to focus on an aspect of race—behavior, if not phenotype—in decisionmaking. Carbado and Gulati, 85 Cornell L Rev at 1262–1263 (cited in note 5).
of the work, the amount of brute strength needed to carry it out, the humiliation of those who complain about its conditions, and the hypersexualized atmosphere among co-workers. This gendering of the work, in other words, reserves certain jobs for the “manly man” and keeps all others—regardless of sex—locked out of them.

How do masculinities narratives help accomplish the employer’s goal of an efficient, profit-maximizing, stable and reliable workforce? In much the same way as performance identity theory reveals that the employer’s search for homogeneity affects how employees behave to get the job and stay in it, masculinities theories catalog the ways in which workers learn to conform to gender specific roles in the workplace. An employer who establishes workplace structures that allow for marginalization based on race or gender (and in some cases, like Nancy’s, immigration status) also benefits from the development of the narratives that adapt to those structures. Masculinities theorists, therefore, focus both on structures and on how the narratives multiply throughout the workplace. They seek to answer why workers, especially wage workers, take the jobs they do when the intrinsic value of the job is not reflected in its pay scale. Masculinities narratives provide for workers the non-remunerative value—dignity, self-worth, pride—in wage labor. In this way, masculinities reify and solidify the hierarchical structures that the employer has established because they supply the worker with the sense of purpose or worth that is not otherwise reflected in the low-wage pay scale.

1. Managerial masculinities.

Although masculinities theories are not based on static or essentialized paradigms, and there are multiple masculinities, they can generally be classified for purposes of this essay into hegemonic and resistance categories, each affecting the generation and regeneration of the other. Hegemonic masculinities are those that provide the narratives for maintaining Anglo, male-dominated workplaces and hierarchies. They are hegemonic in the sense that they preserve hierarchical or power relations even

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50 R.W. Connell and James W. Messerschmidt, Hegemonic Masculinity, Rethinking the Concept, 19 Gender & Socy 829 (2005).
as they change according to the circumstances.  

Managerial workplace structures are examples of those that engender the hegemonic masculinities. The gendering of leadership qualities as male is an example of a hegemonic masculinity narrative. So, for example, terms such as risk-taking, aggressiveness, rational decisionmaking, problem-oriented, independence, and managerial responsibility are all used to describe the natural born leader. They are also the traits used to describe the hegemonic ideal of masculinity. This conflation of the leadership norm or the ideal worker norm and masculinity is at the heart of masculinities research. Other forms of hegemonic masculinity include authoritarianism, paternalism, careerism, entrepreneurialism, and informalism. A paternalistic style, for example, relies on trust and loyalty based on father figure dynamics; an authoritarian style achieves goals through coercive power and control; informalism requires relationship building in and outside the workplace; careerism is enacted through upward mobility as a sign of masculinity; and entrepreneurialism focuses on traits such as competition and efficiency, both of which are gendered male traits. These management styles and their masculinities narratives engender responses that can further isolate minorities and women in the workplace.


52 Id.

53 See, for example, Connell and Messerschmidt, 19 Gender & Soc'y at 834 (cited in note 50); Attila Bruni, Silvia Gherardi and Barbara Poggio, Gender and Entrepreneurship: An Ethnographical Approach 55–58 (Routledge 2005) (describing the “male ethic’ of rationality in organizations” which asserts that organizational needs can be satisfied only by the analytical and leadership abilities of highly educated men, and that these managerial practices and workplace dynamics both challenge and perpetuate this managerial masculinity); Debra E. Meyerson and Deborah M. Kolb, Moving out of the “Armchair”: Developing a Framework to Bridge the Gap between Feminist Theory and Practice, 7 Org 553 (2000); Barrett, 3 Gender, Work & Org at 132–41 (cited in note 46).


