

## BURMA JUST AROUND THE CORNER: WHEN U.S. CORPORATIONS EMPLOY REFUGEES

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### ABSTRACT

The United States continues to receive refugees and other legal immigrants across its borders on a regular basis. These newcomers offer much to our economy. From a business perspective, these refugees and immigrants often represent a resource for corporations. Underlying this concept is the critical nuance that the refugees, and immigrants in general, represent a resource very vulnerable to exploitation. Consequently, refugees and other immigrants fill the jobs that many Americans will not consider, usually involving manual labor at low pay, and many times work in significantly sub-par conditions, such as in plants and other corporate facilities. In this context, this article sets forth the argument that the corporation is the seat of yet another example of growing informality, inequality and illegality that Professor Larson described in her article entitled *Informality, Illegality, and Inequality*. This article's analysis urges that, from the perspective of corporate social responsibility and business ethics, the law should be changed in the manner suggested by Professor Larson, through progressive regularization. With measures to require increased transparency into corporate use and treatment of the refugee and immigrant work force, the consumer market may help to mandate improved working conditions when current law does not.

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*“Informality contradicts legality, and especially equality, as we conceive these values. From within this tradition, informality is an abuse of law, as well as tolerance of exploitation and inequality. Accordingly, informality creates the best argument for stepped-up regulation. . .[yet] support and neither punish nor prohibit those who shelter themselves informally.”<sup>1</sup>*

#### INTRODUCTION

For many U.S. citizens, Burma (also referred to as Myanmar) had not flicked across their radar until the end of 2011 when Secretary of State Hillary Clinton visited Burma.<sup>2</sup> It was the first time in fifty years that a U.S. secretary of state visited the country.<sup>3</sup> But in Nebraska, contact with Burma, albeit indirect, is closer to home. When I was a visiting professor at the University of Nebraska College of Law in Lincoln, I noted that there was a remarkably high number of refugees from Burma in the community. In 2009 and 2010, Nebraska became the initial resettlement for 816 and 818 refugees respectively.<sup>4</sup> Of those totals, refugees from Burma comprised 525 in 2009 and

1. Jane E. Larson, *Informality, Illegality, and Inequality*, 20 YALE L. & POL'Y REV. 137, 142-43 (2002).

2. Mark Magnier & Paul Richter, *Landmark Clinton Visit to Myanmar Includes a Weapons Concern*, L.A. TIMES, Nov. 30, 2011, <http://articles.latimes.com/2011/nov/30/world/la-fg-myanmar-clinton-20111201>. In November 2011, Secretary of State Hillary Rodham Clinton visited Myanmar. *Id.* The primary motive for her visit was to seek assurances from Myanmar that they will curtail the purchase of missile technology from North Korea. *Id.*

3. David Nakamura, *Clinton Becomes First U.S. Secretary of State to Visit Burma in 50 Years*, WASH. POST, Nov. 18, 2011, [http://www.washingtonpost.com/world/asia\\_pacific/clinton-to-become-first-us-secretary-of-state-to-visit-burma-in-50-years/2011/11/18/gIQA2DWN\\_story.html](http://www.washingtonpost.com/world/asia_pacific/clinton-to-become-first-us-secretary-of-state-to-visit-burma-in-50-years/2011/11/18/gIQA2DWN_story.html).

4. *Fiscal Year 2009 Refugee Arrivals*, OFFICE OF REFUGEE RESETTLEMENT, <http://www.acf.hhs.gov/programs/ort/resource/fiscal-year-2009-refugee-arrivals> (last visited Mar. 17, 2013); *Fiscal Year 2010 Refugee Arrivals*, OFFICE OF REFUGEE RESETTLEMENT,

528 in 2010.<sup>5</sup> The next highest number of refugee resettlements was from Bhutan with 54 persons in 2009 and 90 persons in 2010.<sup>6</sup>

Around the same time that I made this discovery, I was reading Doctor Mary Pipher's book *The Middle of Everywhere: The World's Refugees Come to Our Town*, which enhanced my knowledge of the difficulties refugees face in coming to the United States. Doctor Pipher is a clinical psychologist and an adjunct clinical professor at the University of Nebraska,<sup>7</sup> and I was able to connect with her. Pipher truly expanded my understanding and opened my eyes to the plight of refugees, and more broadly immigrants, when they arrive in the United States. While the goal is for refugees to achieve sustainability in four months after arrival,<sup>8</sup> there are many factors that go into the equation. This article will introduce some of the challenges faced by refugees and immigrants that render them a particularly vulnerable population — vulnerable to exploitation. As Pipher stated, "From the moment refugees arrive they are offered ideas about how to spend their time, energy, and money."<sup>9</sup> Pipher's words started my business law and corporate social responsibility brain whirling when I learned some of the difficulties and, sometimes illegal and inhumane, circumstances immigrants suffer when they, as vulnerable people in need of jobs, find themselves working for corporations in manufacturing, meat-packing, or poultry facilities, to name a few ("facilities").<sup>10</sup>

As a practitioner and professor of business law, I have been exploring the issues of corporate personhood, corporate governance, and corporate social responsibility. With this new synergy of concepts, my mind immediately went to the role for-profit business enterprises, namely corporations, play in the lives of these transplanted people, most particularly when the immigrants work for corporations in facilities. It was at this point in my research that I stumbled

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<http://www.acf.hhs.gov/programs/orr/resource/fiscal-year-2010-refugee-arrivals> (last visited Mar. 17, 2013).

5. *Fiscal Year 2009 Refugee Arrivals*, *supra* note 4; *Fiscal Year 2010 Refugee Arrivals*, *supra* note 4.

6. *Fiscal Year 2009 Refugee Arrivals*, *supra* note 4; *Fiscal Year 2010 Refugee Arrivals*, *supra* note 4. *See generally* Paul Kenny & Kate Lockwood-Kenny, *A Mixed Blessing: Karen Resettlement To The United States*, 24 J. REFUGEE STUD. 217, 217 (2011) (observing that ethnic Karen refugees are among the Burmese refugees who have settled in the United States). The Karen are a distinct ethnic group which comes from the Kayin (or "Karen") State in Burma, as opposed to what is referred to as "Burma Proper." Stewart Manley, *Gauging The Economic and Political Costs to China of Article 13(B) Referrals of Sudan and Myanmar To the International Criminal Court*, 7 U. PA. E. ASIA L. REV. 333, 363-364 (2012); David C. Williams, *Constitutionalism Before Constitutions: Burma's Struggle to Build a New Order*, 87 TEX. L. REV. 1657, 1661 (2009).

7. *Mary Pipher*, CREIGHTON UNIVERSITY, <http://mockingbird.creighton.edu/ncw/pipher.htm> (last visited Mar. 12, 2013).

8. MARY PIPHER, *THE MIDDLE OF EVERYWHERE: THE WORLD'S REFUGEES COME TO OUR TOWN* 58 (2002).

9. *Id.* at 88.

