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**Everybody in the Tent: Lessons from the Grassroots about Labor  
Organizing, Immigrants, and Temporary Worker Policies**

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EVERYBODY IN THE TENT: LESSONS FROM THE GRASSROOTS ABOUT  
LABOR ORGANIZING, IMMIGRANTS, AND TEMPORARY WORKER POLICIES

*Leticia M. Saucedo\**

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## INTRODUCTION

Why are so many immigrant workplaces non-unionized and what can the labor movement do about it? The questions about whether and how effectively to bring immigrant workers into the labor movement involve not just the impact of immigrant labor on organizing efforts, but also the effect of the labor movement's policy positions on immigrant labor. According to the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), protections for immigrant workers are as important to the labor movement as protecting jobs for U.S. workers.<sup>1</sup> While there are great examples of union success in organizing immigrant workplaces, however, the vast majority of immigrant workers remain unorganized.<sup>2</sup> The residential construction industry is one of the areas where low-skilled, non-unionized immigrant workplaces dominate the landscape. Unions have had some limited and scattered success in rebuilding the residential construction industry labor movement in places like Los Angeles, California, but the success has not been sustained.<sup>3</sup>

In this article, I share perspectives of local residential construction workers and labor leaders collected from a series of interviews in Las Vegas, Nevada about obstacles to organizing immigrants. I conducted over 100 interviews between 2006 and 2008 that are the basis for a larger project on working conditions among immigrant workers in the

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<sup>1</sup> See AFL-CIO and Change to Win, THE LABOR MOVEMENT'S PRINCIPLES FOR COMPREHENSIVE IMMIGRATION REFORM (Aug. 2009), <http://www.aflcio.org/content/download/60511/854621/UnityFrameworkAug2009.pdf>.

<sup>2</sup> See *infra* section II.B.4.b for a description of successful organizing campaigns involving immigrant janitors and hotel workers.

<sup>3</sup> See Carol Zabin, *Organizing Latino Workers in the Los Angeles Manufacturing Sector: The Case of American Racing Equipment*, in ORGANIZING IMMIGRANTS: THE CHALLENGE FOR UNIONS IN CONTEMPORARY CALIFORNIA 150 (Ruth Milkman ed., 2000).

residential construction industry in Las Vegas. In this article, I explore how immigrant workers and local organizers respond to questions about the difficulties in organizing immigrants. Their responses should provide some guidance to policy advocates and the labor movement as they formulate positions around comprehensive immigration reform proposals.

Several different factors account for the difficulties in reclaiming once-unionized industries such as residential construction. Academics point to the decline of the union movement in the construction trades, increases in open shop arrangements and subsequent increases in independent contractor arrangements.<sup>4</sup> Restrictive interpretations of the National Labor Relations Act (“NLRA”) also make organizing more difficult in an increasingly-immigrant labor market.<sup>5</sup> As I discuss in this article, local labor leaders blame immigrants’ lack of understanding of their rights and their immigration status as factors that make organizing difficult.<sup>6</sup> Workers, on the other hand, do not see much organizing activity in their workplaces, and therefore, do not think much about efforts to organize immigrant workplaces.

Neither the differing perceptions of grassroots leaders and immigrant workers, nor the theories of academics and policy makers, however, tell the whole story about why the labor movement continues to struggle with organizing immigrants. The recent negotiations around comprehensive immigration reform demonstrate the difficult position of labor as it tries to reconcile the interests of native and foreign-born labor in the market.

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<sup>4</sup> See MARC LINDER, WARS OF ATTRITION: VIETNAM, THE BUSINESS ROUNDTABLE AND THE DECLINE OF CONSTRUCTION UNIONS (2000).

<sup>5</sup> See e.g., *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002) (holding that certain backpay remedies for unfair labor practices available to authorized workers were not available to unauthorized workers).

<sup>6</sup> See *infra* section II.B.1 for a discussion on local labor leaders’ perspectives on obstacles to organizing immigrants.

On the one hand, the AFL-CIO allowed business interests to deem residential construction work as a temporary occupation that could be filled with foreign-born workers. On the other hand, it agreed to a proposal that capped the number of visas that would be available for foreign-born residential construction workers.<sup>7</sup> The AFL-CIO's compromise, while providing a path to citizenship for a limited number of immigrant workers, capitulates on the notion of construction work as the solid, stable, full-time occupation that it once was in the era of unionized construction activity. More importantly, limiting the legal avenues for construction work leaves open the possibility of continued undocumented labor in the construction trades. While these high-level policy decisions make sense for an organization trying to protect the interests of American workers, they may ultimately hinder the efforts of local labor leaders to organize immigrant workers.

In Part I of this article, I describe what academics view as obstacles to immigrant worker organizing, including changes in the structure of the construction industry, and restrictive immigration laws. In Part II, I describe the Las Vegas Residential Construction Industry Study and explore the gap in perceptions between local union leaders and non-union workers about obstacles to organizing. I conclude in this part that the construction trade union movement must incorporate aspects of immigrant organizing strategies that have occurred in the service industry. In Part III, I explore the effects of union activity in the most recent negotiations over comprehensive immigration reform, analyzing how the AFL-CIO's position might work at cross-purposes to its stated goals of organizing immigrant workplaces and bringing immigrants into the labor movement. I conclude that by conceding the contingent nature of construction work and then limiting the legal

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<sup>7</sup> See discussion at \_\_\_\_\_, *infra*.

avenues for immigration into construction work, the AFL-CIO's compromises further weaken local labor organizers' attempts to organize immigrants.

#### II. THE MAINSTREAM ASSUMPTIONS ABOUT IMMIGRANT WORKERS AND ORGANIZING

Some academics have documented how immigrants have overcome all kinds of obstacles to organize,<sup>8</sup> especially in low-wage workplaces. At the same time, scholars and policy makers theorize that structural changes in the construction industry, changes in labor and employment law, and demographic changes have weakened unions and their ability to attract immigrant workers. This section describes those theories.

##### A. *Changes in the Employment Relationship and the Rise of Temporary and Contingent Work Make Organizing Difficult*

Law scholar Marc Linder has provided an exhaustive account of the factors leading to the decline of the construction union sector over a several-decade period starting in the 1970s.<sup>9</sup> He notes that construction unions were traditionally in a different posture with employers than were industrial unions because of their unique historical arrangements with builders to provide and manage labor in construction projects.<sup>10</sup> Construction unions operated on a more exclusionary model that trained and provided highly skilled craftsmen to building projects. At their membership peak, in the 1960s and 1970s, 60 to 70% of construction workers were employed in firms with collective bargaining agreements.<sup>11</sup> After a decades-long assault on construction unions, however, builders achieved changes in both state law and the NLRA that facilitated the

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<sup>8</sup> See e.g., Christopher David Ruiz Cameron, *The Labyrinth of Solidarity: Why the Future of the American Labor Movement Depends on Latino Workers*, 53 U. MIAMI L. REV. 1089, 1113–14 (1999); Ruth Milkman & Kent Wong, *Organizing the Wicked City: The 1992 Southern California Drywall Strike*, in ORGANIZING IMMIGRANTS: THE CHALLENGE FOR UNIONS IN CONTEMPORARY CALIFORNIA 169 (Ruth Milkman ed., 2000).

<sup>9</sup> LINDER, *supra* note 4.

<sup>10</sup> *Id.* at 407–08.

