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DAMAGED BODIES, DAMAGED LIVES: IMMIGRANT WORKER INJURIES AS DIGNITY TAKINGS

RACHEL NADAS & JAYESH RATHOD*

I. INTRODUCTION

In 2012, Alberto, a forty-three-year-old undocumented day laborer of Guatemalan origin, was hired by a contractor in northern Virginia, along with three other workers. As is often the case with day labor hiring, the contractor did not inform Alberto in advance about the type of work he would be doing. When Alberto arrived at the work site—a private home undergoing renovation—he learned that he would be installing fiberglass insulation. The contractor did not provide Alberto with any eye protection, and he had not brought his own. Alberto was not familiar with this kind of work, and the contractor who hired him offered no information or training about the risks associated with fiberglass insulation. At the end of a day's work, Alberto's eyes were burning and irritated. He could not afford to go to go to a clinic, so he sought treatment at a pharmacy, where he purchased some eye drops. Slowly, his eyes got better, but Alberto never received formal medical treatment, nor was his injury reported to the state workers' compensation system. And on top of everything, Alberto was never paid for the work he performed that day.¹

Stories like Alberto's are exceedingly common in the U.S. today. Indeed, government data consistently affirm that foreign-born workers experience high rates of on-the-job illness and injury.² Although this

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1. Confidential Interview No. 16 with Immigrant Day Laborer, in N. Va. (July 8, 2014).* All worker names used in this article are pseudonyms. The interviews cited in this article were conducted as part of a formal research study, using protocols approved in advance by the American University Institutional Review Board (#14055).

2. See Economic News Release, Bureau of Labor Statistics, U.S. Dep't of Labor, Labor Force Characteristics of Foreign-Born Workers Summary (May 19, 2016, 10:00 AM), <http://www.bls.gov/news.release/forbrn.nr0.htm> [<https://perma.cc/VVD3-LTNV>] (explaining that immigrant workers are more likely than native-born workers to be employed in service occupations, production, transportation and material moving occupations, and in natural resources, construction, and maintenance occupations). Many of these occupations have high risks of occupational injury. Economic News Release, Bureau of Labor Statistics, U.S. Dep't of Labor, Occupational Injuries and Illnesses



phenomenon is attributable to multiple factors, it partially stems from immigrants working in dangerous conditions, often with little government oversight. Given these dynamics, some have referred to immigrant workers like Alberto as “disposable,”³ recognizing that employers frequently make little effort to protect these workers from injury, knowing there are many others willing to take their place. This problem is exacerbated in a climate where the Occupational Safety and Health Administration (“OSHA”), the government agency charged with protecting individuals from unsafe working conditions, has limited resources and enforcement mechanisms,⁴ and is simply not well-suited to enforce the law at worksites where immigrant workers are often employed, such as small construction sites or farms.

This article explores whether—and under what circumstances—the occupational injuries and illnesses suffered by immigrant workers in the United States, such as Alberto, constitute a dignity taking. Professor Bernadette Atuahene defines a dignity taking as “involuntary property loss accompanied by dehumanization or infantilization.”⁵ Although her discussion of dignity takings focuses on land rights, this article ultimately argues that occupational harms also constitute a dignity taking when certain factors are present.

Following a brief literature review, the article examines each of the definitional criteria of a dignity taking. The article first argues that some injuries suffered by foreign-born workers are indirect takings by the state due to the government’s lackluster oversight and limited penalties for violations of occupational safety and health laws. These injuries disproportionately affect immigrant workers due to their significant presence in industries with high rates of occupational illness and injury, in the context

(Annual) News Release (Nov. 7, 2013), http://www.bls.gov/news.release/archives/osh_11072013.htm [<https://perma.cc/LYP2-LVW3>]; see also Press Release, Nat’l Inst. for Occupational Safety & Health, Ctrs. for Disease Control & Prevention, Needs, Challenges in Addressing Occupational Health Disparities are Described in New Issue of Journal (Feb. 4, 2010), <http://www.cdc.gov/niosh/updates/upd-02-04-10.html> [<https://perma.cc/H76J-88B2>].

3. See, e.g., Lori A. Nessel, *Disposable Workers: Applying a Human Rights Framework to Analyze Duties Owed to Seriously Ill or Injured Migrants*, 19 IND. J. GLOBAL LEGAL STUD. 61, 93 (2012) [hereinafter Nessel, *Disposable Workers*] (quoting Gregory Rodriguez, *Wanted: Indispensable, Disposable Workers*, L.A. TIMES (Apr. 30, 2007), <http://articles.latimes.com/2007/apr/30/opinion/oe-rodriguez30> [<https://perma.cc/3H4V-HT4R>]).

4. For a more thorough discussion of OSHA’s limited resources, see Rachel Nadas, *Justice for Workplace Crimes: An Immigration Law Remedy*, 19 HARV. LATINO L. REV. 137, 147–49 (2016) [hereinafter Nadas, *Justice for Workplace Crimes*].

5. Bernadette Atuahene, *Dignity Takings and Dignity Restoration: Creating a New Theoretical Framework for Understanding Involuntary Property Loss and the Remedies Required*, 41 LAW & SOC. INQUIRY 796, 800 (2016) [hereinafter Atuahene, *Dignity Takings and Dignity Restoration*]; see also Bernadette Atuahene, *Takings as a Sociolegal Concept: An Interdisciplinary Examination of Involuntary Property Loss*, 12 ANN. REV. L. & SOC. SCI. 171, 178 (2016).



of a state-sanctioned environment hostile to immigrants. Second, using a framework of the body as property, this article explores how temporary or permanent injury constitutes an infringement upon a property right. Third, the article examines how the state's weak enforcement of workplace safety laws and general disenfranchisement of immigrant workers creates an environment where these workers are deemed to be sub-persons, and where employer impunity abounds. In this environment, employers are engaging in acts that individually, or in the aggregate, constitute dehumanization. Finally, this article provides some initial suggestions for what dignity restoration might look like for these workers.

In addition to discussing the relevant literature, this article draws upon data gleaned from a 2014 qualitative research project conducted by Jayesh Rathod. This study involved interviews of eighty-four immigrant day laborers in Northern Virginia and yielded numerous stories regarding occupational injuries, including Alberto's experience, recounted above. A comprehensive background regarding this study, including particulars about the research methodology, can be found in *Danger and Dignity: Immigrant Day Laborers and Occupational Risk*.⁶ The present article incorporates narratives and data from this study to illustrate how the principles of dignity takings apply to immigrant workers who experience different occupational harms.

II. LITERATURE REVIEW

As noted above, the specific question explored in this article is whether, and under what circumstances, occupational harms experienced by foreign-born workers in the U.S. constitute "dignity takings." Since the industrial revolution, advocates and scholars in the United States have paid consistent attention to occupational injuries, illnesses and fatalities. For purposes of this project, however, the most relevant literature follows the enactment of the Occupational Safety and Health Act ("OSH Act") in 1970. Indeed, the OSH Act marked the establishment of OSHA, and the enactment of standards and enforcement mechanisms applicable to employers nationwide. Given the complexity of this issue area, the post-1970 literature on occupational harms emerges from a variety of disciplines. The literature examining injuries and fatalities among foreign-born workers, while smaller in scale, likewise offers multiple approaches and analytical lenses. And as described more fully below, this literature on foreign-born

6. Jayesh Rathod, *Danger and Dignity: Immigrant Day Laborers and Occupational Risk*, 46 SETON HALL L. REV. 813 (2016) [hereinafter Rathod, *Danger and Dignity*].



workers occasionally engages with questions of dignity and dehumanization, but not in a consistent way, and certainly not from the perspective of property takings.

The last fifty years of literature on occupational harms in the United States is an immense, far-ranging body of work. There are numerous ways to categorize this literature: by academic discipline, methodology, industry focus, specific subject matter, and more. In very simple terms, much of this literature seeks to document and dissect the incidence and etiology of occupational injuries, illnesses, and fatalities in specific industries and contexts.⁷ Another subset of the literature focuses on the accuracy of existing data regarding occupational harms and examines issues of underreporting⁸ and the reliability of different data sources.⁹ In seeking to understand the factors that contribute to occupational risk, several researchers have examined the possible salience of demographic factors, such as socioeconomic status and race.¹⁰

Naturally, a significant portion of the literature explores the structure and operations of OSHA itself. Some of this work has examined the general efficacy of the regulatory project that OSHA represents, and has assessed competing regulatory approaches;¹¹ other work has criticized OSHA for gaps in its enforcement structure and for generalized regulatory failure.¹² Several authors have written about the broader costs of occupational injuries, illnesses, and fatalities, both to industry and to society at large.¹³

7. See, e.g., Xinyu Huang & Jimmie Hinze, *Analysis of Construction Worker Fall Accidents*, 129 J. CONSTRUCTION ENGINEERING & MGMT. 262 (2003); Theodore K. Courtney et al., *Occupational Slip, Trip, and Fall-Related Injuries: Can the Contribution of Slipperiness Be Isolated?*, 44 ERGONOMICS 1118 (2001); Brian J. Maguire et al., *Occupational Fatalities in Emergency Medical Services: A Hidden Crisis*, 40 ANNALS EMERGENCY MED. 625 (2002).

8. See, e.g., Lenore S. Azaroff et al., *Occupational Injury and Illness Surveillance: Conceptual Filters Explain Underreporting*, 92 AM. J. PUB. HEALTH 1421 (2002).