55 For a general discussion, see R. W. Connell, Masculinities (California 1995).


57 David Collinson and Jeff Hearn, Naming Men as Men: Implications for Work, Organization and Management, 1 Gender, Work and Org 2, 13–16 (1994) (explaining how the several masculinities both affect and are reproduced through managerial practices).

58 Id; McGinley, 83 Or L Rev at 381–82 (cited in note 6).

59 McGinley, 83 Or L Rev at 382–83 (cited in note 6).
linities are important in this discussion because they illustrate the management structures to which immigrant workers are responding through their own forms of resistance masculinities.

2. Working class and resistance masculinities.

Resistance masculinities are best described as those responding to, and at the same time reproducing, hegemonic masculinities narratives. In the workplace, they are the methods by which subordinates find value or dignity in the non-remunerative aspects of their positions. These masculinities narratives allow subordinates to navigate their organizational position and situation in the workplace. Theorists studying blue collar masculinities frame their studies through the lens of resistance masculinities. They argue that the traditional masculinities narratives within these groups of workers focus on and value the differences between the working class and managerial classes of workers by diminishing the masculine nature of managerial jobs and inflating the masculine qualities of blue-collar jobs. For example sociologist Paul Willis's working class masculinities study found that in the manufacturing environment, workers in dead-end jobs recreated their experiences, giving them positive, transformative meaning and a way to tolerate their work lives. Willis observed that the workers developed a culture that included "the sheer mental and physical bravery of surviving in hostile conditions, and doing difficult work on intractable materials." The narrative of the tough, brave male helps workers who fit the mold develop self-esteem, as well as a sense of control over difficult, sometimes unbearable, working conditions. Willis terms this the "mythology of the masculine reputation." It is the way a difficult work environment is trans-

60 See, for example, Willis, Shop Floor Culture at 193 (cited in note 47); Collinson, Managing the Shopfloor at 180 (cited in note 47) (discussing how manual workers with limited mobility secure "a vicarious satisfaction by facilitating the upward mobility of their children"); Paap, Working Construction at 135–36 (cited in note 49) (discussing how construction workers derive a sense of class status from their "pigness" that is characterized by a "raw masculinity that is seen as 'real'").

61 Barrett, 3 Gender, Work & Org at 131 (cited in note 46).


63 Willis, Shop Floor Culture at 189 (cited in note 47).

64 Id at 189, 196 ("Perhaps the most prosaic but actually startling element of shopfloor culture is the articulation of manual labour power—as it is concretely practiced—with assertive male gender definitions. There is an infusion of assertive masculine style and
formed into a bearable one by giving it significance aside from that derived from the work itself, and by instilling it with necessities for manly qualities to succeed.

Willis's study concluded that workers express their place in the work hierarchy through a series of masculinities that express themselves in forms such as humor and ridiculing language in the workplace; control through the group; distrust of theory; and otherwise negating the work of others such as managers, professionals, women, and minorities. In short, the studies of blue collar masculinities demonstrate how the masculinities help blue collar workers explain or make sense of their subordinated lives.

Similar masculinities narratives exist in the construction context. Sociologist Kris Paap recently studied masculinities of Anglo blue collar construction workers after spending two years working on a construction site in the Midwest. Paap identified several masculinities operating to support gender and race/ethnicity hierarchies. These masculinities provided a status floor below which Anglo males cannot fall. Paap's description of the "men are pigs" narrative is especially illuminating to narratives that have been developed in the brown-collar context.

"Men are pigs" describes hypermasculine, animalistic behavior on construction sites. Examples of hypermasculine behavior include excessive competitiveness, aggressiveness, and overt hypersexual behavior. According to the narrative, because men are pigs, they can be asked to and will perform all types of tough jobs. They will also be excused for crude, unrefined, rude beha-
behavior that is otherwise inappropriate outside the blue collar workplace.\(^{70}\)

The "pigness" masculinity gives rise to a "structure of no complaints" among the workers, who individually may fear ridicule or ostracism if they cannot tolerate the tough conditions on the job.\(^{71}\) The structure of no complaints preserves a set of behavioral responses to working conditions, such as safety, undesirable job tasks and even harassment on the job. Workers are expected to put up with harsh conditions, and even harassment, because the reasonable person in an environment of "pigs" would do the same. Paap describes 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.\(^{72}\)

Anyone who complains about the abuse, in other words, is not strong enough or manly enough to do the job.