<sup>11</sup> *Id.* at 101–02.

introduction of open shops and the hiring of less-skilled workers on projects.<sup>12</sup> With every concession came the introduction of less skilled work, and subsequently of more contingent workplace structures such as independent contracting.<sup>13</sup>

As a result of the builders' anti-labor strategy in the 1970s and 1980s, union density in construction nationally decreased by half, from 42 to 22 percent, between 1970 and 1990.<sup>14</sup> Residential construction, where unions historically have had a weaker presence than in the commercial sector in many parts of the country, was especially affected.<sup>15</sup> The concessions that construction unions began to make in the 1970s and 1980s and the development of open shop arrangements caused the decline in union labor even before immigrants began to dominate parts of the market.<sup>16</sup> The changes began with efforts to depress wages and continued with the slow erosion of union bargaining power through the development of open shop provisions and nonunion subsidiaries of union contractors.<sup>17</sup>

As a result of deunionization, the independent labor broker system, which had been at the fringes of the mostly union labor market, became the new labor supply for residential construction employers. In the aftermath, Latino immigrant workers took jobs under this exploitative system.<sup>18</sup> As experienced workers moved out of the residential sector, Mexicans and Central Americans moved in through a social network system that relied on hometown contacts and migration patterns to provide employers with a ready

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<sup>12</sup> LINDER, *supra* note 4, at 34–35, 344, 352.

<sup>13</sup> *Id.* at 396.

<sup>14</sup> Milkman & Wong, *supra* note 8.

<sup>15</sup> *Id.* at 174.

<sup>16</sup> LINDER, *supra* note 4, at 345.

<sup>17</sup> *Id.* at 334, 355–56.

<sup>18</sup> Milkman & Wong, *supra* note 8, at 176, 179.

supply of labor.<sup>19</sup> As the labor broker system became more prevalent the use of contingent, less-skilled, and immigrant labor became the norm in the residential construction industry.<sup>20</sup>

This proliferation of the subcontracting structure means that an employer can subcontract more and more of each piece in the building process. In today's residential market, different subcontractors perform specialized tasks such as the framing for a house, roofing, drywall, painting, floor work, and windows. The more the construction crafts are broken down, the less a contractor needs highly skilled craftsmen who are masters at all parts of the craft. The increase of sub-journeymen (unskilled or less skilled journeymen helpers) in the industry signaled a loss of leverage for unions as well as for individual workers.<sup>21</sup> The independent contractor relationship and similar contingent work structures make it difficult for workers to engage in collective action, because without a union hiring structure, a long-term relationship with an employer does not seem realistic.<sup>22</sup>

### *B. The Role of Labor and Employment Laws*

Legal scholar Katherine Stone theorizes that the individual rights paradigm that underlies much of employment legislation is antithetical to the collective bargaining spirit and the democratic aspirations of unions.<sup>23</sup> Employment legislation tends to protect the rights of individuals in the workplace to litigate around issues like wage and hour

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<sup>19</sup> See *id.* at 177–78; 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, 976–77 (2006).

<sup>20</sup> LINDER, *supra* note 4, at 360–64.

<sup>21</sup> *Id.*

<sup>22</sup> See Jennifer Hill, *Can Unions Use Worker Center Strategies?: In an Age of Doing More with Less, Unions Should Consider Thinking Locally but Acting Globally*, 5 FIU L. REV. 551, 560–565 (2010) (noting that contingent work relationships like independent contracting require changes in organizing strategies aimed at immigrant workers).

<sup>23</sup> Katherine Van Wezel Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 U. CHI. L. REV. 575 (1992).



violations or discrimination, where the government has set the standard for violations. This type of legislation works most effectively when individuals' rights to the substantive benefits of the law are threatened. In a Fair Labor Standards Act claim, for example, the government establishes a minimum wage and enforces violations of the standard on behalf of each affected individual.<sup>24</sup> By contrast, the National Labor Relations Act protects the rights of the collective and contemplates facilitating the conditions for bargaining between employer and employee, leaving the contours of the substantive benefits to the bargaining parties.<sup>25</sup>

The individual worker in the employment law regime may perceive he has little to gain by acting collectively. Stone suggests that individual rights regulation in fact destroys incentives to unionize without providing for strong protection, noting, it “functions to disorganize labor, to prevent the very group-formation that is necessary to retain or improve the minimal terms.”<sup>26</sup> At the same time, even minimum rights enforcement is challenged by employers as not applying to immigrant, or at least, undocumented workers.<sup>27</sup>

### *C. The Limits of the National Labor Relations Act (“NLRA”) in Immigrant Workplace Enforcement*

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<sup>24</sup> Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. §§ 201–219 (2012).

<sup>25</sup> National Labor Relations Act, 29 U.S.C. §§ 151–169 (2012).

<sup>26</sup> Van Wezel Stone, *supra* note 23, at 638.

<sup>27</sup> *See, e.g.*, Flores v. Albertsons, Inc., 2002 U.S. Dist. LEXIS 6171 (C.D. Cal. Apr. 9, 2002) (holding, where an employer challenged the applicability of the Fair Labor Standards Act to undocumented workers, that the FLSA applied to all workers, regardless of immigration status). This debate is ongoing, and can even be seen in Congressional proposals to create an inadmissibility ground for workers who have used false social security numbers despite their having worked for years and provided employers with the benefit of their bargain. Such a proposal pushes undocumented workers further into the shadows by confirming a norm that workers are doing something “wrong” by working without authorization. This shift in the normative view toward employers as the victims of undocumented labor has occurred over the past twenty years or so. During the debates over the passage of employer sanctions provisions in the Immigration Reform and Control Act of 1986, for example, Congress concluded that employers, and not workers, should be sanctioned for undocumented labor because they create the labor pull into the United States. For a discussion of Congressional intent around the employer sanctions provisions, *see* Arizona v. United States, 132 S.Ct. 2492, 2504–05 (2012).

The NLRA curtails the ability of unions to take more radical steps in their organizing activities. Unions cannot instigate or participate in sit-down strikes, secondary boycotts, or other forms of civil disobedience, all of which might allow for more active and engaged participation from rank-and-file members.<sup>28</sup> Employers, on the other hand, suffer relatively light penalties for violations of the Act. For example, while the NLRB can impose back pay and reinstatement as remedial sanctions, in the case of undocumented workers who are unfairly terminated, the employer is merely required to “conspicuously post a notice to employees setting forth their rights under the NLRA and detailing its prior unfair practices.”<sup>29</sup>

Prospects for union organizing in the immigrant workplace have been universally considered weakened by the Supreme Court’s decision in *Hoffman Plastic Compounds v. National Labor Relations Board*.<sup>30</sup> In that case, the Supreme Court limited the authority of the National Labor Relations Board to protect undocumented workers by eliminating the possibility of back pay and reinstatement for undocumented workers who suffered unfair labor practices.<sup>31</sup> Jose Castro, the undocumented worker at the center of the *Hoffman* opinion, lost his job as a result of his participation in union organizing activities. The opinion spawned numerous law review articles noting the difficulties labor would face organizing immigrant workers in the aftermath of *Hoffman*,<sup>32</sup> including that of legal

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<sup>28</sup> DAN CLAWSON, *THE NEXT UPSURGE* 202 (2003).

<sup>29</sup> *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002).

<sup>30</sup> *Id.* at 152.

<sup>31</sup> *Id.* at 151–152; see also Ruben J. Garcia, *Ten Years After Hoffman Plastic Compounds, Inc. v. NLRB: The Power of Labor Law Symbol*, 21 CORNELL J.L. & PUB. POL’Y 659, 669–73 (2012).