9. See, e.g., Nancy Stout & Catherine Bell, *Effectiveness of Source Documents for Identifying Fatal Occupational Injuries: A Synthesis of Studies*, 81 AM. J. PUB. HEALTH 725 (1991).

10. Catherine Cubbin, et al., *Socioeconomic Status and the Occurrence of Fatal and Nonfatal Injury in the United States*, 90 AM. J. PUB. HEALTH 70 (2000); Dana Loomis & David Richardson, *Race and the Risk of Fatal Injury at Work*, 88 AM. J. PUB. HEALTH 40 (1998).

11. Wayne B. Gray & John T. Scholz, *Does Regulatory Enforcement Work? A Panel Analysis of OSHA Enforcement*, 27 LAW & SOC. REV. 177 (1993); David Weil, *Assessing OSHA Performance: New Evidence from the Construction Industry*, 20 J. POL'Y ANALYSIS & MGMT. 651 (2001); Sidney A. Shapiro & Randy S. Rabinowitz, *Punishment v. Cooperation in Regulatory Enforcement: A Case Study of OSHA*, 49 ADMIN. L. REV. 713 (1997).

12. See generally DON J. LOFGREN, *DANGEROUS PREMISES: AN INSIDER'S VIEW OF OSHA ENFORCEMENT* (1989); THOMAS O. MCGARITY & SIDNEY A. SHAPIRO, *WORKERS AT RISK: THE FAILED PROMISE OF THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION* (1993).

13. See, e.g., J. PAUL LEIGH ET AL., *COSTS OF OCCUPATIONAL INJURIES AND ILLNESSES* (2000); Allard E. Dembe, *The Social Consequences of Occupational Injuries and Illnesses*, 40 AM. J. INDUS. MED. 403 (2001).

A subset of this post-1970 literature focuses on occupational harms experienced by foreign-born workers in the United States.¹⁴ This body of work can likewise be divided along the lines described above. Indeed, a significant portion of this literature examines injuries, illnesses, and fatalities among Latino/Hispanic or foreign-born workers, noting disproportionately high rates.¹⁵ Studies relating to this topic have explored many industries, but much of the work focuses on those sectors where foreign-born workers often predominate, including construction,¹⁶ agriculture,¹⁷ meatpacking/poultry,¹⁸ and day labor.¹⁹ Given the troubling injury and fatality rates among foreign-born workers, some researchers have examined specific prevention strategies, including worker education and training.²⁰ And in light of the varied determinants of worker behavior and the complex causes of occupational harms, several scholars have looked more broadly at occupational risk, examining the social context and the perceptions of immigrant workers themselves.²¹

Naturally, as researchers seek to understand why foreign-born workers are uniquely at risk, OSHA and related institutions have been the subject of

14. For a relatively recent review of the worldwide literature on immigrants and occupational health, see Emily Q. Ahonen et al., *Immigrant Populations, Work and Health—A Systematic Literature Review*, 33 SCANDINAVIAN J. WORK, ENV'T & HEALTH 96 (2007).

15. See, e.g., Xiuwen Dong & James W. Platner, *Occupational Fatalities of Hispanic Construction Workers from 1992 to 2000*, 45 AM. J. INDUS. MED. 49–50 (2004) [hereinafter Dong & Platner, *Occupational Fatalities of Hispanic Construction Workers*] (noting disproportionate fatality rates among Hispanic construction workers); Katherine Loh & Scott Richardson, *Foreign-Born Workers: Trends in Fatal Occupational Injuries, 1996-2001*, 127 MONTHLY LAB. REV. 42, 42 (2004) [hereinafter Loh & Richardson, *Foreign-Born Workers*] (noting that foreign-born workers experienced disproportionately high rates of fatal occupational injuries).

16. See, e.g., Bruce Nissen et al., *Immigrant Construction Workers and Health and Safety*, 33 LAB. STUD. J. 48 (2008); Xiuwen Sue Dong et al., *Fatal Falls Among Hispanic Construction Workers*, 41 ACCIDENT ANALYSIS & PREVENTION 1047 (2009).

17. See, e.g., Ketty Mobed et al., *Occupational Health Problems Among Migrant and Seasonal Farmworkers*, 157 W. J. MED. 367 (1992); Sharon P. Cooper et al., *A Cohort Study of Injuries in Migrant Farmworker Families in South Texas*, 16 ANNALS EPIDEMIOLOGY 313 (2006).

18. See, e.g., Sarah A. Quandt et al., *Injuries and Illnesses Reported by Latino Poultry Workers in Western North Carolina*, 49 AM. J. INDUS. MED. 343 (2006); HUMAN RIGHTS WATCH, BLOOD, SWEAT, AND FEAR: WORKERS' RIGHTS IN U.S. MEAT AND POULTRY PLANTS 24–56 (2004) (describing a range of health and safety risks faced by workers in these industries).

19. See, e.g., Susan Buchanan, *Day Labor and Occupational Health: Time to Take a Closer Look*, 14 NEW SOLUTIONS 253 (2004); Rathod, *Danger and Dignity*, *supra* note 6.

20. Tom O'Connor et al., *Adequacy of Health and Safety Training Among Young Latino Construction Workers*, 47 J. OCCUPATIONAL & ENVTL. MED. 272 (2005); Quintin Williams Jr. et al., *The Impact of a Peer-Led Participatory Health and Safety Training Program for Latino Day Laborers in Construction*, 41 J. SAFETY RES. 253 (2010); Linda Forst et al., *More Than Training: Community-Based Participatory Research to Reduce Injuries Among Hispanic Construction Workers*, 56 AM. J. INDUS. MED. 827 (2013).

21. Nicholas Walter et al., *Social Context of Work Injury Among Undocumented Day Laborers in San Francisco*, 17 J. GEN. INTERNAL MED. 221 (2002); Nancy Nivison Menzel & Antonio P. Gutierrez, *Latino Worker Perceptions of Construction Risks*, 53 AM. J. INDUS. MED. 179 (2010).

significant attention. Some scholars have examined aspects of the structure and operations of OSHA that systematically disadvantage foreign-born workers.²² Also implicated in this set of issues are workers' compensation systems, which are often inaccessible for immigrant workers who have sustained on-the-job injuries.²³ Finally, some scholars have explored the effect of immigration enforcement on workplace safety, and have suggested immigration law remedies to make injured immigrant workers whole.²⁴

In this literature on foreign-born workers, scholars have often made reference to "dignity," noting that the promotion of immigrant workers' dignity is critical for ensuring workplace safety, and vice-versa. For example, in their study of poultry workers in North Carolina, Antonio Marin et al. noted how "treat[ment] with dignity and respect" is critical to promoting interactional justice, which informs, in turn, organizational justice and workplace safety generally.²⁵ Several authors writing about occupational health among immigrant workers have emphasized international human rights norms relating to dignity and equal treatment.²⁶ Notably, the public health community has also affirmatively deployed "dignity" as a centerpiece of its efforts to educate immigrant workers about occupational risks. For example, the National Institute for Occupational Safety and Health (NIOSH) recently released informational materials in both English and Spanish, encouraging workers to "Return Home from Work Safely and with Dignity."²⁷

Also running through the literature are iterations of the concept of dehumanization. As intimated above, scholars refer to immigrant workers who are "disposable" or "replaceable" and whose work-related injuries are not afforded proper attention. For example, in her work on the medical repatriation of injured and ill migrant workers, Lori Nessel describes a

22. See, e.g., generally Jayesh M. Rathod, *Immigrant Labor and the Occupational Safety and Health Regime: Part I: A New Vision for Workplace Regulation*, 33 N.Y.U. REV. L. & SOC. CHANGE 481 (2009) [hereinafter Rathod, *Immigrant Labor*].

23. Rebecca Smith, *Immigrant Workers and Workers' Compensation: The Need for Reform*, 55 AM. J. INDUS. MED. 537 (2012) [hereinafter Smith, *Immigrant Workers and Workers' Compensation*].

24. Nadas, *Justice for Workplace Crimes*, supra note 4; Jayesh M. Rathod, *Beyond the "Chilling Effect": Immigrant Worker Behavior and the Regulation of Occupational Safety and Health*, 14 EMP. RTS. & EMP. POL'Y J. 267, 276-75 (2010) [hereinafter Rathod, *Beyond the "Chilling Effect"*].

25. Antonio J. Marin et al., *Evidence of Organizational Injustice in Poultry Processing Plants: Possible Effects on Occupational Health and Safety Among Latino Workers in North Carolina*, 52 AM. J. INDUS. MED. 37, 38, 46-47 (2009).

26. See, e.g., Amy K. Liebman et al., *Occupational Health Policy and Immigrant Workers in the Agriculture, Forestry, and Fishing Sector*, 56 AM. J. INDUS. MED. 975, 979-80 (2013).

27. Press Release, Nat'l Inst. for Occupational Safety & Health, Ctrs. for Disease Control & Prevention, *Return Home from Work Safely and with Dignity: A Family of Materials for Spanish-Speaking Immigrant Workers* (Sept. 15, 2015), <http://www.cdc.gov/niosh/updates/upd-9-15-15.html> [https://perma.cc/73AD-JG2X].