"Pigness" in the construction context is the method by which working class men value themselves and their otherwise undervalued jobs, just as the workers did in Willis's manufacturing industry study. Describing themselves as animals, or pigs, allows male construction workers to define themselves at the same time as less sophisticated and more masculine than their middle class colleagues.\(^{73}\) 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' or 'animals.'"\(^{74}\) As such, the animal nature of pigness allows construction workers to define themselves as "natural born workers" who

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\(^{70}\) Id at 134 ("[P]igness is put forth simultaneously as a form of authentic expression and also a 'license' to use racial and ethnic slurs, to make generalizations about who can and cannot do the work, and to display overt hostility and animosity toward others as the pigs deem appropriate.").

\(^{71}\) Id at 148.

\(^{72}\) Paap, Working Construction at 148 (cited in note 49).

\(^{73}\) Id at 135 (for example, "to call a man a pig is to suggest that he might not know what fork is to be used for salad but that he knows which drill bit is used for different forms of masonry under different and varying conditions").

\(^{74}\) Id at 136.
are made to perform work that is physical, tiring, dangerous, and manly.\textsuperscript{75}

The pigness narrative relies on the corollary myth that individuals choose their jobs and career paths and that people who can't tolerate the pigness in the environment would naturally choose to be elsewhere.\textsuperscript{76} The narrative sustains the dynamic that enables employers to hold the job open precisely for the worker who can handle it. Once the job is masculinized through the narrative, the narrative helps mask the discrimination underlying the structures that allow it to flourish. As Paap notes:

[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 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.\textsuperscript{77}

In the legal literature, masculinities theories have been invoked to inform discussion about just how masculinities narratives further exclude, marginalize, and isolate those who do not conform. As with structuralist and identity performance theories, masculinities legal theorists suggest that to the extent the employer benefits from or institutionalizes practices that encourage the development of masculinities narratives the employer should be held responsible for discrimination.\textsuperscript{78} Ann McGinley's groundbreaking piece argues that masculinities are themselves the structural barriers to advancement in the workplace.\textsuperscript{79} They encompass norms and workplace cultures that attribute gender

\textsuperscript{75} Id at 138.

\textsuperscript{76} Paap, Working Construction at 144 (cited in note 49). ("[T]he self-selection pressures involved in who enters (and leaves) the workforce would appear to support, at least on the surface, the biological argument about the workers' true nature. It appears that these men choose to become construction workers because they 'are' that way, rather than acknowledging that the rules and expectations of the worksite create pigs, even where there might have been none.").

\textsuperscript{77} Id at 148. This masculinity, while seeming to create solidarity among white male workers, is, in many ways, counterproductive to solidarity in which workers are defined by their class status in relation to the owners of capital.

\textsuperscript{78} See, for example, McGinley, 83 Or L Rev at 378–427 (cited in note 6).

\textsuperscript{79} Id at 364–65.
THREE THEORIES OF DISCRIMINATION

three theories of discrimination

to certain jobs and value them accordingly. The structural dimensions of masculinities operate through narratives or stories that reinforce both the workplace culture and its hierarchies. Masculinities and their narratives, it turns out, exist even when the work is completely segregated by race or ethnicity, as it is in the immigrant construction workplace. Masculinities theories can help willing employers understand how masculinities narratives affect workplace dynamics and how restructured dynamics can create a more inclusive and humane workplace.