<sup>32</sup> See, e.g., Garcia, *supra* note 31; Robert I. Correales, *Did Hoffman Plastic Compounds, Inc., Produce Disposable Workers?*, 14 BERKELEY LA RAZA L.J. 103, 104–05 (2003); Ruben Garcia, *Ghost Workers in an Interconnected World: Going Beyond the Dichotomies of Domestic Immigration and Labor Laws*, 36 U. MICH. J.L. REFORM 737, 742–743 (2003); Beth Lyon, *When More “Security” Equals Less Workplace Safety: Reconsidering U.S. Law That Disadvantage Unauthorized Workers*, 6 U. PA. J. LAB. & EMP. L. 571,

scholar Christopher Cameron, which noted that along with immigrant workers, the union movement's organizing efforts would suffer.<sup>33</sup>

#### *D. The Fears of Immigrants in the Workplace*

Numerous scholars have written about immigrants' fears as obstacles to organizing. Scholars have addressed immigrants' fear of becoming targets for employer retaliation,<sup>34</sup> losing their jobs for organizing activity,<sup>35</sup> family separation, jail and/or deportation.<sup>36</sup> Labor lawyer Thomas Geoghegan, in his study of the labor movement, reflects the general sentiment that while immigrants hold the key to success in the growth of unions, they are afraid to participate, especially after 9/11.<sup>37</sup> Immigrants, in other words, are afraid of trouble.<sup>38</sup>

Immigrants' fears are not completely unwarranted. A study conducted by the National Employment Law Project revealed that just before the Obama administration took office, U.S. workplace raids by Immigration and Customs Enforcement ("ICE") had

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605 (2004); Christopher David Ruiz Cameron, *Borderline Decisions: Hoffman Plastic Compounds, The New Bracero Program, and the Supreme Court's Role in Making Federal Labor Policy*, 51 UCLA L. REV. 1, 28–31 (2003); Michael J. Wishnie, *The Border Crossed Us: Current Issues in Immigrant Labor*, 28 N.Y.U. REV. L. & SOC. CHANGE 389, 395 (2004).

<sup>33</sup> Christopher David Ruiz Cameron, *The Borders of Collective Representation: Comparing the Rights of Undocumented Workers to Organize Under United States and International Labor Standards*, 44 U.S.F. L. REV. 431 (2009); see also Ellen Dannin, *Hoffman Plastics as Labor Law—Equality at Last for Immigrant Workers?*, 44 U.S.F. L. REV. 393, 394–95 (2009).

<sup>34</sup> See, e.g., Leticia M. Saucedo, *The Browning of the American Workplace: Protecting Workers in Increasingly Latino-ized Occupations*, 80 NOTRE DAME L. REV. 303, 315–16 (2004).

<sup>35</sup> See, e.g., Ruth Milkman, *Introduction*, in ORGANIZING IMMIGRANTS: THE CHALLENGE FOR UNIONS IN CONTEMPORARY CALIFORNIA 1, 9–10 (Ruth Milkman ed., 2000); Dennis Hayashi, *Preventing Human Rights Abuses in the U.S. Garment Industry: A Proposed Amendment to the Fair Labor Standards Act*, 17 YALE J. INT'L L. 195, 201 (1992).

<sup>36</sup> See, e.g., Edna Bonacich, *Intense Challenges, Tentative Possibilities*, in ORGANIZING IMMIGRANTS: THE CHALLENGE FOR UNIONS IN CONTEMPORARY CALIFORNIA 130, 138, 140, 142 (Ruth Milkman ed., 2000); Milkman, *supra* note 35, at 9–10.

<sup>37</sup> THOMAS GEOGHEGAN, WHICH SIDE ARE YOU ON?: TRYING TO BE FOR LABOR WHEN IT'S FLAT ON ITS BACK 251–275 (2d ed. 2004).

<sup>38</sup> *Id.* at 338.

increased.<sup>39</sup> In fact, deportations have continued their upward trajectory during the Obama administration.<sup>40</sup>

Traditional ICE raids on workplaces instill fears about deportation, imprisonment or detention, and family separation.<sup>41</sup> In incidents arising out of a series of workplace raids of Swift plants in six states, for example, more than 1,000 undocumented workers were rounded up and detained on December 12, 2006.<sup>42</sup> ICE officials claimed that the workers stole the identities of unwitting U.S. citizens when they used their Social Security numbers to obtain work.<sup>43</sup> Most immigrants faced removal proceedings after they were unable to prove they had visas.<sup>44</sup> The fear, however, did not end with the December raid. In July 2007, ICE officials returned to the same Swift plants with warrants, arresting 20 immigrant workers on identity fraud charges, and 2 supervisors on charges of immigration and traffic violations.<sup>45</sup> Such raids have a deep and lasting

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<sup>39</sup> Rebecca Smith, Ana Ana Avendaño & Julie Martínez Ortega, ICED OUT: HOW IMMIGRATION ENFORCEMENT HAS INTERFERED WITH WORKERS' RIGHTS 10 (2009), <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1020&context=laborunions>.

<sup>40</sup> Mark Hugo Lopez & Ana Gonzalez-Barrera, *High Rate of Deportations Continue Under Obama Despite Latino Disapproval*, PEW RESEARCH CENTER (Sept. 19, 2013), <http://www.pewresearch.org/fact-tank/2013/09/19/high-rate-of-deportations-continue-under-obama-despite-latino-disapproval/>.

<sup>41</sup> See, e.g., Raquel Aldana, *Of Katz and "Aliens": Privacy Expectations and the Immigration Raids*, 41 U.C. DAVIS L. REV. 1081 (2008); Erik Camayd-Freixas, *Raids, Rights and Reform: The Postville Case and the Immigrant Crisis*, 2 DEPAUL J. FOR SOC. JUST. 2, 16-17 (2008); Roxana Hegeman, *Last Year's Raid Causing Fear in Meatpacking Towns*, HOUSTON CHRON., April 14, 2007, available at 2007 WLNR 7139456; Dianne Solis, *Eleven Plead Guilty in Swift Raids: Total Prosecutions Hit 47 in Sweep of Illegal Workers at Meat-packer*, DALLAS MORNING NEWS, April 5, 2007, available at 2007 WLNR 6561569.

<sup>42</sup> Editorial, *Swift Raids*, N.Y. TIMES, Dec. 18, 2006, <http://www.nytimes.com/2006/12/18/opinion/18mon1.html>.

<sup>43</sup> Sudeep Reddy, *Focus of Raids Shifts to ID Theft*, DALLAS MORNING NEWS, December 14, 2006, <http://www.dallasnews.com/sharedcontent/dws/dn/latestnews/stories/121306dnnatswift.6f5bca2.html>.

<sup>44</sup> RANDY CAPPS ET AL., THE NAT'L COUNCIL OF LA RAZA, PAYING THE PRICE: THE IMPACT OF IMMIGRATION RAIDS ON AMERICA'S CHILDREN, 24-32 (2007).

<sup>45</sup> Press Release, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, ICE Makes Additional Criminal Arrests at Swift & Company Plants (July 11, 2007) available at <http://www.aila.org/content/default.aspx?docid=22904>.

chilling effect on worker organizing when they target workplaces and when prosecutors criminalize unauthorized work as fraudulent.<sup>46</sup>

The Obama administration's use of workplace audits, instead of workplace raids, has not diminished the fears that were instilled by the previous administration's ICE raids.<sup>47</sup> The immigrant community remains aware that such audits can lead to dismissal, if not deportation. The immigrant community is also aware that the Obama administration is responsible for the highest level of deportations in U.S. history.<sup>48</sup>

## II. THE LAS VEGAS RESIDENTIAL CONSTRUCTION INDUSTRY CASE STUDY AND LOCAL INSIGHTS INTO PERCEIVED OBSTACLES TO ORGANIZING IMMIGRANTS

The immigrants we interviewed in the Las Vegas Residential Construction Industry Study were not aware of the limitations of employment or labor laws, or of the weakened state of the building trades unions. More importantly, they saw little, if any, union organizing activity on their worksites. In the absence of union organizing activity, workers developed narratives that fit the contingent independent contractor employment structures they encountered. The narratives included stories of their endurance in the workplace as well as their entrepreneurial nature as they navigated the difficult workplace environments they entered.