10. *See id.* at 98-99.

upon Professor Jane Larson's writings, most notably *Informality, Illegality, and Inequality*.<sup>11</sup>

In her article, Professor Larson draws a link between conditions that do not conform with the law which 1) create situations of inequality and illegality and 2) simultaneously foster opportunity for individuals who, if they had not subjected themselves to informality, inequality, and illegality, might not have such opportunity.<sup>12</sup> In this article, I adopt this premise for an analysis of the nonconforming facilities where immigrant and refugee workers encounter inequality and illegality. Larson describes the internal culture and living accommodations in the colonias at the border between Mexico and the United States,<sup>13</sup> which have similarities to conditions of the facilities. These colonias are unincorporated townships along the U.S.-Mexico border that touches the four states of Texas, New Mexico, Arizona, and California, and are typically characterized by limited infrastructure, poverty, and dense population.<sup>14</sup> Larson argues that the colonias are an example of localized globalization in which immigrants have created economic opportunity, where there was little, through the unique circumstances created by informality.<sup>15</sup> She describes informality as the product of the state failing to regulate conduct that would otherwise be regulated in a different, in this case geographic, situation.<sup>16</sup> This informality is nonconforming conduct.<sup>17</sup> In the case of colonias, the informality Larson describes is the prolific housing that does not conform to the U.S. laws and regulations.<sup>18</sup> She adopts descriptions from others familiar with the informality of the colonias' housing: "growth without prosperity" and "homemade approaches."<sup>19</sup> Larson's argument recognizes the inequality and illegality that informality creates, but also the housing opportunities it produces in the border regions.<sup>20</sup> Larson's context is directly analogous to the informal working conditions suffered by many working refugees and immigrants in the facilities that propagate inequality, illegality, and inhumanity, yet continue to provide jobs where jobs are needed.

In this article, I will set forth in Part I the context and general premises I adopted from Larson's article *Informality, Illegality, and Inequality*. In Part II, I

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11. Larson, *supra* note 1, at 137.

12. *Id.* at 140-50.

13. *Id.* at 137-42.

14. Barbara J. Robles, *Mobile Homeowners in the Southwest: Financial Behaviors and Economic Mobility Aspirations During Tough Times*, 41 REAL EST. REV. 43, 43-46 (2012).

15. *See* Larson, *supra* note 1, at 137-38.

16. *Id.* at 140-43.

17. *Id.* at 140.

18. *Id.* at 152.

19. *Id.* at 139-40 (quoting BORDERING THE FUTURE, REPORT OF TEXAS STATE COMPTROLLER OF PUBLIC ACCOUNTS (July 1998), available at <http://www.window.state.tx.us/border/border.html>; Oscar Martínez, TROUBLESOME BORDER 2 (1988)).

20. Larson, *supra* note 1, at 152.

will set forth the general situation that refugees face in coming to the United States and, like other immigrants, working in facilities.<sup>21</sup> For the refugees and immigrants working in facilities that do not comply with the law, they directly experience the inequality, illegality, and inhumanity of informality.<sup>22</sup> In Part III, I offer my recommendation to create a due diligence and disclosure process similar to the one mandated by the Dodd-Frank Wall Street Reform Act for conflict minerals. I recommend measures to require increased transparency into corporate use and treatment of the refugee and immigrant work force, through which the consumer market may help to mandate improved conditions in the corporation (and beyond) if current law or enforcement does not.

#### I. JANE LARSON'S PREMISE

The informality of nonconforming conditions provides fertile ground for inequality and illegality. By exposing themselves to the exploitation created through informality, inequality and illegality, however, immigrants also allow for the creation of opportunities that might not otherwise have been available. To regulate and improve these situations, a sudden shift to severe, unadapted regulation might remedy the exploitation but decrease or eliminate the opportunity. To create a balance, an approach of regularized, progressive implementation provides the necessary flexibility to avoid loss of opportunity, yet decrease exploitation. In her article *Informality, Illegality, and Inequality*, Professor Jane Larson examines the informal housing, colonias, in the border region between the U.S. and Mexican border.<sup>23</sup> In particular, she situates her analysis in the free trade region along that border, known as *maquilas*.<sup>24</sup> This area is one of the poorest regions of the U.S., and, as the border regions grow, the poverty increases.<sup>25</sup> In her article, Larson aptly describes the *maquilas* as an internal third world.<sup>26</sup> In her examination of the unregulated, informal housing

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21. The majority of companies comply with the law and treat their workers humanely. TYLER T. MORAN & DARANEE PETSOD, *NEWCOMERS IN THE AMERICAN WORKPLACE: IMPROVING EMPLOYMENT OUTCOMES FOR LOW-WAGE IMMIGRANTS AND REFUGEES* 2 (2003).

22. In fact, current laws, such as labor laws, may be inadequate. "Current labor laws do not provide comprehensive protection. Immigrants often hold jobs, such as temporary or seasonal jobs, that are not protected under labor laws." *Id.* at 3; see also Kenny & Lockwood-Kenny, *supra* note 6, at 219. There are obviously issues of labor, safety and health law that could also respond to these concerns either through additional or different laws and regulations or stepped-up enforcement. This is not the subject of my article. I address corporate social responsibility and provide a suggestion on how to create it.

23. Larson, *supra* note 1, at 137-42.

24. *Maquiladoras* are factories where companies import materials for assembly on a tax-free basis. Brandon Batt, *Private Foreign Investment: Why Mexico's Economic Future Depends on It*, 41 ARIZ. ST. L.J. 1111, 1119 (2009). After assembly, the goods are exported. *Id.*

25. Larson, *supra* note 1, at 139.

26. *Id.* This is in comparison to globalized localism which, for core countries, tends to unify and homogenize the world. See *id.* at 138. In contrast, for the periphery, the countries experience localized globalism which has "the specific impact of transnational practices and

in the colonias, Larson describes them as an informal economy growing “outside the structure of governmental regulation, in particular labor, tax, health and safety, land use and environmental, civil rights, and immigration laws.”<sup>27</sup> As mentioned above, Larson’s informality refers to the nonconforming nature of the housing characterized by non-compliance with the prescribed patterns otherwise applied in the United States.<sup>28</sup> In the case of the colonias, these housing developments do not comply with any building codes and lack the basic infrastructure or public services found in other parts of the United States.<sup>29</sup>

If the requirements attached to housing developments in the rest of the U.S. applied in the colonias, very few people, due to poverty, would have homes.<sup>30</sup> Instead, informality creates opportunity for people who otherwise would not have economic opportunity.<sup>31</sup> This opportunity foundationally comes from people participating in conditions of exploitation in order to open up economic opportunity where there is little.<sup>32</sup> The opportunities of informality occur as a result from “avoiding regulation and all its protections.”<sup>33</sup> “The lack of economic opportunity for which informality compensates often results from discriminatory exclusion or marginalization. Women, immigrants, and people of color, for example, are overrepresented in all sectors of the informal economy because they are vulnerable to exclusion from the formal economy.”<sup>34</sup>

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imperatives on local conditions that are thereby destructed and restructured in order to respond to transnational imperatives.” *Id.* at 138-39.

27. *Id.* at 140 (“Most *colonia* settlements are extra-legal rather than legal: When residents and developers created existing *colonias*, subdivision and sale of rural land for residential construction without provision of basic infrastructure or access to public services was lawful, and no building codes set housing standards. Yet where the state fails to regulate activities that in other settings are regulated according to accepted patterns, a kind of informality develops, albeit one built on legal and material nonconformity rather than illegality.”).