III. REINTERPRETING NANCY’S STORY

Let us now analyze Nancy’s story through the lens of the three discrimination theories. Nancy’s story helps us make the connection between the development of the brown collar workplace and its discriminatory dynamics. Structuralist theory gives us the overall framework for how we should be looking at the development of brown collar workplaces. The structuralist theory raises the question “why should the employer bear the cost of what is really a societal problem of bias?” The performance identity and masculinities theories provide information about just how a worker’s choices are constrained by workplace structures and how the worker responds. It is in the deconstruction of Nancy’s story that we can see the intersection of the structuralist, performance identity, and masculinities theories. We can also see them operating to reveal the type of discrimination that current Title VII theories (disparate impact and disparate treatment) cannot so readily identify.

A. Nancy’s Job through the Lens of the Three Theories

Nancy has been channeled into low-level, dead-end jobs within residential construction, even though she took the job on the advice of friends who said she would earn more in construction than in the traditional Las Vegas service jobs available to her. While she earns marginally more than in the service economy, Nancy perceives little or no advancement opportunity in construction. This is in part, Nancy believes, because neither her co-workers nor her supervisors believe she can do the work. The work is structured in such a way that she needs the support and sponsorship of her co-workers in order to advance. It is also structured in such a way that the work is deskilled and divided up into several distinct jobs, and the employers emphasize efficiency, productivity, and profit. This job structure is reinforced
through a system of piece rate wages and an independent contractor work arrangement. The structuralist approach would point to some of these structures as symptomatic of a workplace environment that creates discriminatory dynamics, in decision-making or otherwise, in the workplace. The piece rate system and the independent contractor arrangement allow subjective criteria such as biases about who can do the work, to enter into decision-making. Those biases, in turn, may be influenced by narratives in and outside the workplace about the ethnicity and the gender of the ideal worker in the low-wage immigrant worker context. The uncertain and unstable legal status of the workers also influences the biases of employers who may feel less loyalty to a workforce that society disdains as not belonging. They certainly influence the behavior of workers, who act the part of good and subservient workers, in part because of their uncertain legal status. The structuralist theory posits that structures that allow these biases to enter decision making processes about who gets hired and why should be dismantled as discriminatory.

The performance identity and masculinities theories provide further nuance to the general structuralist approach that helps us make a more direct connection between employer practices and employee behavior. Performance identity theory in the immigrant worker context says that a worker will conform his identity to meet the expectations of hard work, subservience, and complacency that an employer has of an immigrant labor force. A worker's decision to conform or to perform his identity incurs costs. At the very least, there are psychological costs in doing deskill ed work that is rote, difficult, and meaningless. There are also opportunity costs in performing such work because it does not involve the accumulation of skills that will one day lead to knowledge of all aspects of the trade. A worker also incurs mental or emotional costs in the inability to advance in a workplace structure that is so segmented and segregated and in the inability to complain about it.

How does such a worker maintain workplace satisfaction in this type of environment? In other words, how does she tolerate the work without complaint? As Nancy's story suggests, not everyone can put up with the employer's treatment of immigrants as a group of workers who have little or no choice but to take the jobs offered them. Not everyone, in other words, can perform according to the positive stereotypes of immigrant workers. Those who do may be overvaluing their work with the help of masculinities narratives. Nancy was not one of those who tolerated the
attitude and she was ultimately fired for her willingness to complain.

Masculinities theories help us understand the nonmonetary value of staying in low-wage, low-status, and segregated jobs relegated for the most part to immigrants, at least for those who buy into them. Masculinities narratives in the immigrant worker context emphasize and overvalue the role that immigrant workers play in taking jobs that no one else will take. In response to the deskilling of the job, the lower wage, and the increased productivity required in the job, some men produce a self-image of the rugged, tough, hypermasculine, manly man, who can do the work even though nobody else can. In other words, they accept their role as “pigs,” as sociologist Paap suggests of blue collar workers. Men who perform without complaint assume the attributes of the idealized worker. Those who do not do the work, whether because they cannot, will not, or are not allowed to, are not considered man enough. This goes for native-born workers as well as women. The work itself—industrial painting, for example—assumes the characteristics of men’s work and men structure their narrative around it. Over and over again, Nancy and her female colleagues were told publicly they could not succeed at industrial painting, or any of the higher paying jobs on site, even though privately some male colleagues offered some tips and instruction. When she sought changes to the work environment, she was characterized as seeking accommodations rather than equal treatment.