### A. *Study Description*

Between 2006 and July 2008, my sociologist colleague, Cristina Morales, and I interviewed over 100 construction workers, union leaders, organizers, and union

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<sup>46</sup> Erik Camayd-Freixas, *Raids, Rights and Reform: The Postville Case and the Immigrant Crisis*, 2 DEPAUL J. FOR SOC. JUST., 16-17 (2008).

<sup>47</sup> Cam Simpson and Miriam Jordan, *More Employers Face Immigration Audits*, WALL ST. J., Nov. 20, 2009, <http://online.wsj.com/article/SB125866577819456287.html>.

<sup>48</sup> Corey Dade, *Obama Administration Deported Record 1.5 Million People*, NPR (December 24, 2012), <http://www.npr.org/blogs/itsallpolitics/2012/12/24/167970002/obama-administration-deported-record-1-5-million-people> (stating ICE has removed over 1.5 million immigrants during the first term of the Obama Administration); FY 2012 ICE Immigration Removals, IMMIGRATION & CUSTOMS ENFORCEMENT, available at [www.ice.gov/removal-statistics](http://www.ice.gov/removal-statistics) (stating over 400,000 immigrants were removed in 2012).

members in the residential construction industry in Las Vegas, Nevada. We were interested in exploring the demographic changes in the Las Vegas residential construction labor market, as well as how those changes affected labor conditions, especially workplace organizing opportunities within that sector of the industry. When we began our study, we decided to focus on residential construction workers because preliminary interviews with leaders in the construction industry indicated that the majority of workers in the residential field were undocumented, non-unionized immigrants.<sup>49</sup> The interviews discussed in this essay are part of a larger data set that includes the perceptions of immigrant workers around issues such as their border crossing stories, their perceptions of the difficulties of the work, and their perceptions of their own rights in the workplace.<sup>50</sup>

We started with a set of focus groups to get a general idea of the issues that confronted immigrant workers in the workplace. We conducted all of the interviews in Spanish. The majority of our interviews were with male foreign-born workers from Mexico and Central America. All were working in the residential construction field. The vast majority of our interviewees were undocumented, reflecting a growing pattern in residential construction.

We asked questions in various subject areas. For purposes of this article, we focus on responses to questions that elicited local labor leader and worker perceptions about unions, perceived advantages of union membership, worker grievances, and

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<sup>50</sup> See Leticia Saucedo, *Border Crossing Stories and Masculinities*, in MULTIDIMENSIONAL MASCULINITIES AND LAW: FEMINIST AND CRITICAL RACE APPROACHES (Frank Rudy Cooper and Ann McGinley, eds., 2012); Leticia Saucedo and M. Cristina Morales, *Voices Without Law: the Border Crossing Stories and Workplace Attitudes of Immigrants*, 21 CORNELL J.L. & PUB. POL'Y 641 (2012); Leticia M. Saucedo and M. Cristina Morales, *Masculinities Narratives and Latino Immigrant Workers: A Case Study of the Las Vegas Residential Construction Trades*, 33 HARV. J.L. & GENDER 625 (2010) [hereinafter *Masculinities Narratives*].

obstacles to organizing immigrant workers. Some of the focus group participants were members or affiliates of community organizations and hometown associations. During our outreach for willing construction workers, we came upon a group of workers who were beginning to organize at the workplace. They agreed to participate in the study and met with us several times, as a group and individually.

We focused on the same questions with individual respondents that we covered with the focus groups. These interviews gave us a more nuanced perspective on each of the issues we covered. The interviews began with basic questions about how people entered the construction industry in Las Vegas. They evolved into questions surrounding workplace conditions, workplace grievances, and the outlets that workers perceived for rectifying problems in the workplace.

### *B. The Findings*

Our discussions revealed several gaps between the perceptions of local labor leaders and the workers regarding the importance of and the obstacles to organizing immigrants. The following insights arose out of our interviews.

#### 1. Union Leader Perceptions: Organizing Immigrants is Increasingly Important for Both Workers and Unions

We spoke to several focus groups of building trades union organizers, most of whom were Latino themselves. They saw themselves as educators for a community that sorely needed information. They alluded to the strong union movement in the service and commercial sectors of the Las Vegas casino industry. They understood the importance of organizing because “it will help us to maintain what we have . . . on the strip.”<sup>51</sup> Their goal was to make sure that “everybody’s in the tent.”<sup>52</sup> This view of

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<sup>51</sup> Interview with Jona, Labor Leader, in Las Vegas, Nev. (December 12, 2006).

organizing emphasized the role of the unions as drivers of a labor movement that embodies the issues important to all workers, including immigrant workers.

Union organizers perceived Latinos' exploitability as a motivating reason to organize them in the construction trades.<sup>53</sup> The narrative that Americans would not take these jobs became the rationale for why Latinos were in these jobs. One organizer described a typical scenario in which a contractor would underbid a construction contract and then seek workers at less than desirable wage rates to fulfill the contract. The organizer then explained, "So then what happens? There's [sic] jobs that people have there, but the Americans, because they pay so low, will not take them, so they give them to the Hispanics."<sup>54</sup>

The need to organize Latinos seems to stem from a desire to protect the most vulnerable. One organizer noted, "[t]here are a lot, a lot of people who are being very fraudulent [in their relationships with workers], and who are the ones to suffer? Hispanics."<sup>55</sup> In addition, organizers attributed wage deterioration with the changing demographics among workers in the construction industry:

When I got here in 1993, people were still earning more or less o.k. in non-union jobs, in residential. You would see Americans making \$500 or \$600 dollars a week. Non-union. But after a while, things began to change. And Hispanics began to enter these companies in a big way, which meant many of these people felt pressure to leave. Many of the older ones, Americans, because of the pressure decided to retire. . . . [Today] [w]hat one earns at entry level in a company, is not based on experience. It's based, practically, on what you're willing to accept.<sup>56</sup>

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<sup>52</sup> *Id.*

<sup>53</sup> Interview with Jose, Labor Leader in Las Vegas, Nev. (June 20, 2006).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> Interview with Timoteo, Labor Leader, in Las Vegas, Nev. (June 20, 2006).



Some union leaders believed that the unions lost their leverage in the residential construction industry because of lack of labor regulation in the classification of workers. Nonunionized subcontractors hired workers as independent contractors, when they should have been classified as employees. As a result, one organizer noted:

There were contractors who saw the opportunity of, of making direct deals with people, and then came the moment where the ‘coyotaje’ began. [A coyote] is in charge of contracting the workers and he is the intermediary between the company and the worker and typically he’s the only person that gains advantage. So that was when . . . in this case, the carpenters union here in Las Vegas began to lose the . . . residential sector.<sup>57</sup>

Because of their leverage, employers can set lower wage rates for jobs:

I’ve seen these companies articulate their prices. They know how long it takes for a person to do a job, certain number of pieces for a certain amount of money equaling more or less \$12 an hour; [the workers will] make \$6 or \$7, and [the company will] blame the person for being slow, for not working fast. So they’re pressuring people more and more [to accept] a ridiculous price [for] piecework.<sup>58</sup>

Union leaders we spoke to understood the social consequences of a weak union structure in residential construction. One organizer described the externalized costs of nonunion labor borne by the public:

[W]hen [a nonunionized worker] gets hurt on the job, who’s the one who pays for all of this? Who pays for the doctor and everything? It’s the taxpayers. But with us it’s not like that. With the unions we have our own trust fund.<sup>59</sup>

These narratives of the exploitable immigrant Latino worker needing union protection seem to fit in with a broader goal of organizing all workers, whether American-born or

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<sup>57</sup> Anonymous interview with Labor Leader Focus Group, in Las Vegas, Nevada (June 22, 2006).