28. *Id.* at 151-52.

29. *Id.* at 140.

30. *Id.* at 151.

31. Larson, *supra* note 1, at 150-51 (“The increase in accessibility of the housing market due to *colonia* development is worth remarking: Eighty-five percent of *colonia* households own their own homes, compared to a national home ownership rate of 66.8% for households of all income levels, and 45.5% for Hispanics.”).

32. *Id.* at 150.

33. *Id.* at 151 (“*Colonias* may exist because they create housing opportunity, but they do so by avoiding regulation and all its protections. *Colonia* land sales have been at once exploitative and accessible. Economically marginal buyers can access affordable single-family housing, as well as a means of financing that purchase, but only at high interest rates and without basic consumer protections. Likewise, although land use regulation and building codes would lift living conditions, the families who buy into existing *colonias* could not afford that better-quality housing and environment.”).

34. *Id.* at 150-51 (“[N]on-whites, the poor, and immigrants dominate the *colonia* population. Latina/os comprise 82% of *colonia* residents, compared to 32% of Texas residents and 12.5% of the nation. But this is not a foreign or undocumented population; to

When reading Larson's description, the informality due to lack of economic opportunity in the *maquilas* closely resembles the informality of the facilities. Larson states that similar informality grows in other industries across the United States.<sup>35</sup> "Social scientists have documented substantial informal labor, production, and commerce in goods and services in this country, including unlicensed street vendors, garment sweatshops, office- and house-cleaners, homeworkers, and home manufacturing enterprises."<sup>36</sup> Larson goes further by pointing out that, while an important ingredient in the functioning of the growing informal economies, the individuals, many times women and immigrants, "remain[ ] in the shadows."<sup>37</sup> The people who open themselves to the exploitation and opportunity of informality are hidden from common knowledge because illegal and inhumane conduct tends to be covert.<sup>38</sup> In addition, these people tend to be "disproportionately non-white, immigrant, non-English speakers, and female."<sup>39</sup>

Since informality is exploitation and inequality but also provides for economic opportunities, Larson carefully analyzes the relationship between informality and the law in the colonias.<sup>40</sup> Due to the fact that nonconformity with the law creates otherwise unavailable opportunity,<sup>41</sup> Larson argues that "fundamental values of legal culture stand in the way of a productive engagement with informality in the United States."<sup>42</sup> Yet, informality, as an abuse of the law, leads to exploitation.<sup>43</sup> Informality allows for the exploitation and inequality to continue.<sup>44</sup> Thus, the nature of informality creates a particularly challenging dilemma. On the one hand, without regulation, it provides opportunity; on the other hand it creates exploitation, the best argument for regulation.<sup>45</sup>

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the contrary, 85% of *colonia* residents are citizens and three quarters were born in the United States.").

35. *Id.* at 152-53.

36. *Id.*

37. Larson, *supra* note 1, at 153.

38. *Id.* at 158.

39. *Id.*

40. *Id.* at 142. Larson also notes, "Despite law's role in defining the informal sphere, few legal scholars in the United States study informality. One explanation is the familiar problem of 'othering.' The United States distances itself from development problems and solutions such as informal housing, as do its scholars. U.S. academics have somewhat revived law and development studies focused on bringing western law to democratizing countries around the world. This new attention to law's role in development is hardly a dialogue, however, but instead a one-way transfer: The new scholarship expresses little sense that the United States has much to learn from policies like regularization pioneered in the developing world." (footnotes omitted) *Id.* at 158.

41. *Id.* at 150.

42. *Id.* at 142.

43. Larson, *supra* note 1, at 143.

44. *Id.* at 143.

45. *Id.* at 142-43, 150.

Larson's article recommends that "regulatory policy in the United States support and neither punish nor prohibit those who shelter themselves informally...this strategy is termed 'regularization.'"<sup>46</sup> Regularization is not deregulation.<sup>47</sup> Through regularization the government softens regulatory standards for certain populations to encourage economic opportunity.<sup>48</sup> In the colonias, this process accommodates some nonconforming housing conditions.<sup>49</sup> The regularization applies standards conditioned upon the ability of the regulated.<sup>50</sup> This flexible compliance aims to accomplish progressive improvement over time rather than "immediate, full and universal compliance."<sup>51</sup> Through gradual implementation of progressive regulation, the nonconforming situations will be brought into more conformity over time so as to eliminate the exploitation and inequality.<sup>52</sup> This is in contrast to conventional regulation that imposes universal policies requiring full and immediate compliance.<sup>53</sup>

Larson meets the unique "catch-22" of informal housing in the colonias head-on. With informal housing, which does not conform to prescribed regulations in the rest of the U.S., impoverished individuals have the opportunity to have a home where they might not otherwise. At the same time, however, because the housing does not conform to prescribed standards, these same individuals do not have access to the infrastructure, safety, and health protections that a conforming housing development would. The populations most subjected to informality are the immigrants, female and people of color.<sup>54</sup> Through informality, these populations experience exploitation and inequality.<sup>55</sup> Larson suggests that a measured approach is needed to eradicate the exploitation and inequality yet maintain the opportunity.<sup>56</sup> She advocates for regularization with a goal to progressively achieve conforming regulations with legality and equality.<sup>57</sup>

## II. ARRIVAL IN THE U.S. AND EMPLOYMENT IN THE CORPORATION

*"Refugees reveal the strengths and flaws of America."*<sup>58</sup>

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46. *Id.* at 143.

47. *Id.*

48. *Id.* ("No level of government in this country follows a policy of regularization, and to get there from here would require changes in conventional political thinking as well as innovative reforms in law.")

49. Larson, *supra* note 1, at 141.

50. *Id.* at 143.

51. *Id.*

52. *Id.* at 143-44.

53. *Id.* at 143.

54. *Id.* at 141.

55. Larson, *supra* note 1, at 141.

56. *Id.* at 144.

57. *Id.*

58. PIPHER, *supra* note 8, at 20.

For refugees and immigrants in the U.S., they face a host of challenges and opportunities. Initially, the challenges may be quite weighty creating a situation of vulnerability. In this section, I will set the stage for the life of a refugee by describing the resettlement process. From that description, the article will then discuss the experience of refugees, more specifically refugees' challenges. The article will focus on the refugees (and other immigrants) employed by corporations, particularly corporations that exploit the immigrant and refugee workers.

At a minimum, from a business perspective, refugees represent a resource for corporations. Underlying this concept is the critical nuance that the refugees, and immigrants in general, represent a very vulnerable resource. They are already at a disadvantage in a very new and strange place – desperately needing a job. Consequently, refugees fill the jobs that many Americans will not consider, usually involving manual labor at low pay and many times working in significantly subpar conditions.<sup>59</sup> Due to the high numbers of refugees and immigrants employed by corporations in these manual labor jobs,<sup>60</sup> I believe the corporation's manual labor force – the meat packing plant, for instance – becomes, in Professor Larson's terms, an “experience in globalization.”<sup>61</sup> I suggest beginning by exploring the process for refugees and the ingredients that make them vulnerable.