B. Workplace Safety Conditions and Dynamics through the Lens of the Three Theories

Take safety as another example. The employer posts signs all over the place warning employees to be safe. Each employee must sign a safety disclaimer upon hiring, which states that the employee has read and understands the safety rules of the company (which are typically written in English). The employees sign the forms as a matter of course. This is just another of the several documents that the employer requires before the employee can start the job. Recall that the employer has structured the job’s wage on a piece rate system. Such a system incentivizes fast production schedules and superficial attention to any other workplace priorities, since one gets paid only for the number of pieces completed. Because a living wage requires speed, such a system also disincentivizes taking safety measures or paying attention to OSHA rules on the job. The structuralist approach
might focus on the ways in which the piece rate wage system allows employers to make choices based on bias, based on ethnicity or race—who are the hardest-working, most diligent, most subservient, and most compliant workers—and then based on gender—who can work the fastest in the most dangerous conditions? Performance identity theory helps us analyze how immigrant male workers' responses to employers' piece rate wage structure perpetuate employers' decisions based on group bias. Employers express preferences in behavioral terms such as productivity, hard work, flexibility, and compliance or willingness to do the work. In other words, employers prefer immigrants because immigrant status is a proxy for the subservient behaviors they seek in workers. In response, many immigrant workers behave or perform a subservient identity in order to obtain and preserve their jobs. Based on this set of dynamics employers continue to use immigration status as a proxy for desired workers, who are ultimately locked into low-wage jobs. Masculinities theories are important in analyzing differential responses to the piece rate system. Nancy's response was to complain about work conditions and to claim they violated workplace statutes, and then try to get her co-workers to join her in a collective response. The men we interviewed, for the most part, took the dangers as a given and built a masculinities narrative around them. They accepted the dangers as part of the job, were proud that that they could take on the dangers like men, saw complaints as a form of weakness, and took pride in the fact that these jobs were available only to immigrant men (i.e., that these were jobs only immigrants will take). Their masculinities narrative legitimated a story that portrayed them as manly and dignified for taking on the work. Nancy's response, which challenged the dominant narrative, was treated as aberrant behavior, although natural for a woman. The company retaliated against her with impunity, and she was shunned in her attempts to organize her fellow workers into a collective response.

C. Nancy's Status in the Workplace through the Lens of the Three Theories

Nancy's immigrant status and gender have unique effects on her workplace status, as the three theories illustrate. In the immigrant worker construction context, the worker's role has been masculinized as well as racialized. It has been masculinized to the extent that hard work, flexibility (in the sense of willingness to do the tough work), competitiveness and reliability are, or
have traditionally been, markers of workplace success for males. Immigration status factors into this masculinized role. The more uncertain the workers' immigration status, the more likely it is that the majority of workers will hew to a narrative that they are needed for the type of tough work conditions they are willing to endure. In other words, undocumented workers want to make it worthwhile for an employer to take the chance to hire them even without documentation. Their uncertain status means they have to compensate for their lack of documentation in other ways. This overcompensation distorts the employer-employee relationship, arguably more acutely than in other settings.