“disposable” workforce that is denied fundamental human rights and left without access to meaningful remedies.²⁸ In the context of occupational risks, the idea of a “disposable” or “throwaway” workforce also arises when immigrants are put to work in dangerous conditions, with little attention paid when these workers are seriously injured or die on the job. In this vein, in 2006 the Chicago Tribune published a series of articles, entitled “Throwaway Lives,” which told the stories of injured immigrant workers and detailed the forces that render these workers invisible and unable to access meaningful remedies.²⁹

This troubling tendency has been noted by immigrant workers themselves. For example, one of the Latino workers interviewed by researchers Nancy Menzel and Antonio Gutierrez stated the following about his supervisors: “They need to be more—more human . . . they should not treat Latinos as beasts of burden and something disposable.”³⁰

III. ANALYSIS: ARE THESE OCCUPATIONAL HARMS DIGNITY TAKINGS?

A. Indirect Takings by the State

The first element of a dignity taking is a direct or indirect taking by the state. For immigrant workers suffering occupational illness and injury, the taking is indirect and generally stems from the state’s inaction.³¹ Specifically, the taking arises from unsafe work environments in industries with large numbers of immigrant workers, where the worksites are subject to little government oversight. These conditions are exacerbated by an inhospitable immigration climate emphasizing deportation and providing immigrants with very few ways to migrate legally, frequently leading them to work without authorization.³² Immigrants working without authorization

28. Nessel, *Disposable Workers*, *supra* note 3, at 80–85, 93–94.

29. See, e.g., Stephen Franklin & Darnell Little, *Throwaway Workers: Dangerous Jobs Take a Toll on Illegal Immigrants*, CHI. TRIB. (Sept. 3, 2006), http://articles.chicagotribune.com/2006-09-03/news/0609030237_1_workplace-safety-immigrants-illegal [https://perma.cc/RCC4-KW5H].

30. Menzel & Gutierrez, *Latino Worker Perceptions of Construction Risks*, *supra* note 21, at 183.

31. A state’s inaction can constitute a taking when “a state[] fail[s] to act when it has a duty to act.” BERNADETTE ATUAHENE, *WE WANT WHAT’S OURS: LEARNING FROM SOUTH AFRICA’S LAND RESTITUTION PROGRAM* 27 (2014) [hereinafter ATUAHENE, *WE WANT WHAT’S OURS*]. For example, the state’s failure to maintain the levees in New Orleans and respond adequately after the damage occurred constitutes state inaction as an indirect taking, even though the Hurricane itself was an act of God. *Id.*

32. Bill Ong Hing, *Institutional Racism, ICE Raids, and Immigration Reform*, 44 U.S.F. L. REV. 307, 350 (2009) [hereinafter Hing, *Institutional Racism*] (explaining that economic pressures will continue to lead workers to seek employment in the United States, even amidst employers being sanctioned for hiring unauthorized workers and workplaces facing immigration raids).

are especially vulnerable to workplace exploitation in the current climate of increased immigration enforcement and diminished workplace rights, post *Hoffman Plastic Compounds, Inc. v. NLRB*.³³ Accordingly, the taking stems from the state's failure to act in rectifying the significant preventable occupational safety and health problems rampant in industries with large immigrant populations while implicitly propagating the message that immigrant workers' lives are less valuable than those of native-born workers.

1. Unsafe Work Environments and Minimal Labor Standards Enforcement

Immigrants tend to be concentrated in industries with high rates of occupational injury, for two reasons. First, immigrants are sometimes funneled into less safe industries, driven there by significant economic pressures, which can lead them to forsake safety considerations in favor of stable or continued employment.³⁴ Additionally, as discussed in greater detail below,³⁵ barriers to enforcing immigrant workers' rights can also incentivize employers to disregard safety. These problems can be exacerbated for workers who face more limited job mobility due to their immigration status,³⁶ and especially for undocumented workers who are often relegated to seeking employment in the informal economy.³⁷ Lack of immigration status or an insecure status can also contribute to fearfulness in reporting unsafe workplace conditions.³⁸ Finally, limited English-language skills can enhance immigrant workers' occupational risk due to limited ability to understand instructions, participate in trainings, and ask questions.³⁹

33. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 140 (2002).

34. See Cora Roelofs et al., *A Qualitative Investigation of Hispanic Construction Worker Perspectives on Factors Impacting Worksite Safety and Risk*, 10 ENVTL. HEALTH 84, 89 (2011).

35. See *infra* Part III(A)(2).

36. See Maria L. Ontiveros, *Immigrant Workers' Rights in a Post-Hoffman World—Organizing Around the Thirteenth Amendment*, 18 GEO. IMMIGR. L.J. 651, 652–53 (2004) [hereinafter Ontiveros, *Immigrant Workers' Rights*] (explaining that, “[f]or the most part, the terms and conditions of employment are determined by a market-based negotiation between an individual employee and his employer.”).

37. Rathod, *Danger and Dignity*, *supra* note 6, at 822 (explaining that undocumented immigrants are often “denied access to formal job markets and instead funneled into the informal economy, where precarity is the norm”).

38. *Id.* at 820 (discussing various studies correlating immigration status and occupational risk).

39. *Id.* at 822–24. Many scholars have discussed the high risks of occupational injury faced by foreign-born workers. See, e.g., Dong & Platner, *Occupational Fatalities of Hispanic Construction Workers*, *supra* note 15, at 47, 49–50; Loh & Richardson, *Foreign-Born Workers*, *supra* note 15, at 42. As noted by these and other works, the high incidence of occupational harm among foreign born workers is not new.

Alongside the problems with high rates of occupational injury for low-wage workers,⁴⁰ the regulatory structure for ensuring safe workplaces is underfunded and largely ineffective. OSHA is charged with “assur[ing] safe and healthful working conditions for working men and women by setting and enforcing standards and by providing training, outreach, education and assistance.”⁴¹ OSHA accomplishes this goal by, inter alia, setting and enforcing occupational safety and health standards.⁴² To enforce compliance with these standards, OSHA has the authority to conduct workplace inspections.⁴³ These inspections can be conducted by federal OSHA or approved state OSHA programs.

However, OSHA’s small size and budget typically allow for only minimal enforcement. Among both federal OSHA and its state partners, there are only 2200 inspectors responsible for the health and safety of 130 million workers at over 8 million worksites.⁴⁴ Of those 8 million worksites, 75,053—less than 1%—were inspected by federal or state OSAs in fiscal year 2016.⁴⁵ Indeed, an AFL-CIO report estimates the federal OSHA can conduct a workplace inspection of each workplace once every 131 years, while state OSHA inspectors can do so once every 76 years.⁴⁶ That OSHA is drastically under-resourced and unable to conduct inspections in a meaningful way is not a new phenomenon; indeed, this critique has been lodged against OSHA for decades.⁴⁷

Moreover, OSHA penalties are weak. Employers typically face only civil penalties, rather than criminal charges, for violations of the OSH Act. The most costly violations are for employers who willfully or repeatedly violate an OSHA standard, and they face a maximum fine of \$126,749 per

40. See *supra* notes 15–19 and accompanying text.

41. See *About OSHA*, OCCUPATIONAL SAFETY & HEALTH ADMIN., U.S. DEP’T OF LABOR, <https://www.osha.gov/about.html> [<https://perma.cc/9Y8Y-TQ75>].

42. See 29 U.S.C. § 655(b) (2012) (outlining the procedure for creating, modifying, or revoking OSHA standards).

43. See OCCUPATIONAL SAFETY & HEALTH ADMIN., U.S. DEP’T OF LABOR, ALL ABOUT OSHA 14 (2016), https://www.osha.gov/Publications/all_about_OSHA.pdf [<https://perma.cc/7JHM-5LRX>].

44. See *Commonly Used Statistics*, OCCUPATIONAL SAFETY & HEALTH ADMIN., U.S. DEP’T OF LABOR, <https://www.osha.gov/oshstats/commonstats.html> [<https://perma.cc/EC4M-K9AN>].

45. See *id.* (showing 31,948 federal OSHA inspections and 43,105 state OSHA partner inspections).

46. AFL-CIO, DEATH ON THE JOB: THE TOLL OF NEGLECT 2 (22d ed. 2013), <http://www.aflcio.org/content/download/79181/1933131/DOTJ2013.pdf> [<https://perma.cc/4HUP-NGMT>].

47. See, e.g., MARTHA MCCLUSKEY ET AL., CTR. FOR PROGRESSIVE REFORM, THE NEXT OSHA: PROGRESSIVE REFORMS TO EMPOWER WORKERS 16 (2012), http://www.progressivereform.org/articles/Next_Generation_OSHA_1207.pdf [<https://perma.cc/S5JC-Y3AR>]; Michael Levin, *Politics and Polarity: The Limits of OSHA Reform*, REG.: AEI J. ON GOV’T & SOC’Y, Nov./Dec. 1979, at 33, 37 (noting concerns that OSHA is “drastically underfunded”).

violation.⁴⁸ Employers can further be assessed a civil penalty of up to \$12,675 for each day they fail to correct a known violation.⁴⁹ By comparison, environmental penalties demonstrate how low OSHA penalties are. For example, in 2001, an acid explosion at an oil refinery killed an employee, resulting in \$175,000 in OSHA penalties.⁵⁰ The same incident led to thousands of dead fish and crabs, and the violations of the Clean Water Act resulted in \$10 million dollars in fines.⁵¹ Due to the minimal penalties and limited enforcement by an underfunded agency, employers face little risk if they do not follow the law. Employers may even be incentivized to not follow occupational safety and health practices if they believe it will be less expensive to just pay OSHA fines in the unlikely event of an accident or inspection.⁵²

The combination of immigrants working in industries with high rates of illness and injury and lackluster government enforcement of occupational safety and health standards constitute an indirect taking due to inaction by the state. The state is well-aware of the problem⁵³ yet few, if any, signif-

48. 29 C.F.R. § 1903.15(d)(1), (2) (2016). Average penalties are significantly lower. For example, under the Virginia state OSHA plan, the average penalty for serious violations in the private sector was \$1503.40. See *FY2016 State Plan Penalty Data: Average Penalty Amount per Serious Violation for Private Section Employees*, OCCUPATIONAL SAFETY & HEALTH ADMIN., https://www.osha.gov/dcspp/osp/state_plan_penalty_data.html [<https://perma.cc/5HG4-GW9E>] (last visited June 4, 2017).