#### A. Resettlement: What Happens

The flood of immigrants and refugees into Lincoln, Nebraska is not unique.<sup>62</sup> The United States government continues to admit people and administer the refugee program; and, before 1990, most of the refugees settled in six states: California, Texas, New York, Florida, New Jersey, and Illinois; and, then among other things, refugee settlement spread into the Midwest.<sup>63</sup> The United Nations Refugee Convention mandates that a state party provide national protection and guarantee specific rights to refugees.<sup>64</sup> Under the United Nations Refugee Convention, a “refugee” is a person who

[O]wing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the

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59. *Id.* at 98-99; *see also* RILEY, *supra* note 22, at 56-57.

60. *See* PIPHER, *supra* note 8, at 98-99; RILEY, *supra* note 22, at 57.

61. Larson, *supra* note 1, at 138 (describing the maquilas on the U.S.-Mexican border as localized globalism, where the edge of the nation makes “contact with the world”).

62. PIPHER, *supra* note 8, at 8 (“Our city’s experience is not unique. As writer Pico Iyer puts it, ‘More bodies are being thrown more widely across the planet than ever before.’ America keeps taking people in. By 2050, whites of European origin will no longer be the majority race in our country. We’re becoming a richer curry of peoples.”).

63. *See id.*

64. DEBORAH E. ANKER, *LAW OF ASYLUM IN THE UNITED STATES* 2 (3d ed. 1999).

protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.<sup>65</sup>

The corresponding U.S. statute tracks the language of the UN Convention and expands upon it to include people who are victims or survivors of past persecution.<sup>66</sup>

Under the United States Refugee Admissions Program (USRAP), a collection of numerous federal agencies and non-governmental agencies, refugees gain access to the resettlement process in the United States.<sup>67</sup> These agencies, working together, administer and assist in various aspects of refugee resettlement.<sup>68</sup> Through USRAP, the agencies receive delegated tasks and responsibilities, but no single agency in USRAP controls the whole process.<sup>69</sup> This decentralized approach has resulted in inconsistent and, sometimes, inadequate provision of assistance to refugees.<sup>70</sup> Consequently, there is heavy reliance on volunteer-based organizations in this process.<sup>71</sup> The Department of State contracts with these volunteer agencies to assist the refugees in the resettlement process but does not entirely fund them.<sup>72</sup> In the U.S., the

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65. United Nations Convention Relating to the Status of Refugees, art. 1A(2), *opened for signature* July 28, 1951, 189 U.N.T.S. 137, 152.

66. ANKER, *supra* note 64, 2-4.

67. Laura P. Lunn, *Displaced and Disillusioned: "Free Case" Refugees and The Government's Obligation to Facilitate Effective Resettlement*, 14 J. GENDER RACE & JUST. 833, 841-42 (2011).

68. *Id.*

69. *Id.* at 842.

70. See Kenny & Lockwood-Kenny, *supra* note 6, at 235 ("There is a greater need for language capability and other resources, which are supplied at the local level. Although the public—private partnership model of resettlement is by no means unique to the US, what is unique is the extent to which it relies on voluntary organizations for the domestic portion of the resettlement programme. This in itself is not a weakness as *volags* and their affiliate organizations have successfully resettled most of the refugees living in the US. Unfortunately, these organizations are so underfunded and overburdened that they are in turn required to rely on churches and volunteers to supplement services they are unable to provide.").

71. *Id.* at 219-20 ("This heavy reliance on volunteers is not a new phenomenon in US refugee resettlement. It has proven valuable to refugees and communities and is a money-saving device for the relevant Federal and State-level public authorities. However, the longer-term effects on the refugees concerned have not been researched, while the broader implications of this policy for the successful integration of refugees into American society remain unclear.").

72. Lunn, *supra* note 67, at 844-45 (A list of organizations provided by Office of Refugee Resettlement include "Church World Service (CWS), Ethiopian Community Development Council (ECDC), Episcopal Migration Ministries (EMM), Hebrew Immigrant Aid Society (HIAS), International Rescue Committee (IRC), Kurdish Human Rights Watch, Inc. (KNRW), U.S. Committee for Refugees and Immigrants (USCRI), Lutheran

resettlement volunteer agencies aim to have the refugees self-sufficient in only four months.<sup>73</sup>

Despite the fragmented settlement approach and the challenges faced by refugees settling in the U.S., not the least of which is attributable to the quick and pressured drive towards self-sufficiency, refugees continue to choose the U.S. as the favored state for refugee emigration. For instance, in a recent study of Karen refugees,<sup>74</sup> when refugees were asked their preference for a resettlement country, the most frequent answer was the United States because resettlement was faster than other countries.<sup>75</sup> This is true despite the fact that many refugees indicated that overall conditions of resettlement may be better in Australia or Canada, but the process takes significantly longer.<sup>76</sup> Thus, as the U.S. continues to provide shelter to refugees fleeing terrible situations in their home countries, the overall resettlement process sets the stage to create a very vulnerable portion of the U.S. population.

### *B. Refugee Experience: Contributions and Challenges*

“The United States is a series of paradoxes for newcomers. Every plus is married to a minus. It is the land of opportunity and yet the opportunity is often to work in a meatpacking plant.”<sup>77</sup> Therefore, while refugees significantly contribute to the economy, refugees face significant challenges as they establish a new life in the United States.

Similar to Professor Larson’s description of the people living in an informal economy, refugees often find themselves marginalized by poverty and prejudice. Psychologist Michael White has stated that these people start to see how Americans view and treat them, and start to view themselves as inferior as well.<sup>78</sup> He described this process as being “recruited into prejudice.”<sup>79</sup> They are vulnerable to exploitation due to the lack of language skills, recent transplantation, lack of infrastructure, lack of representation, lack of knowledge of their new homeland’s customs and laws, lack of support networks, lack of money, and many other factors.<sup>80</sup> In fact, under the U.S. refugee program, most of the refugees arrive in the U.S. with very little money.<sup>81</sup> Facing a very

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Immigration and Refugee Services (LIRS), U.S. Conference of Catholic Bishops (USCCB), World Relief Corporation (WR), and State of Iowa, Bureau of Refugee Services.”).

73. PIPHER, *supra* note 8, at 58.

74. See sources cited *supra* note 6, for an explanation of the Karen ethnic group.

75. Kenny & Lockwood-Kenny, *supra* note 6, at 227.

76. *Id.*

77. PIPHER, *supra* note 8, at 88.

78. *Id.* at 226.

79. *Id.*

80. *See id.* at 57-58.

81. *Id.* at 57-58 (“In fact, I have never met a rich refugee. All arrive worried about jobs and housing, as well as about their legal status in the United States. Especially if they have been tortured or lost family members, they are not at peak mental efficiency. . . They have no way to sort out whether people are kind and helpful or psychopaths. All of us look alike to them. They fear robbers, harassment, getting lost, or being hit by a car.”).

challenging four-month window to sustainability and the basic need to survive, these impoverished new arrivals to the U.S. are desperate to make money.