The immigrant worker's role is racialized to the extent that employers behave as if native-born workers will not perform residential construction jobs by hiring immigrants. Immigrant status factors as well into the racialization of the construction workplace. The result is that the ideal worker for the residential construction job today is an immigrant Latino male. Those who refuse to conform to the identity and performance cues expected of the Latino immigrant male are less likely to "fit in" to the workplace culture that the employer has fostered. This is the dilemma that Nancy and her female counterparts face. Does she "act like the ideal immigrant man" in order to maintain stable co-worker relationships at the cost of safety and better working conditions? Does she fight for better working conditions and risk isolation and marginalization because of her behavior, which runs against the ideal immigrant Latino male image of hard work, flexibility, and reliability? Or does she play the role of immigrant female victim, viewed as seeking accommodation for her lack of abilities even as she seeks equal treatment, as her employers want to characterize her? The first and second characterizations—to which performance identity and masculinities theories respond—highlight the costs to immigrant women of the identities employers expect of them. The third characterization elicits a structuralist response, and highlights the role of workplace structures in creating an obvious contradiction be-

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80 In the southern Nevada construction context we studied, the majority of the immigrant population in Nevada and in Las Vegas is Mexican-born. Of the 67 percent increase in the immigrant population between 2000 and 2007, 47 percent has been estimated as foreign born. Of that number, 78 percent was estimated as Mexican born. Statistical Portrait of the Foreign Born Population in the United States, Pew Hispanic Center, 2007, available at <http://pewhispanic.org/factsheets/factsheet.php?FactsheetID=45> (last visited Mar 5, 2009).
tween the immigrant woman who lacks skills and the immigrant woman who seeks workplace equality.

These are just some examples of how masculinities and performance identity theories help the structuralist approach respond more effectively to the argument that employers should not be held responsible for the bias that exists in American society. The examples described here illustrate that Nancy's complaints about dangerous work and about limited transfer opportunities are not simply seeking accommodation for her weaknesses. The lens of performance identity and masculinities help us see the dynamic of discrimination at play. To the extent that the employer benefits from the way that workers respond to its structures and help maintain those structures the employer should be held liable for workplace discrimination under antidiscrimination law. Furthermore, to the extent the employer benefits from co-worker behaviors that disadvantage or discriminate against women, the employer should be held liable.

So, in general, if the employer encourages cohesion or homogeneity among like employees—and this applies whether those employees are in-group members or out-group members, as we find in the immigrant worker context—those employees can both build narratives around their likeness and shun with impunity those who do not fit the narratives or the stereotype of the naturally good worker for the job. To the extent that discrimination or stereotyping motivates such characterizations it should be captured by the anti-discrimination frameworks. The structures that create such “homogeneity” cannot be explained away as simply the problem of exploitation in the low-wage workplace.

IV. RESOLVING NANCY'S DILEMMA: HOW AN EMPLOYER CAN USE THE INTERSECTION OF THE THEORIES TO EFFECT ANTI-DISCRIMINATORY DECISIONMAKING IN THE LOW-WAGE WORKPLACE

The three theories of discrimination demonstrate how employer structures and practices produce workplace dynamics, how gender plays a role in workers' responses to those structures and dynamics, and how the masculinities narratives currently established in the industry continue to isolate and marginalize those who eschew masculinities. Sociologists have posited, however, 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. Organizational theorists Ely and Myerson have developed a theory for how organizations can change their processes to emphasize how alternative identities are important to the life of the organization. Their theory arises out of a study of an off-shore oil platform operation, which is stereotypically a hyper-masculine work environment. They found that the employer's emphasis on safety and performance changed the way that men enacted masculinity in the workplace. The emphasis on safety changed traditional masculinities behavior such that "oil-rig workers who had used machismo to prove their competence now had a more nuanced sense of their personal capacities, particularly a capacity for vulnerability, the antithesis of the traditional masculine ideal." Ely and Meyerson concluded in their study that masculinities were indeed mutable, suggesting that workplaces can "disrupt" negative tendencies by "changing norms and work practices to the benefit of individual workers and the organization as a whole."