49. 29 C.F.R. § 1903.15(d)(5).

50. *Protecting America's Workers Act (PAWA): Modernizing OSHA Penalties: Hearing Before the S. Comm. on Health, Educ., Lab. and Pensions*, 111th Cong. (2010) (testimony of David Michaels, Assistant Secretary for Occupational Safety and Health, U.S. Department of Labor), https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=TESTIMONIES&p_id=1122 [<https://perma.cc/D3FB-RJJA>].

51. *Id.*

52. See Sidney A. Shapiro & Randy Rabinowitz, *Voluntary Regulatory Compliance in Theory and Practice: The Case of OSHA*, 52 ADMIN L. REV. 97, 105 (2000) (“A firm will prevent health and safety risks to the point where the cost of further risk reductions exceeds the expected compensation that the firm will pay for injuries or illnesses.”). This is further exacerbated when immigrants are fearful of engagement with government agencies, because it makes the risk of inspection even lower if immigrants are unwilling to report to the agency. See Stephen Lee, *Monitoring Immigration Enforcement*, 53 ARIZ. L. REV. 1089, 1104 (2011).

53. See, e.g., News Release, Occupational Safety & Health Admin., U.S. Dep’t of Labor, DOL/OSHA Schedules Conference on Latino Worker Safety and Health (Jan. 13, 2010), https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=17061 [<https://perma.cc/M2SK-4HUP>] (quoting Assistant Secretary of Labor for OSHA, David Michaels, as saying “[f]ar too many Latino workers have needlessly lost their lives just trying to earn a living and it must stop”); Rathod, *Immigrant Labor*, *supra* note 22, at 489 (discussing how OSHA has acknowledged the safety and health challenges faced by immigrant workers); U.S. DEP’T OF LABOR, STRATEGIC PLAN FISCAL YEARS 2014–2018, at 33–34 (2014), <https://www.dol.gov/sites/default/files/documents/agencies/osec/stratplan/fy2014-2018strategicplan.pdf> [<https://perma.cc/8XKX-N4FM>] (“OSHA has made outreach to Latino and other limited English proficiency workers—a population that typically experiences a higher rate of injuries, illnesses, and fatalities in the workplace—a priority by working with community- and faith-based groups, employers, unions, consulates, the medical community, health and safety professionals, and government representatives.”).

icant steps have been taken to mitigate the increased occupational risks faced by immigrant workers. Although OSHA's mandate requires appropriate action be taken to assure safe workplaces, the state has clearly failed to make that mission a reality.⁵⁴ Indeed, OSHA penalties were raised in 2015 for the first time in twenty-five years—and even then, only to combat inflation.⁵⁵

2. An Inhospitable Immigration Climate

Immigrants wishing to work in the United States face an inhospitable immigration law environment, with few pathways to work legally and a significant increase in deportations and enforcement. Permanent visas for unskilled workers are limited to 10,000 per year,⁵⁶ and the wait for a family-based green card can be upwards of twenty years.⁵⁷ The Immigration Reform and Control Act (“IRCA”), passed in 1986, made it illegal to knowingly employ undocumented immigrants,⁵⁸ yet the manner in which it is enforced places little burden on employers who do not follow the law. To comply with IRCA, employers must review the documents of prospective employees, and as long as the employee presents documents that look reasonable, the employer has fulfilled his obligation under IRCA.⁵⁹ Scholars have argued that drafting the law in this manner actually allows employers to hire undocumented workers without breaking the law as long as they conduct the requisite document review.⁶⁰ This allows the official government policy to prohibit the hiring of unauthorized immigrants while in practice easily allowing employers to tap into the cheaper and more marginalized labor pool.⁶¹

The heavy emphasis on immigration enforcement also contributes to the marginalization of immigrants and their fear of engaging with government agencies. In recent years, deportations reached a record high: in 2013,

54. Rathod, *Immigrant Labor*, *supra* note 22, at 489 (discussing how OSHA's efforts to increase enforcement, training, and education are “laudable” but more fundamental reform is necessary).

55. See OCCUPATIONAL SAFETY & HEALTH ADMIN., U.S. DEP'T OF LABOR, OSHA FACT SHEET: OSHA PENALTY ADJUSTMENTS TO TAKE EFFECT AFTER AUGUST 1, 2016 (2016), <https://www.osha.gov/Publications/OSHA3879.pdf> [<https://perma.cc/9543-MQBE>].

56. Immigration and Nationality Act §§ 203(b)(3)(A)(iii), (B), 8 U.S.C. § 1153 (2006).

57. See BUREAU OF CONSULAR AFFAIRS, U.S. DEP'T OF STATE, PUB. NO. 9514, VISA BULLETIN FOR MAY 2017, <https://travel.state.gov/content/visas/en/law-and-policy/bulletin/2017/visa-bulletin-for-may-2017.html> [<https://perma.cc/Y5YB-G9DS>] (showing the wait for F2B and F3 visas from Mexico and F2B, F3, and F4 visas from the Philippines are over twenty years).

58. 8 U.S.C. § 1324(a)(3)(A).

59. Ontiveros, *Immigrant Workers' Rights*, *supra* note 36, at 654–55.

60. *Id.* at 655.

61. *Id.* As the federal government moves towards increased use of electronic employment verification systems, such as E-Verify, such practices will become increasingly difficult for employers.

there were 435,000 deportations, compared 211,000 ten years prior.⁶² Immigration advocates warn this climate can create a “chilling effect” in that undocumented workers will hesitate to complain about poor working conditions to avoid drawing attention to their presence in the country.⁶³ Aggressive enforcement tactics, like immigration raids, can also contribute to immigrants’ fear of deportation.⁶⁴

This inhospitable immigration environment is compounded in the workplace in light of *Hoffman Plastic Compounds, Inc. v. NLRB*.⁶⁵ In *Hoffman*, the Supreme Court held that an undocumented worker could not be awarded back pay after being unlawfully fired for his union organizing activities.⁶⁶ While certain court decisions have suggested *Hoffman*’s limiting of remedies for undocumented workers applies only in narrow circumstances,⁶⁷ other court decisions have used it as justification to curtail benefits to immigrant workers.⁶⁸ For example, in Pennsylvania, an undocumented worker was struck in the head, back, and neck by a steel beam at work, seriously injuring him and rendering him unable to work for months.⁶⁹ Using similar reasoning as *Hoffman*, the Pennsylvania Supreme Court held that there were different requirements for terminating disability benefits for undocumented individuals because an undocumented individu-

62. Ana Gonzalez-Barrera & Jens Manuel Krogstad, *U.S. Immigrant Deportations Declined in 2014, but Remain Near Record High*, PEW RESEARCH CTR. (Aug. 21, 2016), <http://www.pewresearch.org/fact-tank/2016/08/31/u-s-immigrant-deportations-declined-in-2014-but-remain-near-record-high/> [https://perma.cc/RNJ7-3CLJ]. Although deportations decreased in 2014, at 414,000 they were the third highest on record after 2013 and 2012. *Id.* Deportations declined further in 2015, to around 333,000. OFFICE OF IMMIGRATION STATISTICS, U.S. DEP’T OF HOMELAND SEC., 2015 YEARBOOK OF IMMIGRATION STATISTICS 107 (2016), https://www.dhs.gov/sites/default/files/publications/Yearbook_Immigration_Statistics_2015.pdf [https://perma.cc/4SZM-TEFF].

63. Rathod, *Beyond the “Chilling Effect,” supra* note 24, at 272. While this chilling effect undoubtedly impacts the climate for immigrants, immigrant workers are not stripped of individual behavior and agency simply because of the chilling effect. See *id.* for a thorough discussion of this issue.

64. For a discussion of immigration raids, see Hing, *Institutional Racism, supra* note 32, at 307–23. Although raids have not always been a favored enforcement strategy in recent years, community fear from these tactics may have long-lasting effects. *Id.* at 321 (“While the long-term effects of the raids are still unraveling, psychologists have already observed and are concerned about long-term depression and other mental illness in family members.”).

65. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 140 (2002).

66. *Id.*

67. See Ontiveros, *Immigrant Workers’ Rights, supra* note 36, at 656 (explaining a narrow reading of *Hoffman* limits the holding to the NLRB being unable to award back pay to undocumented workers, while a broader reader prevents undocumented workers from receiving back pay and other workplace remedies under other statutes).

68. See Rebecca Smith, Amy Sugimori, & Luna Yasui, *Low Pay, High Risk: State Models for Advancing Immigrant Workers’ Rights*, 28 N.Y.U. REV. L. & SOC. CHANGE 597, 635–36 (2004) (discussing the Nevada Supreme Court decision holding that undocumented workers are not entitled to vocational rehabilitation benefits).

69. *Reinforced Earth Co. v. W.C.A.B.*, 570 Pa. 464, 477–78 (2002).

al's inability to work was fundamentally due to his immigration status, not his work-related injury.⁷⁰ Although the exact bounds remain unclear, *Hoffman* sends the message that not all workers are equally protected under the law.⁷¹

State action plays a significant role in the taking with regard to the inhospitable immigration law environment. By implementing increased immigration enforcement and effectively creating two levels of enforcement for workplace rights—one for native-born workers and one for immigrant workers—the state is fostering a climate that encourages workers to remain silent about workplace concerns.