<sup>58</sup> Interview with Timoteo, *supra* note 56.

<sup>59</sup> Interview with Cesar, Laborer Leader, in Las Vegas, Nev. (June 20, 2006).

not. It also makes the objective of protecting jobs for American workers irrelevant to the broader goal of having more workers under the union's umbrella.

## 2. Laws, Unfamiliarity with Laws and Unions, Unregulated Employer Practices, and Immigration Status Make it Difficult to Organize Immigrants

Union leaders identified lack of government regulation or enforcement as an obstacle to organizing Latinos in construction:

So what is the role of the government here in politics? Why isn't there enforcement by the labor commission? . . . If they enforced the laws, then they would prevent the salaries from forcibly falling and this in turn would give an opportunity to all of the labor force.<sup>60</sup>

They perceived Latinos' unfamiliarity with workplace legal protections as a reason that organizing is so difficult. Because Latinos, especially the foreign-born, do not know about their protections, they are perceived as less likely to seek them:

[W]e represent all of the workers—Americans, Hispanics, blacks—whatever. But unfortunately, we focus on Hispanics who are being badly exploited. It's not that they're not educated; the labor force is mostly Mexican. Because [from the day] you are born [in the United States], people start talking about the law in this country. That's the advantage that [native-born workers] have.<sup>61</sup>

Labor leaders were also aware of the tarnished image of unions in public discourse and discussed how important it was to repair that image at the same time that they tried to attract immigrant workers.<sup>62</sup> They also perceived that if workers did not hear about unions directly from union members or labor organizers, the narrative of union members was that they were unproductive, lazy, and unacceptable workers.<sup>63</sup> Moreover, in some workplaces, union leaders felt they were considered outsiders who may turn

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<sup>60</sup> Interview with Jose, *supra* note 53.

<sup>61</sup> *Id.*

<sup>62</sup> Interview with Timoteo, *supra* note **Error! Bookmark not defined.**; Interview with Cesar, *supra* note **Error! Bookmark not defined.**

<sup>63</sup> Interview with Timoteo, *supra* note **Error! Bookmark not defined.**

information in to government agencies about an immigrant's undocumented status. As one organizer noted:

I am the [safety] Compliance Officer [for a union], and I get to go to government jobs, schools . . . I come across Hispanics who are being hidden, they have them working after hours, or that they're paying them what they should be getting paid and there are times when they start to tremble when they begin talking to me. There is a huge fear. They think that the union means deportation also, especially for those who don't have any papers.<sup>64</sup>

At least one union leader acknowledged difficulties for immigrant workers seeking acceptance into specialty unions such as the electricians' union. His perception was that the electrician union's apprenticeship program requires a five year commitment and a written exam, both of which he thought deterred immigrant participation.<sup>65</sup> Another acknowledged that racism and bigotry within unions made organizers' jobs in attracting immigrants more difficult.<sup>66</sup> In a discussion of labor leaders, all acknowledged that as demographics changed and Latinos became a larger part of the population, the unions would be affected.<sup>67</sup> They all understood, moreover, that education about what unions do, about concerted activity, and about the ideology of solidarity was important for their success.<sup>68</sup>

Ultimately, the leaders saw their success in outreach to the Latino community and to immigrants who were now overrepresented in the residential construction industry:

I think all the unions see the necessity to organize and they say it's all going to be better through organizing . . . . If anybody is working with the tools of the trade, doesn't matter if they're Hispanic, Chinese or whatever, they should be in the union. . . . [I]t's gone as far as one of our presidents

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<sup>64</sup> *Id.*

<sup>65</sup> Interview with Joe, Union Leader, in Las Vegas, Nev. (June 20, 2006).

<sup>66</sup> Interview with Cesar, *supra* note **Error! Bookmark not defined.**

<sup>67</sup> Labor Leader Focus Group, in Las Vegas, Nev. (June 20, 2006).

<sup>68</sup> *Id.*

saying, you know, you see a group of guys, they're workers, if you don't stop and talk to them, you're not doing your job.<sup>69</sup>

The organizers we interviewed also noted that immigration status does not enter the picture when they try to organize a site:

We don't ask for [documentation status]. And we don't know either. We don't know. It's not our job, we can't ask them that. To tell you the truth, that's uh, that doesn't even cross my mind. If he's working with the tools of our trade, then we need to organize them.<sup>70</sup>

Nonetheless, immigration status was perceived as an obstacle:

[T]he workers are scared, they don't want to organize. They don't want to do nothing [because] they're scared, their immigration status. I mean, there's several different things, you know. It's very hard, very hard to organize.<sup>71</sup>

The biggest obstacle leaders perceived is the lack of understanding of a union's role in the workplace. The difficulty lies in the painstakingly slow work of union organizing:

They don't know, they don't understand that, you know? They're just there because it's a job, right? When we go talk to them we tell them that . . . the union is not a couple of people in the office, or whatever, a building down there that we have, it's just not the union. The union is one person, one worker talking to another worker, to make sure they are protected, right? Concerted activity. It's just one guy talking to another guy, one worker talking to another, that's where the union starts.<sup>72</sup>

The sentiment of these union leaders was that education was needed on both sides of the table. At the local level, they understood that Latino immigrant workers were the future of the union movement. They also understood that they needed to convince both the workers (especially the circular migrants who did not plan to stay long in the United States) and those in the union movement who are still unconvinced by an "everyone in

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<sup>69</sup> Interview with Joe, *supra* note 65.

<sup>70</sup> *Id.*

<sup>71</sup> Interview with Joe, *supra* note 65.

<sup>72</sup> *Id.*

the tent” strategy, that unionization was beneficial in the short run as well as in the long run.

### 3. Undocumented Worker Perceptions

We did not encounter interviewees who were actively hostile to unions or to the idea of organizing. Instead, there was a lack of awareness of union organizing efforts. Most of the interviewees had little or no knowledge of a union presence in or around their worksites. Nor did they think about organizing when they ran across difficulties at work. Instead, they seemed consigned to work the difficult hours and take the risks that they took and to fend for themselves individually if they needed to complain about workplace conditions. The following insights about working conditions, complaints in the workplace, and the workers’ perception of their rights in the workplace illustrate the lack of awareness of unions as a possible solution to their workplace problems.

#### a. Immigrants Don’t Organize Because of Unfamiliarity with Law, with Union Efforts or Because They are Resigned to Their Working Conditions

The immigrant workers we interviewed were by and large resigned to their working conditions, in part because they perceived they had few rights as immigrants. Workers also perceived that they could not complain about workplace conditions because employers would threaten to turn them over to immigration enforcement authorities. If that occurred, workers would not be able to “work in peace.”<sup>73</sup>

One worker provided an apt description of the sentiment of many of the workers in the study:

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<sup>73</sup> Interview with Rogelio, Construction Worker, in Hidalgo, Mexico (August 13, 2008).