Refugees, and immigrants overall, are important parts of the economy.<sup>82</sup> Between 1991 and 2006, immigrants into the U.S. started twenty-five percent of the U.S. venture-backed, public companies.<sup>83</sup> In turn, these businesses employed many people.<sup>84</sup> In addition, refugees and immigrants fill vacancies in the workforce that allow the U.S. economy to be more efficient.<sup>85</sup> Further, immigrants boost the economy by buying services and products, creating increased need.<sup>86</sup>

“Immigrant workers are concentrated in low-skill, low-pay jobs, although they are represented across the employment spectrum.”<sup>87</sup> Given the goal of four months to sustainability,<sup>88</sup> volunteer organizations look to find employment for refugees as soon as possible.<sup>89</sup> Consequently, refugees do not have time to adjust to the new culture and experience, recover from any traumas they have experienced, or increase job skills or wait to find a job or a location that really suits them.<sup>90</sup> For instance, the Karen refugees from Burma “who have resettled to the US live in meagre accommodation, work for the minimum wage, and are frequently compelled to relocate, all the while struggling to retain their traditional values and practices. For most refugees, resettlement has been a mixed blessing.”<sup>91</sup> This confluence of situations almost forces refugees, and many other immigrants, to accept low wage service or manufacturing jobs that do not fully utilize their skills or knowledge base.<sup>92</sup>

Of the immigrant population in the U.S., only one-quarter have a bachelor’s degree or higher education, and one-third of the immigrant population has less than a high school education.<sup>93</sup> In contrast, most native-born U.S. workers are between the extremes of an advanced degree and less than high school education.<sup>94</sup> Consequently, while there is some overlap, and given

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82. RILEY, *supra* note 22, at 12 (“[I]mmigrants, including low-skill immigrants, are an asset to the United States, not a liability. Immigrants help keep our workforce younger and stronger than Asia’s and Europe’s. As entrepreneurs, they create jobs. As consumers, they generate economic activity that results in more overall economic growth. By taking jobs that over-qualified Americans spurn, they fill niches in the workforce that make our economy more efficient and allow for the upward mobility of the native population.”).

83. *Id.* at 64.

84. *Id.* (“These businesses employed some 220,000 people in the United States and boasted a market capitalization that ‘exceeds \$500 billion, adding significant value to the American economy.’”).

85. *Id.* at 12.

86. *Id.*

87. MORAN & PETSOD, *supra* note 21, at 2.

88. PIPHER, *supra* note 8, at 58.

89. Kenny & Lockwood-Kenny, *supra* note 6, at 225.

90. *Id.*

91. *Id.* at 218.

92. *Id.* at 225.

93. RILEY, *supra* note 22, at 57.

94. *Id.*

the above mentioned settlement challenges,<sup>95</sup> refugees and immigrants commonly fall into low paying jobs that do not fit their particular skills, including working in facilities.<sup>96</sup> Consistent with this result, it has been found that immigrants disproportionately work in riskier jobs than native-born workers.<sup>97</sup> It is within these circumstances that refugees and other immigrants experience the potential of economic opportunity offered by corporations in the facilities because many corporations view refugees and immigrants as a low-cost workforce.

### C. Corporations' Treatment of Refugees and Immigrants

While many U.S. companies treat immigrant workers humanely and comply with the law,<sup>98</sup> other companies discriminate against and exploit refugee and immigrant workers. While this may sound like an Upton Sinclair book, the reality is that these companies exploit immigrant workers through "low wages, long hours, poor working conditions, or denial of other rights."<sup>99</sup> American-born workers may also be subject to similar treatment by companies, but refugees and immigrants are much more vulnerable to exploitation based on their immigration status, and cultural and linguistic lack of knowledge.<sup>100</sup>

Professor Larson's concepts of an "internal third world"<sup>101</sup> and informality apply to the working environment created by the corporations where the refugees and immigrants endure poor labor conditions. Refugees, as well as immigrants, being more vulnerable and controllable than other workers, often end up working in situations that are informal, illegal, and inhumane.<sup>102</sup> This

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95. See Kenny & Lockwood-Kenny, *supra* note 6, at 219 ("We find that refugees experience substantial difficulties in the initial stages of their resettlement, in part due to the lack of institutional support available to them. However, after approximately a year of resettlement, many of the refugees in our study sample have begun to integrate successfully. In addition, a number of researchers have argued that refugees, like voluntary migrants, have an idealized expectation of life after resettlement, and that this contributes to feelings of distress and depression when the actual experience does not match their hopes (internal citations omitted).").

96. See RILEY, *supra* note 22, at 57.

97. Pia M. Orrenius & Madeline Zavodny, *Do Immigrants Work in Riskier Jobs?* 46 DEMOGRAPHY 535, 535-37 (2009).

98. MORAN & PETSOD, *supra* note 21, at 2.

99. *Id.* at 2-3 ("Immigrants who participate in union-organizing drives are particularly vulnerable to employer intimidation tactics, such as reporting workers to the INS (Immigration and Naturalization Service). Although such tactics are illegal under U.S. labor law, penalties are light and often come too late to change the outcome of organizing campaigns.").

100. *Id.* at 2.

101. Larson, *supra* note 1, at 139.

102. PIPHER, *supra* note 8, at 98 ("Refugees are much more vulnerable and controllable than other workers. Hence, they work in the places where their ears hurt from constant noise or where they get headaches or throw up because of noxious materials used in production. They work in factories that have poor ventilation and no windows, and that insist upon split shifts and forced overtime. Even though these conditions are unhealthy and

process has been described as “the race to the bottom” in labor conditions.<sup>103</sup> This informality is similar to Larson’s description of the inequality and illegality endured by inhabitants of the colonias. “Immigrants suffer unique discrimination and exploitation in the workplace.”<sup>104</sup> “Lack of orientation, long hours, language problems, and pressure to work faster increase the danger.”<sup>105</sup>

In Nebraska, many refugees work in meatpacking plants where people have fallen down on unclean, bloody floors.<sup>106</sup> “Knives slip while slicing meat. Carcasses hit workers when they are not watching.”<sup>107</sup> Once again, the situation in Nebraska is not unique.<sup>108</sup> For example, in 1996-2001, as the numbers of immigrant labor increased in the United States, so too did the instances of fatal occupational injuries for immigrant workers.<sup>109</sup> Such refugees and immigrants often suffer harm or death as a result of the informality, illegality, and inequality. For example, the machinery in the Nebraska meat packing facilities was created for larger, Scandinavian laborers.<sup>110</sup> The smaller framed Asian refugees, such as the Burmese, end up suffering workplace injuries or death from the ill-suited machinery.<sup>111</sup> In the same corporation, there is a vast

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unsafe, there is little anyone can do to protect workers. By now OSHA exists only theoretically. It is virtually impossible to obtain a workplace inspection for any reason.”)

103. *House Subcommittee on Immigration Policy and Enforcement Holds Hearing on E-Verify*, 88 INTERPRETER RELEASES 558, 559 (2011).

104. MORAN & PETSOD, *supra* note 21, at 2-3 (“Immigrants who participate in union-organizing drives are particularly vulnerable to employer intimidation tactics, such as reporting workers to the INS (Immigration and Naturalization Service). Although such tactics are illegal under U.S. labor laws, penalties are light and often come too late to change the outcome of organizing campaigns.”).