B. Property Interests in this Context

As noted above, the concept of a dignity taking (and of takings in general) requires some kind of state action or inaction that leads to a deprivation of a property right. In the case of immigrant workers who have experienced work-related injuries and illnesses, the relevant property rights stem from the concept of “body as property.” Specifically, all persons have a right to *bodily integrity*, which includes the right to be free from unwanted incursions upon the physical body. This concept can be seen in the work of prominent theorists, and also in U.S. constitutional jurisprudence.⁷² From this property right of bodily integrity flow other possible property rights, including the right to future earnings. In the case of immigrant workers in U.S. workplaces, this constellation of property rights is violated through the direct and indirect actions of the state, as described above.

“Property” includes a broad range of rights and interests, but broadly captures the right to possess, use, and enjoy things that one owns, free from interference from others. Applying this principle to the human body, if humans do own their own bodies, then property rights must attach. John Locke opined on this issue in the seventeenth century, writing that “every man has a property in his own person. This, nobody has any right to but

70. In Pennsylvania, part of the requirement to terminate disability benefits involves the employer producing evidence of available jobs that the disabled employee is able to complete. Accordingly, the employer argued, and the Pennsylvania Supreme Court agreed, that the employee was unemployed due to his immigration status, not his workplace injury, and thus his former employer did not need to prove there were available jobs in order to terminate disability benefits. *Id.*

71. See Ontiveros, *Immigrant Workers' Rights*, *supra* note 36, at 658 (“*Hoffman* signals the de jure creation of a class of workers without equal recourse or remedies for violations of laws designed to protect all employees.”).

72. See, e.g., John F. Acevedo, *Restoring Police Dignity Following Police Misconduct*, 59 HOW. L.J. 621 (2016).

himself.”⁷³ Locke immediately then asserted a labor-related theory of property, noting that “[t]he labour of his body and the work of his hands, we may say, are strictly *his*.”⁷⁴ Locke also recognized that in a society, each individual’s use of his or her own body is not limitless, but must be constrained so as not to interfere with others’ use of their bodies.⁷⁵

James Madison, the very author of the takings clause, similarly intimated that the body should be treated as property. Writing about property in the National Gazette in 1792, Madison asserted that property included not only one’s land and other material goods, but also “the safety and liberty of his person, [and also] the free use of his faculties and free choice of the objects on which to employ them.”⁷⁶ Hinting at the concerns underlying the takings clause, Madison added that: “Where an excess of power prevails, property of no sort is duly respected. No man is safe in his opinions, *his person*, his faculties, or his possessions.”⁷⁷ In specifically referencing “the safety . . . of his person,” Madison affirmed that property rights inhere in the human body, and that these rights should be protected from external incursions.

Other scholars have examined the link between the physical body and individual identity, making an even stronger case for personal property rights in one’s body. Margaret Jane Radin, for example, in analyzing the links between property and personhood, posits that the physical body is “literally constitutive of one’s personhood” and therefore that “the body is quintessentially personal property[.]”⁷⁸ Building upon Radin’s work, David Kushner suggests that the realization of personhood necessarily requires recognition of property rights in the body.⁷⁹ This concept of exercising bodily property rights as part of personhood is particularly resonant in the context of foreign-born workers in the U.S., given the long-standing concerns about worker invisibility and lack of autonomy. In noting the special importance of these property rights, Kushner further argues that “in order

73. Roger F. Friedman, *It’s My Body and I’ll Die if I Want To: A Property-Based Argument in Support of Assisted Suicide*, 12 J. CONTEMP. HEALTH L. & POL’Y 183, 202 (1995) [hereinafter Friedman, *It’s My Body and I’ll Die if I Want To*].

74. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 27 (Jonathan Bennett ed., 2008) (1690), <http://www.earlymoderntexts.com/assets/pdfs/locke1689a.pdf> [https://perma.cc/S3ZT-E8SP].

75. Friedman, *It’s My Body and I’ll Die if I Want To*, *supra* note 73, at 203–04 (citations omitted).

76. JAMES MADISON, *Property*, in THE PAPERS OF JAMES MADISON (William T. Hutchinson et al. eds., 1962), <http://press-pubs.uchicago.edu/founders/documents/v1ch16s23.html> [https://perma.cc/N8DJ-SLBG].

77. *Id.* (emphasis added).

78. Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 966 (1982).

79. David Kushner, *Property Interests in Nude Sunbathing*, 18 WHITTIER L. REV. 261, 270 (1997).

to facilitate full self-actualization, [the rights] ought to be accorded the highest claims to entitlement and respect.”⁸⁰

Beyond this work of theorists, both the U.S. Constitution and case law can be read to support this concept of the body as property, including the right to bodily integrity. In the Constitution, although the Thirteenth Amendment ended slavery and invalidated property interests *over* other human beings, in another respect, the language of the amendment “could be construed as supporting one’s right of exclusive control over their own physical being[.]”⁸¹ Furthermore, if the body is to be treated as property, it follows that under the due process clauses of both the Fifth and Fourteenth Amendments, such bodily property cannot be taken without due process of law. And indeed, a right to bodily integrity—to freedom from interference with, or harm to one’s body—has long been recognized by the federal courts in the United States.⁸² The line of cases relating to bodily integrity emerges from varying contexts, including criminal procedure, reproductive rights, and the right to refuse medical treatment.⁸³ To be sure, none of these cases specifically involve a state’s role in preventing an occupational harm, and to prevail on such a claim in a court of law, a more precise framing of existing precedent would be required. Nevertheless, for purposes of this article, this prior case law provides a conceptual foundation for a takings argument in this context.

If persons in the U.S. enjoy a property right to bodily integrity, which includes freedom from unwanted and damaging incursions upon the physical body, one could argue that *future* earnings from labor performed by a healthy, undamaged body is a corollary property right. Although this specific right has not been formalized via the takings or due process jurisprudence, the concept of future earnings as property does exist in other areas of U.S. law. For example, in the area of family law, future earnings of a spouse (or former spouse) are frequently considered by courts when decid-

80. *Id.*

81. Friedman, *It’s My Body and I’ll Die if I Want To*, *supra* note 73, at 207. *See also* Roy Hardiman, *Towards the Right of Commerciality: Recognizing Property Rights in the Commercial Value of Human Tissue*, 34 UCLA L. REV. 207, 225 (1986) (arguing that the experience of slavery highlights the importance of recognizing a property right in one’s own body, so as to avoid similar profiteering in the context of human biologics); Kaimipono David Wenger, *Slavery as a Takings Clause Violation*, 53 AM. U. L. REV. 191, 192 (2004) (arguing that slaves “possessed a property right of self-ownership” and that the legally sanctioned practice of slavery constituted a violation of the Takings Clause).

82. *See, e.g.*, *Union Pacific Railway Co. v. Bosford*, 141 U.S. 250, 251 (1891) (“No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.”).

83. *See* Acevedo, *Restoring Police Dignity Following Police Misconduct*, *supra* note 72, at 632–39 (cataloging relevant cases).

ing upon property division and alimony.⁸⁴ More relevant to the current project, future earnings can factor into workers' compensation awards for injured workers.⁸⁵

Note that "body as property" includes many subsidiary property rights, including the right to bodily integrity described above. The present inquiry does not implicate questions relating to commodification of body parts, as reflected in the donation or sale of organs. Nor does it implicate questions of whether the property right over one's body extends to permit (assisted) suicide. These are, of course, independent questions that do not arise in the context of occupational harms experienced by foreign-born workers. Some scholars have advocated for distinct conceptual categories under the rubric of bodily property rights. For example, Meredith Render has recommended disaggregating "personhood" from "bodies," and to likewise avoid the conflation of property rights with concerns relating to commodification.⁸⁶ Despite the complexity of the "body as property" concept, a simple, straightforward way to make the claim is to say that no one has ownership over my body but me.

C. Dehumanization of Immigrant Workers

To satisfy the definition outlined by Professor Atuahene, a "dignity taking" must be occasioned against individuals deemed to be dehumanized or infantilized, making their dignity invisible.⁸⁷ Infantilization "is the restriction of an individual or group's autonomy based on the failure to recognize and respect their full capacity to reason."⁸⁸ Although there may be some instances of infantilization in the context of immigrant workers and occupational safety, this article will focus on dehumanization, which is "the failure to recognize an individual or group's humanness."⁸⁹ Here, immigrant workers are dehumanized by the creation of a lower class of workers whose full humanity is not recognized.

Our basic humanity requires that we have the ability to lead illness- and injury-free lives. When the state fails to act to ensure immigrant workers are well protected at work, these workers are dehumanized. At the same

84. See, e.g., *In re Marriage of Francis*, 442 N.W.2d 59, 62 (Iowa 1989) ("future earning capacity flowing from an advanced degree or professional license is a factor to be considered in the division of property and the award of alimony").

85. See, e.g., *Sellers v. Pinedale Residential Center*, 564 S.E.2d 694, 699 (S.C. Ct. App. 2002).

86. Meredith M. Render, *The Law of the Body*, 62 EMORY L.J. 549, 586–88, 597–601 (2013).

87. ATUAHENE, WE WANT WHAT'S OURS, *supra* note 31, at 30.

88. *Id.* at 32.