The majority of us here live with that fear that immigration will come for us. A lot of times we don't fight the company for fear of being deported. The company can just deport[] us and they [will] get rid of the problem.<sup>74</sup>

Our interviewees perceived that the rights available to other workers were not available to them, and that as a result, complaints were futile. One worker noted, "I think that I don't have the same right as someone who's a resident here."<sup>75</sup> Another worker felt that he and his colleagues could not complain about workplace conditions, and if they did "no one will listen to us."<sup>76</sup>

Many of the workers we interviewed did seem to accept the work conditions without much complaint. One worker described the working conditions in a nonunion residential worksite where immigrant workers were overrepresented:

[T]here is a lot, a lot of pressure in the workplace . . . . You have to leave the jobs at one hundred percent (100%), not forget any details. And if you leave a job in bad condition[] right now, they take you out back . . . they give you a warning . . . if you do a bad job, you're out of here.<sup>77</sup>

Instead of complaining about bad working conditions or other grievances, the workers developed endurance narratives that helped them get through the work without having to resort to outside help or to each other for relief. The single-mindedness of their purpose for being in the United States is revealed through this narrative. One worker noted, "[W]hen we move here, we just focus on working, and we don't think about how long we're going to be living and working here. We don't take into consideration the working conditions of our jobs, or that we might get ill."<sup>78</sup> The narrative that Latinos

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<sup>74</sup> Interview with Juvencio, Construction Worker, in Las Vegas, Nev. (June 14, 2007); *see also* Leticia M. Saucedo & Maria Cristina Morales, *Voices Without Law: The Border Crossing Stories and Workplace Attitudes of Immigrants*, 21 CORNELL J.L. & PUB. POL'Y 641, 654 (2012).

<sup>75</sup> Interview with Miguel, Construction Worker, in Las Vegas, Nev. (June 14, 2007).

<sup>76</sup> Interview with Samuel, Construction Worker, in Las Vegas, Nev. (June 15, 2007).

<sup>77</sup> Anonymous interview with Non-union Worker Focus Group, in Las Vegas, Nev. (December 10, 2006).

<sup>78</sup> Interview with Nancy, Construction Worker, in Las Vegas, Nev. (November 10, 2006).

tolerate conditions and do work that no one else would is part of the endurance theme.<sup>79</sup>

Many of the male workers we interviewed withstood undesirable working conditions even when those conditions violated wage and hour requirements or safety laws. One worker, explaining that the company would not pay overtime, noted, “[t]hat’s the first thing they tell us when we start work, not to ask for anything.”<sup>80</sup> This worker believed he accepted both the job and the condition that he would not complain about its terms.<sup>81</sup>

Another worker accepted his supervisor’s admonishments that he, the worker, had to work faster than he thought reasonable so that the contract would remain profitable.<sup>82</sup> Yet another noted that his only alternative to enduring his situation was leaving the workplace.<sup>83</sup> Several workers asserted that they would continue to work for the company despite having complaints about the company’s operations. For example, when asked how he would resolve any problems with the company, one worker stated, “I would just keep working for the company.”<sup>84</sup>

This understanding of the employment contract tends to preclude any predisposition toward organizing. In none of these conversations did workers say they would resort to organizing or unionization to resolve their workplace grievances. Instead, alongside the endurance narrative we found a theme in workers’ stories about their entrepreneurial nature. The narrative fit well with the structure of the jobs in residential construction as independent contractor arrangements. Many of the workers were recruited to their work through labor brokers, or *contratistas*. Many aspired to become *contratistas* themselves.

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<sup>79</sup> Leticia M. Saucedo, *Border Crossing Stories and Masculinities*, in *MASCULINITIES AND THE LAW: A MULTIDIMENSIONAL APPROACH* 146, 150-154 (Frank Rudy Cooper & Ann C. McGinley eds., 2012).

<sup>80</sup> Interview with Juvencio, *supra* note 74.

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

<sup>82</sup> Interview with Antonio, Construction Worker, in Las Vegas, Nev. (June 12, 2007).

<sup>83</sup> Interview with Deltorro, Construction Worker, in Las Vegas, Nev. (June 15, 2007).

<sup>84</sup> Interview with Juvencio, *supra* note 74.

In fact, the goal for many of the workers we interviewed was to become a subcontractor after a few years of working and building contacts, saving to buy tools, and amassing a bit of capital. This aspiration was expressed as their desire to be entrepreneurs or their own businessmen in the United States.

#### b. Workers Who are Aware of Union Activity are Less Resigned to Their Workplace Conditions

Interestingly, one small focus group of workers saw unionization as a viable route for resolving workplace problems, such as safety or salary concerns.<sup>85</sup> These workers—mostly women—who had communicated with unions, were positive in their assessment of how unions could help alleviate disagreeable working conditions. Several of them volunteered their time to talk to their co-workers, because “if you want all of these injustices to stop, you have to do something.”<sup>86</sup>

Workers who perceived power in a union understood that employers could “do with us what they want” if they remained unorganized.<sup>87</sup> One worker described how an employer had responded to a small group of workers that requested a pay increase:

[I]f a small group of five or six go to talk to the owner of a company, they’ll just tell you, ‘If you want it. If not then leave. Behind you are hundreds of people who, for five or six dollars, will do it.’<sup>88</sup>

### 4. The Gap in Perceptions: Lessons Learned

#### a. Lack of Awareness was a Bigger Obstacle than Negative Views of Organizing Activity

Most of the workers we interviewed seemed to perceive limited options to redress grievances: endure or leave. The fact that workers perceived they had limited options to

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<sup>85</sup> I explore the gender dynamics that operate between this group and the larger set of interviewees in a separate article. See *Masculinities Narratives*, *supra* note 50, at 645–46.

<sup>86</sup> Interview with Diana, Residential Construction Worker, in Las Vegas, Nev. (June 13, 2007).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*



express their workplace grievances was a big obstacle to organizing efforts. It was not because, as some union leaders believed, workers had negative perceptions of unions. Rather, it was a lack of opinion or any awareness of organizing efforts that was the biggest obstacle to successful organizing. In its place, the void in knowledge about the power of unions was filled with narratives—mostly masculinities driven—of self-sufficiency, endurance and individual ability to deal with whatever employers demanded of workers.<sup>89</sup>

#### b. Education about Union Activities and Awareness of the Importance of Immigrant Issues Within Unions Can Facilitate Organizing

The fact that those workers who had contact with unions were positive about their experiences suggests that local union leaders in Las Vegas have correct intuitions about the need to educate more workers. Immigrant workers also seem open to hearing about collective activity as an alternative to the narratives they have developed.

There are, of course, numerous examples of recent immigrant union organizing successes that started with education drives. The Justice for Janitors organizing campaign succeeded in organizing the janitorial services industry throughout Los Angeles, for example.<sup>90</sup> The organizers of this campaign recognized and adjusted to the changed demographics in this industry. They listened to the workers' fears and needs, and developed strategies for targeting the joint employers in the industry's labor contracting arrangements. This resulted in thousands of immigrant workers being incorporated in the Service Employees International Union ("SEIU"). By targeting the building owners rather than the contractors, the union strategies successfully brought pressure on those with the power to agree to union representation. After several strikes,

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<sup>89</sup> See Saucedo & Morales, *supra* note \_\_\_\_ (describing how these narratives operate in the workplace).

<sup>90</sup> See generally Milkman & Wong, *supra* note 8.

demonstrations and other militant activity, the building owners and contractors agreed to a contract with increased wages, more benefits, and importantly, immigrant protections for over 8,000 immigrant workers in the industry.<sup>91</sup>

The strategy of organizing among diverse immigrant communities in the San Francisco hotel and restaurant industry is another example of the success of rank-and-file democratic principles in bringing immigrants into the labor movement fold.<sup>92</sup> In San Francisco, the Hotel and Restaurant Employees (“HERE”) Local 2 embraced the concept of organizing diverse immigrant communities, accepting the reality that the industry and the city’s demographics were increasingly immigrant-driven.<sup>93</sup> HERE organizers rejected the traditional public perception that immigrants are difficult to organize. They found that immigrants, especially Latino immigrants, carry with them a history of experience with oppositional politics and stronger union traditions in their home countries.<sup>94</sup> They found that immigrants felt they had less to lose by organizing than their native-born counterparts since they were already in low-paying, difficult and high turn-over jobs.<sup>95</sup> They developed narratives that called on their ability to endure by comparing union organizing in the U.S. with the dangers of organizing in their home countries.<sup>96</sup> Union organizers repackaged the common perceptions of immigrant obstacles of organizing to convince immigrant workers to join organizing campaigns.