105. PIPHER, *supra* note 8, at 99.

106. *Id.* at 98.

107. *Id.* at 98-99 (“Many of these plants were built for brawny Swedes and Germans, and most of the workers are now smaller people, Mexican, Laotian, and Vietnamese, who are the wrong size for the equipment. . . . Injury rates in our packing plants are as high as 50 percent. Some places have an injury rate of 80 percent for workers the first year on the job.”).

108. See KEVIN BALES, ET AL., HIDDEN SLAVES: FORCED LABOR IN THE U.S. 5 (Sept. 2004), available at [http://www.law.berkeley.edu/files/hiddenslaves\\_report.pdf](http://www.law.berkeley.edu/files/hiddenslaves_report.pdf) (“Forced labor exists in ninety cities across the United States. It is practiced in a wide range of industrial sectors, including domestic service, the sex industry, food service, factory production, and agriculture.”); see also Joni Hersch & W. Kip Viscusi, *Immigrant Status and the Value of Statistical Life*, J. HUM. RESOURCES 749, 757 (2010) (describing a recent study, where it was shown that “[i]mmigrants as a group have substantially higher fatality rates than all workers”).

109. Katherine Loh & Scott Richardson, *Foreign-Born Workers: Trends in Fatal Occupational Injuries, 1996-2001*, 127 MONTHLY LAB. REV. 42-43 (2004) (indicating that “foreign-born employment share has increased at a slower rate than the foreign-born share of occupational fatalities. . .”). It is difficult to determine the number of injuries and illnesses associated with these work-related conditions since workers may not report problems to their employers because they fear retaliation. Orrenius & Zavodny, *supra* note 97, at 541.

110. PIPHER, *supra* note 8, at 98-99.

111. See *id.*

disparity between the conditions for the refugees and immigrants performing manual labor versus the individuals working in the office.

In this context, it is my argument, that the corporation is the seat of yet another example of growing informality. The informality of nonconformity with the law and social responsibility creates exploitation, inequality, and inhumanity in the facilities. At the same time, however, because the labor is cheap and the conditions do not require much to maintain, corporations take advantage of the low cost and, thereby, economic opportunity becomes available to the refugees and immigrants that might not otherwise be there. As Professor Larson urges, such a situation argues in favor of an examination of the law and the actuality.<sup>112</sup> I position my analysis in the law and actuality of corporate governance and corporate social responsibility.

#### *D. Corporate Social Responsibility*

It is important to start the analysis with a determination of what is meant by corporate social responsibility. Usually when people refer to corporate social responsibility the term is interchanged with corporate philanthropy, sustainability, business ethics, and other terms.<sup>113</sup> The definition varies depending on the use and organization.<sup>114</sup> For the purposes of this organization, corporate social responsibility is when a corporation's policies and decision-making reflect the potential impact of its corporate actions on various other stakeholders besides the common shareholders.<sup>115</sup>

The development of the use of the corporation for other than common shareholder profit maximization has bumped, grinded, and gyrated through history. Yet it remains true that the common shareholders need not be the only focus of the corporate management's attention. As Justice Marshall noted in 1819 in *Trustees of Dartmouth*, "The objects for which a corporation is created are universally such as the government wishes to promote."<sup>116</sup> In 1919 in *Dodge v. Ford*, the Delaware court set forth a summary of the traditional approach to a director's fiduciary duties and obligations.<sup>117</sup>

[I]t is not within the lawful powers of the board of directors to shape and conduct the affairs of a corporation for merely incidental benefit of shareholders and for the primary purpose of benefitting others, and no one will contend that, if the avowed purpose of the defendant

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112. See Larson, *supra* note 1, at 146.

113. Mark S. Ostrau & Ashley C. Walter, *Corporate Social Responsibility: Spotlight on Supply Chain* (Practical Law Company) (2012), available at <http://www.techlaw.org/wp-content/uploads/2010/07/Fenwick-Corporate-Social-Responsibility-and-the-Supply-Chain-August-2012.pdf>.

114. *Id.*

115. *Id.*

116. *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 637 (1819).

117. *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919); JAMES D. COX & THOMAS LEE HAZEN, *BUSINESS ORGANIZATIONS LAW* 92-93 (3rd ed. 2011).

directors was to sacrifice the interests of shareholders, it would not be the duty of the courts to interfere.<sup>118</sup>

This case set forth that while shareholder benefit is the “primary purpose” of management’s activities, the court did not say “only.” In 1968, the court in *Shlensky v. Wrigley* allowed that the mere failure to “follow the crowd” is not a dereliction of managements’ duties.<sup>119</sup> The court allowed management to consider as part of its business decision, a non-shareholder constituency, such as the surrounding community.<sup>120</sup> The implication being that other interests, besides that of the shareholders, may be served.

Similarly, the American Law Institute (ALI) has picked up the charge and taken it one step further in ALI Principles Section 2.01: The Objective and Conduct of the Corporation:

(a) Subject to the provisions of Subsection (b) and § 6.02 (Action of Directors That Has the Foreseeable Effect of Blocking Unsolicited Tender Offers), a corporation [§ 1.12] should have as its objective the conduct of business activities with a view to enhancing corporate profit and shareholder gain.

(b) Even if corporate profit and shareholder gain are not thereby enhanced, the corporation, in the conduct of its business:

(1) Is obliged, to the same extent as a natural person, to act within the boundaries set by law;

(2) May take into account ethical considerations that are reasonably regarded as appropriate to the responsible conduct of business; and

(3) May devote a reasonable amount of resources to public welfare, humanitarian, educational, and philanthropic purposes.<sup>121</sup>

The implications of ALI 2.01 are that other interests are intended to be served in addition to that of shareholders. In particular, Section 2.01 sets forth that even if no shareholder benefits or corporate gain inures, the corporation may consider reasonably appropriate ethical decisions and allocate a reasonable level of resources to “public welfare, humanitarian, education, and philanthropic purposes.”<sup>122</sup> Of course, in both situations, case law will determine how to measure reasonableness. Will that reasonableness somehow be based in effect upon shareholders profit or corporate benefit overall? It would not be surprising.

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118. *Dodge*, 170 N.W. at 684.

119. *Shlensky v. Wrigley*, 237 N.E.2d 776, 781 (Ill. App. Ct. 1968).

120. *Id.* at 778-79.

121. AM. LAW INST., PRINCIPALS OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS, § 2.01 (1992).

122. *Id.* § 2.01(b)(2)-(3).

Further, over half of the states in the United States have “other constituency statutes.”<sup>123</sup> These statutes permit the board of directors to consider the interest of other stakeholders than the shareholders.<sup>124</sup> These statutes would allow corporate management to consider the effect of corporate policy and decisions on other stakeholders, such as the immigrants working in facilities.<sup>125</sup>

Yet, despite the fact that the law allows corporate management to consider the conditions faced by immigrants working in facilities for the corporation, some corporate management continue to support working conditions that violate the law and propagate inhumane conditions. While corporations’ management are permitted to make socially responsible decisions with regards to how workers are treated, clearly, some management do not. What is needed is a new regulatory approach.