89. *Id.* at 31.

time, employers often perceive immigrant workers to be disposable, able to work long hours in unsafe conditions,⁹⁰ and easily replaceable—like a cog—by another immigrant worker should an injury or illness occur. This treats immigrant workers as machine-like, not recognizing their individual value and humanity.

The dehumanization of immigrant workers in the United States is not a new phenomenon. During the Great Depression, the United States repatriated “excess” Mexican laborers, even some who had lawfully established permanent residence in the United States.⁹¹ The Bracero Program, which brought one million Mexican guest workers to the United States to work in agriculture from 1942 to 1964, was notorious for exploiting workers by failing to properly compensate them and for providing substandard housing.⁹² Still today, many immigrants come to work in the United States under the H-2A or H-2B guest worker programs, which allow immigrant workers to continually return to the United States but provide no path towards permanent relocation. This has created an environment where immigrant workers are a “temporary resource” used to meet economic demands.⁹³

Some have likened the dehumanization of immigrant workers in the United States to slavery. Maria Ontiveros argues that the *Hoffman* Court’s limiting of protections for undocumented immigrants violates the Thirteenth Amendment because it leads to the creation of a “race[]-based two-tiered system of labor [that] is also a slavery-like system prohibited by the Thirteenth Amendment.”⁹⁴ She likens slaves and immigrant workers by explaining undocumented immigrants are typically (1) racial minorities who are excluded from the political process and thus unable to remedy their situation through those means; (2) unable to use traditional labor law protections and accordingly remain in the control of their employers; and (3) outside the scope of labor laws written to cover “individuals,” which is reminiscent of slaves not being “persons.”⁹⁵ As she explains, “the wrong of slavery was the commodification and dehumanization of a racially defined

90. See, e.g., Tosh Anderson, *Overwork Robs Workers’ Health: Interpreting OSHA’s General Duty Clause to Prohibit Long Work Hours*, 7 N.Y. CITY L. REV. 85, 108 (2004) (“In the garment industry, well known for its exploitive subcontracting system that employs mostly immigrant labor, workers are subjected to compulsory long work hours accompanied by intimidation, constant surveillance, restrictions on movement, non-payment of wages, heavy lifting, and repetitive work.”).

91. Rathod, *Immigrant Labor*, *supra* note 22, at 553.

92. *Id.*; Kitty Calavita, *Why Revive an Inhuman Program?*, L.A. TIMES (July 18, 1999), <http://articles.latimes.com/1999/jul/18/opinion/op-57064> [<https://perma.cc/U4TH-QMB9>].

93. Rathod, *Immigrant Labor*, *supra* note 22, at 553.

94. See Ontiveros, *Immigrant Workers’ Rights*, *supra* note 36, at 673.

95. See *id.*

group of workers. The current treatment of undocumented immigrants mirrors this commodification and dehumanization.”⁹⁶ One scholar has noted that the enforcement system under IRCA, which fines employers for hiring unauthorized workers, has the effect of “dehumaniz[ing] and commodif[ying]” them “simply as ‘unauthorized.’”⁹⁷

Dehumanization of immigrant workers is also evident from the above-noted practice of medical repatriation, where seriously ill and injured immigrants are returned to their home countries by United States hospitals.⁹⁸ While this practice is not limited to those who experienced occupational harms, some of the individuals facing repatriation did indeed suffer severe injuries in the workplace.⁹⁹ The practice occurs because the federal government will not pay for medical care beyond stabilization and hospitals face economic pressures when treating patients who are unable to afford care and do not qualify for government reimbursement programs.¹⁰⁰ This reinforces the commodification of immigrants—they can come to the United States to work, but the government will not be responsible for costs of medical care should they get injured in the workplace. Physical removal of seriously injured or ill immigrants threatens their survival and undermines their humanity, emphasizing their role as a commodity: labor.¹⁰¹

The dehumanizing environment created by the state has led to an environment of dehumanization by individual employers. This points to an important interplay between the objective, state-sanctioned dehumanization occurring at a governmental policy level and the subjective, individual dehumanization occurring at individual workplaces. Indeed, the lack of enforcement creates an environment where foreign-born workers are considered less worthy, which seems to permeate the atmosphere at worksites. This individualized dehumanization was pronounced in the one-on-one interviews conducted with eighty-four Latino immigrant day laborers living

96. See *id.* at 674; see also Hing, *Institutional Racism*, *supra* note 32, at 343–46 (explaining the cycle of dehumanizing, demonizing, then dehumanizing again and eventually criminalizing immigrants).

97. Hing, *Institutional Racism*, *supra* note 32, at 346.

98. Nessel, *Disposable Workers*, *supra* note 3, at 64.

99. *Id.* at 62 (discussing the case of a Mexican migrant who fell twenty feet from a roof and was repatriated to a hospital in rural Mexico that lacked necessary equipment to sustain his life).

100. *Id.* at 63.

101. See Rathod, *Immigrant Labor*, *supra* note 22, at 554 (“This is wholly consistent with the presumed ‘foreignness’ ascribed to many categories of immigrants and the general expectation that the sojourn of these workers in the United States will be temporary and will cleanly meet the needs of the market without reciprocal obligation to protect their safety, health, or other rights.”); see also Nessel, *Disposable Workers*, *supra* note 3, at 92 (explaining the practice of physically removing individuals from the United States after their being injured here “is symptomatic of a global regime that dehumanizes migrant workers”).

and working in Northern Virginia. The interviews covered a range of topics, including the workers' backgrounds, experiences with employment in the U.S., workplace safety practices, familiarity with regulatory actors, and more. A series of questions during the interviews explored whether the workers had experienced a work-related injury or illness in the United States. If the worker answered affirmatively, the interview then proceeded to explore the particulars of the incident, along with relevant contextual details about the workplace, the nature of the employer and the employment relationship, and safety-related practices in that workplace.

As described more fully below, the interviews revealed a range of practices by employers which, taken together, amounted to dehumanization of the immigrant workers. As noted above, this article is not exploring cases of infantilization. This is because the interviews did not reveal any practices that signaled infantilization as that term has been used in the dignity takings literature. Because the empirical research did not include interviews with employers, it is likely that the data does not capture the full arc of employer perspectives towards the workers. For example, one might hypothesize that employers withheld safety-related information from the workers because they felt that the workers were simply incapable of comprehending the risks that they would face in the workplace. Such behavior might constitute infantilization, as it is premised on the worker's inability to reason for herself. Nevertheless, an employer who would allow that same worker to face that possible risk of injury is simultaneously engaging in an act of dehumanization, by undermining the value of that worker's life and the importance of her bodily integrity. In this sense, to the extent infantilization is occurring in this context, it is likely to be closely intertwined with instances of dehumanization.

What follows are excerpts from the interviews, first illustrating cases where dehumanization was present (in varying degrees) in the context of a work-related injury, followed by examples where the circumstances arguably do not amount to dehumanization. An examination of this data suggests that dehumanization falls along a spectrum, with additive conditions and behaviors that exacerbate the act of dehumanization. These interviews allow us to identify the factors that are constitutive of dehumanization, and to conceptualize a continuum of behavior by employers. The data do not definitively answer the question of when enough factors are present to constitute dehumanization (and thus a dignity taking), but provide a point of departure for further theorizing on this issue.

Although dehumanization (and the resulting dignity takings) are on a spectrum, Figure 1 below is a helpful framework for assessing whether a



dignity taking has occurred for a particular immigrant worker's injury. The chart positions, on the horizontal axis, indicia of humane treatment by the employer—relating to the provision of training, personal protective equipment, and facilitating access to medical care after the injury. On the vertical axis, the chart lists another key factor: the employer's knowledge of a clear danger. Under the law, employers are required to safeguard the workplace to prevent a broad range of workplace harms, including those that are known and visible, and others that are latent and more difficult to detect. That said, as explained more fully below, dignity takings constitute a subset of all regulatory violations, and require intentional or reckless conduct by the employer.

Given this primary focus on the employer's actions and responses, this article adopts a primarily "top-down" approach to determining the occurrence of a dignity taking, per the models outlined by Professor Atuahene.¹⁰² Since the data is drawn from worker interviews, the descriptions of employer actions are interspersed with—and necessarily shaped by—the workers' own feelings about their injury experience and the behavior of their former employers.

Figure 1: Assessing Dignity Takings in the Context of Immigrant Worker Injuries

		HUMANE TREATMENT AND REACTION (provision of training, protective equipment, medical care)	
		YES	NO
EMPLOYER KNOWLEDGE OF RISK TO BODY	YES	NO DIGNITY TAKING	DIGNITY TAKING
	NO	NO DIGNITY TAKING	POSSIBLE DIGNITY TAKING

As discussed in the case studies below, not all scenarios will fit neatly into one of these boxes. For example, an employer might have provided

102. Atuahene, *Dignity Takings and Dignity Restoration*, *supra* note 5, at 811–12.

some, but not sufficient, safety training; or an employer might have a somewhat humane reaction to an injury by telling a worker to go home and rest rather than require him to keep working, when a more dignified reaction would be ensuring the worker's access to adequate medical care.

1. Cases Involving Some Kind of Dehumanization

A first example involves Marvin, a national of El Salvador in his mid-forties, who experienced a workplace injury approximately six months before he was interviewed in 2014. Marvin recounted the following about his employer at the time, the particulars of the accident, and the aftermath:

I was hired by a company to do iron work, and I was working at a construction site in Bethesda [Maryland] The supervisor was Hispanic, but he was very abusive and yelled a lot. He would tell us to work more quickly When I entered the company they provided a class and they showed you how to move the metals and how to walk so there are not any accidents. One day I was carrying a heavy piece of metal. I got too close to another worker who was also walking, and I fell into a ditch and hurt my shoulder and cut my knee.