Ely and Meyerson also demonstrated that the problems with masculinities was not so much masculine behavior as it was men's attempts to prove themselves and their worth through such behavior. This focus on the masculine nature of the job forced workers to act defensively for their own selves, rather than proactively to meet the company's overall goals. The study found that a company-wide initiative focusing on safety created a set of norms and practices that "released men from the performance of masculinity traditionally associated with dangerous work." Specifically, practices that emphasized the importance of working together to meet broader goals, driven by larger concerns, such as a team or social ideal, enabled workers to release concerns over self-image for the broader organizational good. These practices, in turn, resulted in more positive relational processes. In other words, masculinities performed in 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. Ely and Meyerson concluded, "organizational

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81 Ely and Meyerson, Unmasking Manly Men at 5 (cited in note 46).
82 Id.
83 Id.
84 Id at 18.
85 Ely and Meyerson, Unmasking Manly Men at 18 (cited in note 46).
86 Id. at 28.
features, such as policies, practices, and norms, were key to this disruption by creating conditions that shifted men’s energies away from the goal of proving their masculinity and instead support their pursuit of goals larger than themselves." They identified several organizational practices that allowed workers to set aside the need to rely on masculinities for self-worth or for non-monetary value of the job. Giving meaning to their jobs allowed the workers to tap into alternative identities outside of the masculinities norms. Once safety became a real and stated priority over production and profit, in other words, the men felt secure in letting go of masculinities narratives that encouraged individualism, risk-taking, aggressiveness, and danger. Organizational practices that signaled to workers that they were part of a larger community communicated their importance within the organization. Recognizing workers for positive contributions, no matter how small, helped workers change their masculine behaviors. Practices that communicated the company’s preference for workers who learned from mistakes and worked well in teams tended to decouple masculinities narratives from notions of competence. In sum, Ely and Meyerson noted that “by redefining the meaning of masculinity and supporting a generative rather than defensive process of masculine identity construction, these platforms may have avoided costs other dangerous workplaces pay for men’s masculinity strivings.”

More importantly, Ely and Meyerson connected masculinities quite explicitly to workplace structures and practices that employers themselves can change to transform workplace behaviors. They articulate a theory of masculinities that provide organizations with the opportunity for change. The model “expands the existing perspective on masculinity as an identity largely shaped by society’s idealized images of masculinity by depicting organizational conditions as a moderating influence on the relationship between society’s gender ideology and the relational processes through which men construct masculine identities.” Ely and Meyerson articulate the connection between structuralists, performance identity theorists, and masculinities theorists clearly:

87 Id.
88 See id.
89 Ely and Meyerson, Unmasking Manly Men at 34–5 (cited in note 46).
90 Id at 36–37.
91 Id at 37.
A society's traditional gender ideology orients men to the goal of validating an idealized masculine image, but organizational features can create conditions that shift men's energies away from that goal and redirect them toward the pursuit of goals larger than themselves. This shift in orientation supports a set of relational processes in which men reconstruct their masculine identities.92

Ely and Meyerson's prescriptions include the development of workplace practices and processes that move workplace goals toward a focus on "a transformation of the process of identity construction from one anchored in self-validation goals to one anchored in the real demands of their work."93 This articulation of the workplace transformational change coincides with the structuralists' vision of the power of organizations to change employee behavior. As Vicki Schultz, a structuralist legal scholar, notes, "[i]f people's lives can be constrained in negative ways by their conception of the occupational roles, they can also be reshaped along more empowering lines by changing work or the way it is structured or understood."94 Schultz's example of women entering the skilled trades in the 1970s only to get stuck in dead-end jobs, shows that one's relationship to work depends on the opportunities available to an employee. Increased opportunities for lines and types of work increase self-esteem and deepen a worker's commitment to the job as other than a wage vehicle.95

How does the theory work in the immigrant context? In Nancy's example the rewards go to those who played the roles employers expect of immigrant workers—subservient, compliant, working long hours, and demonstrating loyalty to the company, risk-taking, and accepting of personal responsibility for risk-taking. All of these qualities are typically ascribed to males in this society. And in construction today, they are ascribed to immigrant men. Anyone who refuses or fails to conform to these qualities is isolated, marginalized, or punished, as was Nancy in this case.