### III. RECOMMENDATION: A NEW APPROACH

In *Informality, Illegality, and Inequality*, Larson urged a new legal approach.<sup>126</sup> “For to consider how law should respond to informality is to face a basic question of political strategy in the brave new world of globalization...”<sup>127</sup> The process she argued for was regularization with progressively implemented regulation.<sup>128</sup> Regularization is not complete deregulation which would allow the informality to continue the illegal and inhumane treatment.<sup>129</sup> Regularization provides for a massaging of regulations to allow for flexible application of the law to the regulated corporations with informal conditions like the facilities where the immigrants work.<sup>130</sup> With this flexible approach, the goal will be to eventually, but not immediately, accomplish consistent, universal conformity through progressive regulatory application. Through progressive regulation, a better solution can be found to support rights and dignity for the immigrant laborers, maintain economic opportunity, and increase prosperity by responding to public opinion.<sup>131</sup>

Under Larson’s analysis of colonias, she analyzed an issue that universally applied to all colonia housing. This is not the case for companies that use refugee and immigrant workers because the illegal and inhumane conditions are

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123. COX & HAZEN, *supra* note 117, at 92.

124. JAMES D. COX & THOMAS LEE HAZEN, TREATISE ON THE LAW OF CORPORATIONS § 4:10, n.3 (3rd ed. 2012), *available at* Westlaw LAWOF CORP (indicating that a “state by state compilation of other-constituencies statutes” can be found at Steven M. H. Wallman, *The Proper Interpretation of Corporate Constituency Statutes and Formulation of Director Duties*, 21 STETSON L. REV. 163, 194-196 (1991)).

125. *See id.*

126. Larson, *supra* note 1, at 144-45.

127. *Id.* at 144.

128. *Id.*

129. *Id.* at 143.

130. *See id.* at 144.

131. *See generally* RILEY, *supra* 22, at 55 (“A better fit between employers and employees increases productivity and prosperity.”).

not universal. In fact, many corporations do employ refugees and immigrant workers in facilities in a conforming approach.<sup>132</sup> In this way, we know that economic opportunity and welfare for workers and companies may be achieved at the same time. The reason Larson opted for “flexible alternatives to accommodate and build on, rather than resist, informality. . . [was because she could not] support holding poor families hostage to their need for shelter while we struggle to force government to keep promises it no longer intends to honor.”<sup>133</sup>

Currently there are flexible regulations that some companies fulfill and through which immigrants achieve economic opportunity. This is evidenced by the fact that most companies do not treat immigrant workers illegally or inhumanely.<sup>134</sup> This is the story for the corporations, and the workers in the corresponding facilities, that do not conduct business informally. This article, and the corresponding application of Larson’s argument for progressive regulation, applies to corporations that conduct business, or cause business to be conducted, informally in the facilities. If those corporations were immediately subject to stepped-up regulation and scrutiny, the result may be loss of economic opportunity for the workers. If the cost to the corporation to conform immediately is prohibitive, it may cause the corporation to fail or find other less expensive options (i.e., outsourcing to the developing world).<sup>135</sup>

I urge progressive enforcement of an approach similar to that taken by Congress under Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Section 1502”) through which Congress mandated the U.S. Securities and Exchange Commission<sup>136</sup> to create final rules regarding the disclosure of companies’ use of conflict minerals from the Democratic Republic of Congo and neighboring countries.<sup>137</sup> The goal of Section 1502 is to promote peace by reducing trade and use of conflict minerals

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132. MORAN & PETSOD, *supra* note 21, at 2.

133. Larson, *supra* note 1, at 164.

134. MORAN & PETSOD, *supra* note 21, at 2.

135. See Larson, *supra* note 1, at 176 (“Government enforcement of unattainable standards burdens those already on the margins and increases reliance on informal solutions.”).

136. I recognize that the U.S. SEC may not be the ideal choice as a regulator either of conflict minerals or refugee/immigrant working conditions. That topic I reserve for separate discussion.

137. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §1502, 124 Stat. 2212, 2213 (2010) (to be codified at 15 U.S.C. 78m). Section 1502 added new section 13(p) to the Securities and Exchange Act of 1934. *Id.* §1502(b); Conflict Minerals, 77 Fed. Reg. 56,273, 52,275 (Sept. 12, 2012). The new rules cover minerals (including cassiterite, columbite-tantalite, gold, wolframite, certain derivatives of these minerals like tine, tantalum and tungsten), that are included in many common products, most particularly electronic components. Dodd-Frank Wall Street Reform and Consumer Protection Act §1502(e)(4); CTR. FOR AM. PROGRESS, *Conflict Minerals*, RAISE HOPE FOR CONGO (2012), <http://www.raisehopeforcongo.org/content/initiatives/conflict-minerals>.

that are believed to fund violent and deadly conflicts in the Democratic Republic of Congo and the neighboring countries.<sup>138</sup>

On August 22, 2012, the SEC adopted rules that require companies that use conflict minerals in the products they manufacture or contract to manufacture to conduct due diligence and make annual disclosures on the SEC's new Form SD.<sup>139</sup> The company must perform a reasonable country of origin search to determine if the conflict minerals: a) originated in the Democratic Republic of Congo or a neighboring country and b) did not originate from recycled or scrap sources.<sup>140</sup> If the company determines the minerals did not originate in the Democratic Republic of Congo or neighboring countries or did come from recycled or scrap sources, then the company must file a Form SD that describes the reasonable inquiry it conducted to determine country of origin and the results thereof.<sup>141</sup> If the company determined that it does use or contracts to use conflict minerals in its products, then the company must conduct heightened due diligence as to the source of the minerals and the chain of custody.<sup>142</sup> The due diligence must include an "independent private sector audit. . .in accordance with standards established by the Comptroller General of the United States."<sup>143</sup> Congress opted to use the securities laws to accomplish this end goal through the disclosure requirements.<sup>144</sup> Through making more information available to the public, Congress sought to "enhance transparency" and "help American consumers and investors make informed decisions."<sup>145</sup>

I recommend a very similar approach, using the SEC's disclosure requirements, to ensure that companies that manufacture in the United States positively monitor working conditions for workers or, if not, be subject to public opinion and legal ramifications through increased transparency. As in the regulation of conflict minerals, a company must monitor whether it hires or indirectly hires immigrant workers. If the company were to conduct an initial review and determine that in the process of manufacturing it hires or indirectly hires a majority of immigrant workers in facilities, then it must conduct an audit to determine if the facilities conduct operations in a legal and humane manner. The results of the findings would be filed with the SEC in a similar fashion to that for conflict minerals.

If this approach is adopted, the SEC has a rule making approach that echoes Larson's regularization. During the rule making process, the SEC

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138. See §1502(a); *see also* Conflict Minerals, 77 Fed. Reg. at 52,275 (providing a "Background and Summary").

139. Conflict Minerals, 77 Fed. Reg. at 56,362-63 (to be codified at 17 C.F.R. Pts. 240, 249(b)); *see also* Conflict Minerals, Exchange Act Release No. 34-67,716 (Aug. 22, 2012), available at <http://www.sec.gov/rules/final/2012/34-67716.pdf>.

140. Conflict Minerals, 77 Fed. Reg. at 56, 280.

141. *Id.* at 56,363.