. . . .

I told my supervisor that I was hurt, and he told me to just keep working He didn't want to take me to a doctor, because he said I was fine Three days later, I could not bear the pain, so they just sent me home. They told me to return when I could work again to return.

. . . .

The shoulder still hurts And I can't feel two toes in my foot. Sometimes when I work, my shoulder hurts a lot.¹⁰³

In this case, we see some actions on the part of the employer that constitute mistreatment, and might constitute dehumanization. Marvin recounted that he did receive safety-related training, which suggests some concern on the part of the employer for his well-being. At the same time, the employer's exhortations created an unpleasant—and perhaps even unsafe—work environment.¹⁰⁴ The most concerning aspect of this narrative, however, is the supervisor's reaction after the injury occurred. Clearly, the supervisor had little regard for the Marvin's well-being, and failed to acknowledge his pain, as a human being would typically do to another. Additionally, the employer brazenly ignored existing OSHA guidelines regarding the handling of work-related accidents.¹⁰⁵

103. Confidential Interview No. 32 with Immigrant Day Laborer, in N. Va. (July 10, 2014).*

104. Menzel & Gutierrez, *Latino Worker Perceptions of Construction Risks*, *supra* note 21, at 180.

105. For examples, employers with more than 10 employees are required to document significant work-related injuries, and to maintain records regarding these injuries. *See* 29 C.F.R. § 1904.4 (2016).

Interestingly, the behavior that most strongly suggests dehumanization occurred *after* Marvin had experienced the injury. As described above, however, the property rights at issue in this context include not only bodily integrity, but the right to future earnings. An employer's dismissive attitude regarding medical treatment might exacerbate an injury, particularly if the worker stays on the job, instead of seeking medical attention and rest. On the whole, however, this is probably a borderline case of dehumanization because the worker did receive some training, which reflects an attempt by the employer to alert workers to known risks, and to prevent occupational harms.

A somewhat similar case was recounted by Samuel, a worker of Guatemalan origin, also in his mid-forties, who had been living in the U.S. for nearly sixteen years at the time of the interview. Samuel described an injury he sustained on his first day of work in a position that involved installing wooden floors. Although Samuel had performed that kind of work before, this particular employer provided no formal training, and Samuel had complained to the employer about the unsafe working conditions. Samuel described the accident as follows:

[A]s I cut a few pieces [of wood], I would put them away. When I saw my employer bring more wood, I gathered it to be able to cut it and did not realize that he left other pieces of wood in the floor. I tripped and fell on the wood cutting machine. I saw the saw go into my arm and I made the decision to take out the saw. I saw a big chunk of skin come off.

....

When the supervisors found out, they said that it was no problem, and they would wrap my arm and we could finish the work. I couldn't believe it so I told them that I would call the police and as soon as I said that they rushed me to the hospital and they waited for me. After, they did not want to hire me again.

....

This would never have happened if the employer kept the pieces of wood off the floor, like I told him to. Even now, when I use a lot of force or lift heavy things, I have a lot of pain in the arm.¹⁰⁶

Like the first example, this case involves an employer who was initially dismissive about the worker's medical needs. The employer failed to offer continued employment to Samuel, which might suggest a perception of the injured worker as unproductive, damaged, or too great a liability. Notably, Samuel had specifically complained to the employer about the conditions that precipitated the accident, but the employer—whether negli-

106. Confidential Interview No. 43 with Immigrant Day Laborer, in N. Va. (July 25, 2014).*

gently or recklessly—perpetuated the unsafe work environment. While the mental state of this specific employer is not known, their knowledge about a specific risk in the workplace—and failure to act—seems relevant to the dehumanization analysis. As argued below, the question of dehumanization will likely depend on the employer’s specific knowledge and intent, given the largely top-down approach taken in this article. On the whole, however, this case presents another borderline example of dehumanization.

Additional considerations emerge from an interview of Victor, a man from El Salvador in his early forties. Victor described an injury he sustained at a restaurant; at the time the accident occurred, he had already been working at the restaurant for three years:

I was washing the floor with some chemicals and had a reaction. The skin on one of my legs began to swell and became discolored. It gradually got worse.

. . . .

The employer never gave us any safety equipment or training on how to do the work Before the accident happened, he would tell us to work quickly, saying “fast, fast.” After the accident happened, at first, my supervisor told me to go to the doctor. I had to go to the hospital three times and I saw a skin specialist in DC. But about a month after the injury, my employer tried to reduce my wages and basically forced me to quit. They made fun of me for not speaking English and talked about my immigration status.¹⁰⁷

This interview contains aspects previously noted, including the employer’s mistreatment of Victor after the injury. The reasons for this shift in behavior are unclear, but might include (as suggested above), a perception that Victor was now “damaged” or concerns about liability. A new factor here is the employer’s failure to provide any safety equipment to Victor. Although, in this case, the lack of equipment cannot be tied specifically to the occurrence of the injury, it may be a relevant factor in other cases, where an employer fails to provide protective equipment that would abate a known risk. The same rationale might apply to the failure to provide training to the worker.

A pair of interviews, each recounting an incident of poison ivy exposure, offers further insight into how dehumanization might occur in the context of an occupational injury. The first involves Francisco, a man from Guatemala, now in his mid-fifties, who was hired by a homeowner to do landscaping work in 2008 or 2009.

107. Confidential Interview No. 1 with Immigrant Day Laborer, in N. Va. (May 27, 2014).*

I was doing some landscaping work, cleaning up the garden. The homeowner gave me some gloves, but did not tell me to wear long sleeves or that it was dangerous to work there. I was just supposed to work in the garden and no one told me what poison ivy was.

....

At the end of the day, I got paid. I did not know my hands had bad poison ivy. It got worse, so I tried to get some cream at the Walgreens but then the hand got really swollen and I could not move it. Then I decided to go to a Hispanic clinic and while I was there they talked about amputating my hand. I refused and said I could go back to Guatemala. Then they gave me a shot and a cream and slowly my hands began to get better.

....

When [the homeowner] called for me to work again, I told him that my hands were really red and they really hurt me and he hung up the phone and refused to answer any calls.

....

My hand still hurts a lot, and I take vitamins for it.¹⁰⁸

The second incident also involves a man from Guatemala, Edgar, now in his mid-forties, who was similarly hired by a homeowner to perform landscaping work. The incident occurred in summer 2014, just a few weeks before Edgar was interviewed for the study:

I was cleaning up the garden, to remove weeds. They [the homeowners] know which weeds they have and they pay cheap The homeowner told us to do the work quickly, and not to waste a lot of time. He did not give us any gloves so we were not wearing anything.

....

I was removing the weeds, and it was poison ivy, so I had a skin reaction all up and down my arms.¹⁰⁹

What is notable about both of these narratives is the workers' belief that the employer knew about the risk, but failed to notify the worker in advance, and similarly failed to provide the required protective equipment. Assuming the workers' perspectives are accurate, it suggests an even greater degree of dehumanization on the part of the employers—knowingly placing the workers in harm's way, without appropriate protection. Such behavior on the part of employers is possible, given the state-sanctioned environment of immigrant worker vulnerability and employer impunity. In

108. Confidential Interview No. 26 with Immigrant Day Laborer, in N. Va. (July 3, 2014).*

109. Confidential Interview No. 58 with Immigrant Day Laborer, in N. Va. (Aug. 8, 2014).*

the case of Francisco, the act of dehumanization was exacerbated by the employer's refusal to engage with the worker after the injury occurred.

One final example, recounted in the introduction of this article, illustrates a similar situation, illustrating dehumanization. This incident was recounted by Alberto, a worker of Guatemalan origin, now in his late forties, who had been seeking work as a day laborer in 2012, and was hired by a contractor. The following is an excerpt of his account:

There were three other workers, and the boss. We were at a building, doing renovation. I was the only one doing insulation work, putting it in the walls and ceilings.

....

The boss did not give us anything—no glasses [eye protection]. I did not have my own. One does not know what kind of work you are going to do.

....

My eyes were irritated, burning from the insulation. I went to a pharmacy right after work and got some drops. That helped slowly.

....

I never got paid for that day of work.¹¹⁰

This example arguably represents the most severe case of dehumanization among those presented. Fiberglass insulation work is generally known to be dangerous, and yet the contractor asked the worker to perform this task with no eye protection. In other words, the employer knowingly allowed the worker to be exposed to a known, serious harm. While more facts are needed about the lack of payment, this also suggests that the worker was perceived by the employer as temporary and disposable.

2. Cases Not Involving Dehumanization

Before proceeding to an analysis and synthesis of the narratives mentioned above, we offer a few examples of situations that arguably do *not* rise to the level of dehumanization. These are drawn from the same set of interviews with immigrant day laborers in northern Virginia. The first involves Wilfredo, an immigrant from El Salvador who had been working at a construction site for several months. He recounted the following:

They give you some basic safety instructions but not a formal training. You learn slowly from your co-workers when you are new. They gave us a hard hat and glasses [eye protection]. I brought my own gloves.

....

110. Confidential Interview No. 16 with Immigrant Day Laborer, in N. Va. (July 8, 2014).*



There was a container with concrete and steel and we needed to move it inside. And when I moved it, I hurt my left shoulder. I had everything required on—a hard hat and glasses. It was just too much force.

....