Ely and Meyerson concluded from a separate study of gender dynamics in a manufacturing plant that employers who desired gender equity in the workplace had to move beyond their precon-

92 Id.
93 Ely and Meyerson, Unmasking Manly Men at 40 (cited in note 46).
94 Schultz, 100 Colum L Rev at 1891 (cited in note 23).
95 See id at 1891–92.
ceptions of who could do the work. They also must focus on the organizational structures and practices that govern how the work is done. Deconstructing the way that work privileges men and how men sustain that privilege will reveal the areas within the work environment where seemingly neutral practices and policies have a gendered effect. One such arena is the deskilling of jobs, now the norm in low-wage occupations. Deskilling has the effect of inviting masculinities narratives that overcompensate for the decreased satisfaction, the contingent nature, the increased repetitiveness, or the decreased wages, all of which are characteristics of deskilled occupations. One possible set of changes that employers can consider is to reduce the amount of deskilling taking place in occupations within low-wage workplaces. It would involve creating more worth, and less rigidity into the tasks assigned to a particular job. It would likely also require de-emphasizing productivity and profit, as was illustrated in the oil rig platform case.

Ely and Meyerson point to the development of narratives that disrupt the assumptions behind current narratives. The prevailing assumption in gender relations is that we are all simply individuals, "without gender identities, occupying the same cultural, historical, material, and political positions, subject to and participating in the same neutral organizational processes and impartial interpersonal interactions. These assumptions are therefore uncontestable." Under the prevailing assumption, women, immigrants, and low-wage workers are solely responsible for their failures, leaving employers and their structures unaccountable.

One possible disruptive narrative, which challenges the prevailing assumption, revolves around workers leveraging their collective bargaining or organizing strength. Nancy chose to pursue this narrative in the hope that it would disrupt the individualist masculinities narrative prevalent in her workplace. This narrative emphasizes connections among workers, as well as connections between workers and employers. Employer practices that may contribute to this disruptive narrative include an emphasis on safety, the importance of community-building, and the

96 Ely and Meyerson, 7 Org at 593 (cited in note 56).
98 Ely and Meyerson, 7 Org at 604 (cited in note 56).
99 See id.
importance of stating a company's mission more broadly than short-term production and profit maximization.\textsuperscript{100} Nancy's narrative, in the immigrant context, is different from the traditional union organizing narrative in that it includes organizing for the rights of immigrants outside the workplace as well inside. Because of its importance to both workplace and societal positioning, her approach may appeal across gender, class, and race. Stronger enforcement of workplace laws will also help Nancy's organizing narrative overcome the deeply entrenched gendered approaches to the immigrant construction industry.

Another example of a disruptive practice 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 and 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 different systems, decreased workers' reliance on masculinities and defensive behaviors.\textsuperscript{101} This change to knowledge and reflection from production and individualism fostered a more collaborative and inclusive environment for all workers.

V. CONCLUSION

Nancy's story illustrates the fact that multidimensional levels of discrimination in the immigrant workplace require multi-level analysis. The employer structures present in workplaces like residential construction in Las Vegas are not simply exploitative or subordinating practices, as traditional views of low-wage workplaces might suggest. Rather, the three theories of discrimination discussed here provide an apt model for illustrating how employer practices can foster discriminatory conditions. Nancy's immigrant workplace provides us with precisely the focus at the intersection of the structuralist, performance identity and masculinities approaches to discrimination that we need to understand substandard conditions in low-wage workplaces as more than simply the natural order of things.

\textsuperscript{100} Ely and Meyerson Unmasking Manly Men (cited in note 46) (identifying this "connective purpose" approach as helpful in disrupting masculinities behaviors in the oil rig setting).

\textsuperscript{101} Id at 40–42.