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<sup>91</sup> CLAWSON, *supra* note 28, at 99–101.

<sup>92</sup> Miriam J. Wells, *Immigration and Unionization in the San Francisco Hotel Industry*, in ORGANIZING IMMIGRANTS: THE CHALLENGE FOR UNIONS IN CONTEMPORARY CALIFORNIA, 109–29 (Ruth Milkman ed., 2000).

<sup>93</sup> *Id.* at 110.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> Wells, *supra* note **Error! Bookmark not defined.**, at 120; *see also* Clawson, *supra* note **Error! Bookmark not defined.**, at 99-101.

HERE also took specific steps to incorporate immigrants and their concerns into collective bargaining agreements with hotels, thereby increasing their effectiveness and relevance with immigrant populations.<sup>97</sup> For example, one provision protects workers who used false social security numbers before obtaining legal immigration status and who then changed their names and numbers.<sup>98</sup> Another provision allows the union to negotiate grievances with employers who attempt to implement English-only requirements on their employees.

The SEIU and HERE experiences in California may be the key to organizing in Las Vegas. Currently, the narratives of endurance and hyper-masculinity are powerful among the immigrant workers we interviewed. Our study shows that in the absence of targeted organizing efforts aimed at the immigrant worker experience, immigrant workers will resort to narratives that help them tolerate their working conditions as individuals. Among these are masculinities narratives about their special skill at tolerating dangerous and difficult working conditions. These same narratives, however, can be re-tooled to focus their endurance stories on their organizing and collective bargaining experiences. The immigrant worker experiences described here illustrate how workers respond positively to messages that call on their persistence and endurance to create a workplace that fits their lived reality, especially their uncertain immigration status.

A narrative of solidarity, power in endurance, and of a union movement that cares about immigration advocacy, therefore, would appeal to those who have resorted to masculinities narratives to sustain themselves in the workplace. Appeals to the strong social networks that got workers into the industry in the first place, moreover, may work

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<sup>97</sup> *Id.* at 126.

<sup>98</sup> Wells, *supra* note **Error! Bookmark not defined.**, at 126.

to strengthen the core of workers who already believe in organizing. Past experience with immigrant organizing efforts show that they can be successful if they are aimed at the issues that the groups deem important. Policy discussions about the future of immigrant workers and temporary labor programs for the future must, however, progress keeping in mind that the labor movement is committed to including immigrant workers “in the tent.”

### III. CAUTIONS FOR THE FUTURE: THE ALIENATING EFFECTS OF LEGISLATIVE PROPOSALS TO LIMIT ADMISSION OF TEMPORARY WORKERS IN THE CONSTRUCTION INDUSTRY

This section takes the lessons learned from the perception gap in obstacles to organizing and applies those lessons to the labor movement’s involvement in the latest round of legislative immigration reform efforts. The positive lessons from the SEIU and HERE examples discussed in the previous section demonstrate how unions can readjust their strategies to recognize and adapt to demographic shifts in their constituencies. Unions that fail to take account of the demographic shifts or that work to reverse demographic shifts do so at their peril.

History provides us with several examples in which the labor movement has acted in a protectionist or restrictive manner. Union leaders participated in the debate that ultimately produced the National Origins Quota Act of 1924, which imposed racial restrictions on the entry of immigrants into the United States.<sup>99</sup> Unions were instrumental in limiting the scope of the H2 temporary worker program enacted in the 1952 Immigration and Nationality Act in order to restrict foreign-born labor in

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<sup>99</sup> Letter from Samuel Gompers to William Gerber (May 31, 1923), in *THE SAMUEL GOMPERS PAPERS*, vol. 12, 259-60 (Peter J. Albert & Grace Palladino eds., 2011); *see also* Hearing on S. 500: Hearing Before the Subcomm. on Immigration and Naturalization of the S. Comm. on the Judiciary, 89th Cong. (statement of Andrew Biehler, Director, American Federation of Labor and Congress of Industrial Organizations), in OSCAR M. TRELLES II & JAMES F. BAILEY III, *IMMIGRATION NATIONALITY ACTS, LEGISLATIVE HISTORIES AND RELATED DOCUMENTS 1950-1978*, 637.

agriculture.<sup>100</sup> Unions fought hard to eliminate the Bracero labor contracting program in 1964 and to narrow the scope of temporary worker programs in the 1965 amendments to the Act for the same reasons.<sup>101</sup> Unions were involved in the Department of Labor's efforts to restrict the H2 program to agricultural growers after the Bracero program ended.<sup>102</sup> In the aftermath of these restrictive measures, growers continued to hire foreign workers even though they were undocumented. Unions were instrumental in persuading Congress to include an employer sanctions provision in the 1986 Immigration Reform and Control Act, believing that such a measure would curb undocumented labor.<sup>103</sup>

The AFL-CIO's position over the years has moved considerably toward recognizing that immigrant workers are key to union progress and growth.<sup>104</sup> Its most recent policy positions, however, reflect glimmers of the restrictionist positions of the past at the same time that the AFL-CIO professes a vision for the future that includes getting everybody in the tent.

*A. The Current Legislative Proposal and Labor Movement's Most Recent Compromise over Guest Worker Programs*

In Spring 2013, a bipartisan group of Senators crafted a legislative proposal to reform the nation's immigration laws. The group, colloquially known as the Gang of Eight, ultimately shepherded the immigration bill through the Senate known as S. 744, the Border Security, Economic Opportunity, and Immigration Modernization Act of

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<sup>100</sup> KITTY CALAVITA, *INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION AND THE INS* 122, 145–48 (1992).

<sup>101</sup> *Id.* at 142–43.

<sup>102</sup> *Id.* at 143–44.

<sup>103</sup> David Bacon, *Employer Sanctions: The Political Economy of Undocumented Immigration in the United States*, LABORNET NEWS, May 13, 2001, <http://labornet.org/viewpoints/dbacon/sanctions.html> (last visited Aug. 6, 2013). In fact, the measure simply drove more undocumented workers in the shadows.

<sup>104</sup> *Id.*

2013, which passed in the Senate on June 27, 2013.<sup>105</sup> The Senate bill includes a mechanism for providing temporary nonimmigrant status to foreign-born workers in several industry sectors, including construction.<sup>106</sup>

In the process of securing legislation that would be acceptable to different constituencies, the Senate negotiators sought input from business groups and the AFL-CIO.<sup>107</sup> These parties represented two main interests: (1) employers who utilize the services of immigrant labor, and (2) organized labor seeking to incorporate labor protections for immigrant workers but also maintain jobs for American workers.<sup>108</sup> The AFL-CIO's dual role representing the interests of immigrant workers currently in jobs and American workers feeling squeezed out of jobs resulted in tenuous positions on several issues. To be sure, the proposed legislation contains a *Hoffman* fix that allows remedies for workers suffering from an employer's unfair labor practices in violation of the NLRA regardless of their immigration status.<sup>109</sup> On the other hand, the proposal limits the number of temporary workers who can enter the construction industry, where hundreds of thousands, if not millions, of immigrants have been employed over the past decade.<sup>110</sup>

The proposed legislation provides for the implementation of a "W visa" for temporary nonimmigrant workers in fields designated as necessary by the Bureau of Immigration and Labor Market Research, a newly-created agency within the Department

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<sup>105</sup> Parker & Martin, *supra* note 93.

<sup>106</sup> BORDER SECURITY, ECONOMIC OPPORTUNITY, AND IMMIGRATION MODERNIZATION ACT OF 2013, S.744, 113<sup>th</sup> Cong. § 4701-03 (2013).