The boss was understanding. He said I could go home and rest and come back when I feel better.¹¹¹

In this case, none of the conduct related to dehumanization was present. The employer had provided training and some protection, and reacted in a humane manner after the incident, allowing Wilfredo to recuperate. Although Wilfredo was inclined to blame himself, it is possible (though not definitive) that more specific training on moving heavy objects could have changed the outcome here. That said, Wilfredo's account does not suggest that the employer knowingly placed the worker in harm's way. On the contrary, the worker's description suggests a relatively robust safety culture at that workplace.

Luis, a Bolivian immigrant in his mid-fifties, shared a similar narrative. Luis had been hired a few years prior to perform snow shoveling work in winter. The employer did not provide any training or safety equipment. On the third day of work, Luis "was shoveling snow and felt a sensation. It slowly got worse. It turned out to be an inguinal hernia."¹¹² Luis did not report his injury to his employer, and about three days after the incident, he sought medical attention at a clinic when he was unable to walk. Again, the employer in this case is not without fault. Although the etiology of hernias is complex, training and protective equipment (perhaps a back brace) might have prevented this injury. Yet while the employer likely bears some responsibility, nothing in the narrative suggests dehumanization, as the employer here was not aware of the injury and thus his reaction cannot be ascertained. Moreover, although snow removal work does carry some risks, it does not appear that the injury resulted because the employer knowingly placed Luis in harm's way.

A final narrative comes from Isaac, a Guatemalan immigrant in his late thirties, who was hired by a contractor to do painting at a gas station that was under construction. As with the previous case, Isaac did not receive any protective equipment, nor did the contractor provide any training on how to do the work safely. The following occurred:

I was painting a gas station, outside. I was on a ladder that was about 40 feet high, and the ladder slid and I fell, and I broke my nose.

....

111. Confidential Interview No. 35 with Immigrant Day Laborer, in N. Va. (July 29, 2014).*

112. Confidential Interview No. 5. with Immigrant Day Laborer, in N. Va. (May 29, 2014).*

The contractor saw me fall down the ladder. He was worried and he took me to the hospital and stayed with me. He paid for my hospital bill.

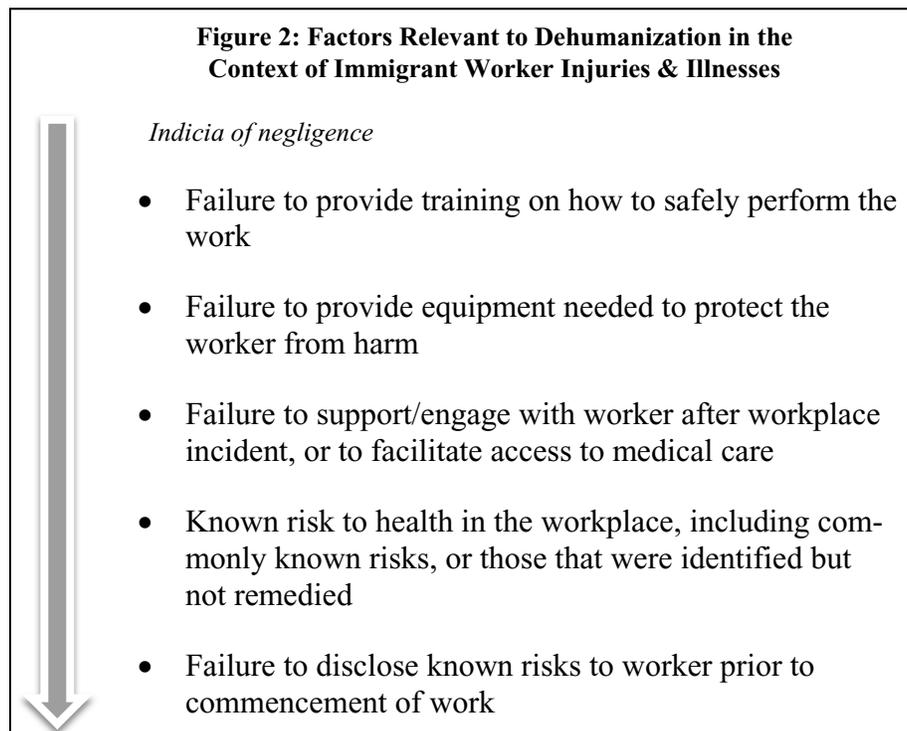
....

It was just the contractor and me working there. Someone should have been holding the ladder down while I was climbing it, but he [the contractor] did not have anyone else working.¹¹³

This final example is more complex. On the one hand, the contractor instructed Isaac to perform work at a significant height, without the appropriate safeguards in place. In this sense, the employer knowingly allowed Isaac to face a risk of harm. At the same time, the employer's reaction after the incident suggests a more empathetic, humane posture towards Isaac. While this could certainly be debated, it is difficult to make a compelling case for dehumanization.

3. Distillation of Factors Relevant to Dehumanization

What do these stories tell us about immigrant worker injuries, and whether they constitute dignity takings? A significant conceptual hurdle is whether or not dehumanization is occurring in these situations. It is challenging, of course, to definitively answer that question without looking into the hearts and minds of employers. Nevertheless, the narratives shared by the workers, along with other structural considerations, allow us to distill factors that are relevant to issue of dehumanization. Figure 2 below illustrates these factors:



The factors listed above are additive, in that the presence of multiple factors is more likely to indicate a situation involving dehumanization. Additionally, in evaluating each situation, it is helpful to draw from the tort concepts of negligence, reckless, and intentional conduct. Some behavior on the part of employers—such as failure to provide training or equipment—could potentially be negligent. Yet other behavior, including a dismissive attitude towards an actual injury, suggests a greater disregard for a fellow human being—indeed, a type of callousness—that is consistent with the practice of dehumanization. And when employers knowingly allow workers to face substantial health risks, with no protection or prior warning to the worker, those employers are projecting a reckless or intentional disregard for the worker's life and health, which should be categorized as dehumanization.

The above is meant to be an initial theoretical frame regarding dignity takings in this context, subject to further refinement as additional data becomes available. Certainly, work-related injuries and illnesses are a very complex phenomenon, with multiple actors and circumstances at play. Nevertheless, the interviews support the proposition that a subset of these workplace injuries are, in fact, dignity takings. The troubling state inaction in this context—including the lack of worksite enforcement, and the positioning of immigrant workers in a second-class legal status—has created a hospitable environment for the types of experiences the workers recounted. The damage that the workers have experienced, both to their bodies and their dignity, should be worthy of some kind of remedy.

IV. DIGNITY RESTORATION: SOME PRELIMINARY SUGGESTIONS

This article focuses primarily on the issue of dignity takings, and applying that framework to workplace injuries experienced by foreign-born workers. For that reason, the article does not offer a robust analysis of what measures would be required to achieve dignity restoration. Nevertheless, the interview data suggest some preliminary suggestions, which can be explored more fully in future work.

Of the eighty-four workers interviewed for the study, thirty-nine reported having experienced some kind of work-related injury or illness in the United States. Of these thirty-nine, five reported two separate incidents, leading to a total of forty-four separate workplace incidents that were reported. For most workers who experience a work-related injury, a critical mechanism for receiving financial support and coverage for medical expenses is the state workers' compensation system. This mechanism is designed to recognize the salience of the injury, and provide a state-

sanctioned remedy. Unfortunately, however, these systems are often inaccessible for immigrant workers.¹¹⁴ And indeed, this is reflected in the interview data: of the forty-four incidents, only three were reported to the workers' compensation system. Ensuring that workers' compensation is accessible and navigable for immigrants will likely be a key component for dignity restoration. Yet even when the workers' compensation system functions properly, the monetary awards are unlikely to adequately remedy the harms to body *and* dignity that are occasioned due to state inaction and a culture of employer impunity vis-à-vis noncitizen workers.

In order to achieve dignity restoration, therefore, more holistic reform is needed, both in the sphere of workers' compensation and beyond. The OSHA enforcement system does not allow injured workers to have a voice in penalty determinations or appeals of penalties.¹¹⁵ The entire OSHA enforcement structure needs to be re-centered to focus on the risks faced by low-wage workers, including immigrants and workers of color, whose lives are systematically undervalued. Immigrant workers themselves can be given a more active role in training and oversight, and should be able to report hazardous conditions without fear of reprisal. In this regard, both community-based programs,¹¹⁶ and broader structural remedies (such as immigration remedies for injured workers)¹¹⁷ are possible solutions.

V. CONCLUSION

The concept of dignity takings offers a valuable analytical frame for examining, and addressing, the phenomenon of occupational injuries, illnesses, and fatalities among immigrant workers in the United States. In particular, this frame allows for a nuanced yet forceful critique of government (in)action, and also attaches significant value to the bodies and lives of immigrants in the United States through creative property law arguments. The interview data reveal ongoing practices by employers that dehumanize immigrant workers – practices enabled by the lack of oversight by the state, and a long-standing tendency to devalue immigrant lives.

As is clear, the current systems we have in place are insufficient to remedy to the takings of bodily integrity experienced by immigrant workers—especially given an environment where these takings happen with disturbing frequency and result in paltry punishment. The dignity takings

114. See generally Smith, *Immigrant Workers and Workers' Compensation*, *supra* note 23.

115. Rathod, *Immigrant Labor*, *supra* note 22, at 546.

116. *Id.* at 543–45.

117. Nadas, *Justice for Workplace Crimes*, *supra* note 4.

framework provides a new lens with which advocates can work to achieve safe and dignified working conditions for immigrants in the United States.