<sup>107</sup> Steven Greenhouse, *Business and Labor Unite to Try to Alter Immigration Laws*, N.Y. TIMES, Feb. 7, 2013, <http://www.nytimes.com/2013/02/08/business/business-and-labor-unite-to-try-to-alter-immigration-laws.html>.

<sup>108</sup> *See id.*

<sup>109</sup> BORDER SECURITY, ECONOMIC OPPORTUNITY, AND IMMIGRATION MODERNIZATION ACT OF 2013, S.744, 113<sup>th</sup> Cong. § 3101(a)(8) (2013).

<sup>110</sup> *Id.*

of Homeland Security.<sup>111</sup> The Senate bill limits the number of temporary construction workers that can be admitted with W visas to 15,000 per year or 7,500 every six months.<sup>112</sup> While the compromise may protect jobs for American workers, it does nothing to protect the interests of those like our interviewees, who have occupied the field of residential construction over the last several decades. It, in fact, encourages the continued undocumented immigrant workplace. Workers, like our interviewees, who are part of the circular migration stream will continue to cross the border without authorization, just as workers in the past have migrated alongside authorized temporary workers to fill unmet labor needs.<sup>113</sup>

### *B. Lessons for Policy Making*

The AFL-CIO's insistence that the initial legalization route for construction workers be temporary and limited has important ramifications for the work of local labor leaders. First, the W visa provisions' inclusion of construction work signals the labor movement's concession to the seasonal nature of construction work. If we accept that the construction industry can structure jobs so that they can be filled with temporary labor it will be much more difficult to focus organizing efforts around these job structures. This is certainly not the intention of organized labor, which over decades successfully transformed the construction industry into a set of labor structures that fostered some semblance of permanence, even if individual jobs filled temporary needs.<sup>114</sup> So, the first lesson is that allowing W visas in construction in the first place has the potential for

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<sup>111</sup> *Id.* at § 220(a)(1).

<sup>112</sup> *Id.* at § 220(a)(4), § 220(h)(5)(B).

<sup>113</sup> See Calavita, *supra* note 100 (describing the phenomenon of undocumented workers filling jobs alongside contract labor under the Bracero Program in the 1950's and 1960's).

<sup>114</sup> See Milkman & Wong, *supra* note 8, at 171–72.

eroding the nature of construction jobs, especially if there is no counterbalancing set of provisions making it easier for unions to organize temporary workers.

Second, the W visa provisions may preclude the type of labor movement organizing that places the needs of immigrant or foreign-born workers at its center—the type of organizing that HERE Local 2 undertook in San Francisco, and that the janitors undertook in Los Angeles. These organizing strategies were based on the premise that the membership constituency had changed, and the unions understood they had to change their methods to attract the new, immigrant constituency.<sup>115</sup> Limiting the number of visas available, and therefore the legalization opportunities for immigrant construction workers, on the other hand, reflects ambivalence about the construction of its membership in the future. By limiting the number of immigrant workers in the industry, the AFL-CIO is signaling that its membership constituency is still the white male workers who once held the jobs and who still dominate the unionized sector of the industry. The provisions capping the number of visas available for temporary construction work signals that the AFL-CIO will continue with its traditional model of organizing with traditional white male constituencies. In other words, the construction trades unions have yet to switch to an expansive organizing model, choosing instead to protect jobs for its highest skilled (white) native-born workers. This strategy signals to local labor leaders that they should not count on resources for the type of organizing that made SEIU and HERE successful.

Third, and relatedly, the W visa provisions capping the number of visas available to construction workers reflect an assumption that the labor movement can recapture construction jobs for American workers and in doing so, rebuild the American labor

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<sup>115</sup> Wells, *supra* note 92 at 120.



movement. Lessons from the demographic changes in other industries, however, demonstrate the difficulties that organized labor faces in rebuilding jobs for native-born workers.<sup>116</sup> Past guest worker program initiatives –most notably, the Bracero Program of the 1940s and 1950s –demonstrate that a labor supply of undocumented workers arose alongside the legal guest worker program.<sup>117</sup> As attempts to limit the guest worker programs increased, so did the undocumented population.<sup>118</sup> Attempts to regulate employer hiring of undocumented workers did little to stop undocumented migration, in part because employer sanctions have historically been weak.<sup>119</sup> If undocumented workers are already in the field and there is little incentive to reduce their numbers, they will continue to be pulled into the work. In sum, the limited number of W visas available for the construction sector—and the large number of immigrant workers already in the field—means there is little incentive for employers to keep from hiring undocumented workers. Parts of the industry will continue to be overrepresented by undocumented workers, even after passage of comprehensive immigration reform legislation. This is a universal lesson for all industries facing a shift to immigrant labor about what has occurred in the past and will occur in the future if future legislation continues to ignore the employer pull of undocumented labor into the market.

Organized labor at the national level must consider whether each of its compromises potentially undermines the work of local labor organizers trying to attract

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<sup>116</sup> In the poultry processing industry, for example, Latinos – mostly immigrants – have replaced unionized native-born, primarily white workers in many of the industry’s plants. *See Latinos in the Poultry Processing Industry*, NATIONAL COUNCIL OF LA RAZA, <http://www.nclr.org/images/uploads/publications/PIRM2012.pdf>. This is the reality that parts of the union movement like the SEIU and HERE had to confront over a decade ago, and which the union movement today still debates.

<sup>117</sup> Calavita, *supra* note 100 at 46–50.

<sup>118</sup> Calavita, *supra* note 100 at 46–50.

<sup>119</sup> Peter Brownell, *The Declining Enforcement of Employer Sanctions*, MIGRATION POLICY INSTITUTE (Sept. 1, 2005) <http://www.migrationinformation.org/Feature/display.cfm?ID=332>.

immigrant labor. One way out of the AFL-CIO's dilemma is to jettison immigration proposals based on the historic narrative that certain jobs must be protected for the American worker. The premise has its historical roots in racist, nationalist and protectionist ideas that track discriminatory practices in the workplace we have long protected against. The argument for protecting American workers has also led to increasingly restrictive and punitive immigration law measures that have nonetheless been ineffective at curbing undocumented immigration to the workplace.<sup>120</sup> Construction trades councils may have felt historically protected based on their strong union presence in the construction trades.<sup>121</sup> Unfortunately, they cannot now blame immigrant work for the disintegration of the employment structures in the residential construction sector.<sup>122</sup> Instead, the construction labor movement should reassess its organizing strategies and recognize that some of its industry has industrialized. This shift calls for a shift in organizing strategy, which will be much more effective than protectionist legislation.

#### CONCLUSION

The Las Vegas Residential Construction Study gives us a unique perspective on the effects of policy compromises on the most affected communities. Unions have been struggling for decades to figure out how to incorporate immigrant communities more fully into the labor movement. At the same time, organized labor has been at the forefront of the compromises that have kept immigrant workers—legal or unauthorized—at the fringes of the labor economy. Interestingly, although local union leaders and organizers understand the importance of attracting immigrant workers to the labor movement, the union movement remains largely absent from the workplace reality of

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<sup>120</sup> *Id.*

<sup>121</sup> Milkman & Wong, *supra* note 8, at 169–176.

<sup>122</sup> *Id.*

many immigrants. We found that workers simply did not know much about unions or the labor movement in the United States. In the absence of the narratives of collective strength that union presence would have fostered, immigrant workers in the residential construction area constructed narratives of individual hypermasculinity in the face of increasingly harsh and difficult working and living conditions. The data collected from our interviews indicates that labor movement policy advocates must proceed with caution given their dual role in speaking for American labor while simultaneously determining how to attract immigrant workers. The construction trades unions must especially be aware of the changing demographics in their trades. This awareness may redirect the union movement's energies back toward an "everybody in the tent" approach, both at the policy and at the grassroots organizing levels.