142. *Id.*

143. *Id.*

144. *Id.* at 56,276.

145. 156 CONG. REC. S3976 (daily ed. May 19, 2010) (statement of Sen. Feingold).

receives comments on the rule while it is being drafted.<sup>146</sup> Further, the SEC has a comment period for each proposed rule set forth in the Proposing Release.<sup>147</sup> For instance, the Proposing Release for the conflict minerals rules occurred on December 15, 2010,<sup>148</sup> and provided for a comment period until January 31, 2011.<sup>149</sup> Based on requests, the SEC extended the comment period to March 2, 2011.<sup>150</sup> In addition, based on requests, on October 18, 2011, the SEC held a roundtable, open to the public<sup>151</sup> during which participants stated views and suggestions on the rulemaking.<sup>152</sup> The commentators included investors, issuers, human rights groups, and other constituencies.<sup>153</sup> Based on the

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146. See, e.g., Conflict Minerals, 77 Fed. Reg. at 56,276 n.17 (“See, e.g., letters from Aditi Mohapatra of Calvert Asset Management Company, Inc. on behalf of 49 investors, including the Social Investment Forum and Interfaith Center of Corporate Responsibility (Mar. 2, 2011) (“SIF I”); Boston Common Asset Management, LLC, Calvert Asset Management Co., Inc., Interfaith Center on Corporate Responsibility, Jesuit Conference of the United States, Marianist Province of the US, Mercy Investment Services, Inc., Missionary Oblates of Mary Immaculate, Responsible Sourcing Network, Sustainalytics, Trillium Asset Management, and Tri-State Coalition for Responsible Investment (Feb. 1, 2012) (“SIF II”); Calvert Investments (Oct. 18, 2011) (“Calvert”); General Board of Pension and Health Benefits of The United Methodist Church (Mar. 7, 2011) (“Methodist Pension”); State Board of Administration of Florida (Feb. 3, 2011) (“FRS”); and Teachers Insurance and Annuity Association and College Retirement Equities Fund (Mar. 2, 2011) (“TIAA-CREF”). See also letters from Catholic Relief Services (Feb. 8, 2011) (“CRS I”) (“We submit these comments with the hope the SEC will consider the need of investors to access information to make sound business decisions that reflect both their social and their financial concerns.”); Enough Project (Mar. 31, 2011) (“Enough Project II”) (stating that advancing the “goal of resolving a humanitarian crisis that continues to cause countless deaths and unimaginable suffering” is “of great interest to many, including investors”); Senator Richard J. Durbin and Representative Jim McDermott (Feb. 28, 2011) (“Sen. Durbin / Rep. McDermott”) (suggesting that the provision’s purposes were both to end conflict in the DRC and to provide current information for investors, and the latter purpose is identical to the purpose of requiring the disclosure of other information in an issuer’s the periodic reports) and Senator Patrick Leahy, Senator Christopher Coons, Congressman Howard Berman, Congressman Jim McDermott, Congressman Donald Payne, Congressman Gregory Meeks, and Congressmember Karen Bass (Feb. 16, 2012) (“Sen. Leahy et al.”) (asserting that an issuer’s conflict minerals information is “critical to both investors and to capital formation” because “when a publicly traded company relies on an unstable black market for inputs essential to manufacturing its products it is of deep material interest to investors”).

147. THEODORE S. LYNN, MICAH W. BLOOMFIELD, & DAVID W. LOWDEN, SEC RULEMAKING § 12:7 (2012), available at Westlaw SECREIT. See generally *How to Submit Comments*, U.S. SEC. & EXCH. COMM’N (Jan. 2, 2009), <http://www.sec.gov/rules/submitcomments.htm>.

148. Conflict Minerals, 75 Fed. Reg. 80,947 (proposed Dec.15, 2010).

149. Conflict Minerals, 77 Fed. Reg. at 55,277.

150. *Id.*

151. See *Roundtable Discussion on Conflict Minerals*, U.S. SEC. & EXCH. COMM’N (Oct. 18, 2011) (unedited transcript), <http://www.sec.gov/spotlight/conflictminerals/conflictmineralsroundtable101811-transcript.txt>.

152. Conflict Minerals, 77 Fed. Reg. at 56,277.

153. *Id.*

Roundtable, the SEC requested additional comments from the public.<sup>154</sup> Through this whole process, the SEC received

approximately 420 individual comment letters in response to the rules, with approximately 145 of those letters being received after the SEC Roundtable, and over 40 letters regarding the Conflict Minerals Statutory Provision prior to the proposed rules. . .[The S.E.C.] also received approximately 13,400 form letters from those supporting ‘promptly’ implementing a ‘strong’ final rule regarding the Conflict Minerals Statutory Provision, with approximately 9,700 of those letters requesting some specific requirements in the final rule, and two petitions supporting the proposed amendments with an aggregate of over 25,000 signatures.<sup>155</sup>

The SEC involves the public in the rule making procedure and delays implementation of rules. This approach is consistent with Larson’s recommendation for progressive regularization. With the Conflict Minerals Rules, the effective date was November 13, 2012, after the extended comment period, and required compliance with the final rule for the calendar year starting January 1, 2013, with the first disclosure reports due on May 31, 2014.<sup>156</sup> Further, the SEC acknowledged that compliance with the Rules would be burdensome and amended the Proposed Rules to respond to suggestions in the comments for decreasing the costs to the companies.<sup>157</sup> By allowing time for the corporations to become compliant, the SEC provides for progressive implementation.

While the SEC has traditionally not been an enforcer of peace and human rights, it has taken up the mantle delegated to it by Congress related to conflict minerals. A similar approach could be initiated by Congress and regulated by the SEC to manage the corporate responsibility for the rights and welfare of workers in facilities. Through regularized and progressive implementation of due diligence and disclosure requirements, this new approach would require corporations to, first, be informed about the conditions of the facilities, and second, to do something about it. Subject to the transparency of the disclosure requirements, the corporation would be held up to the scrutiny of popular opinion. Popular opinion is a very strong persuasive force for corporations since it does, in fact, affect corporate profit and common shareholder benefit.<sup>158</sup>

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154. *Id.*

155. *Id.* at 56,277-78 (footnotes omitted) (“The comment letters came from corporations, professional associations, human rights and public policy groups, bar associations, auditors, institutional investors, investment firms, United States and foreign government officials and other interested parties and stakeholders.”).

156. *Id.* at 56,274.

157. *Id.* at 56,301.

158. See generally Wolfgang G. Friedman, *Corporate Power: Government by Private Groups and the Law*, 57 COLUM. L. REV. 155 (1957). See Robert C. Blitt, *Beyond Ruggie’s Guiding Principles on Business and Human Rights: Charting an Embrasive Approach to*

## CONCLUSION

Many times, refugees and immigrants, even though a remarkably increasing part of the U.S. population, are not observed by the people around them.<sup>159</sup> It seems that this trend will continue as our economy requires more workers.<sup>160</sup> Similar to their likely invisibility, the illegal and inhumane conduct that occurs in the facilities takes place right under our noses, yet due to lack of transparency, the public remains relatively unaware.<sup>161</sup> Adopting Larson's terminology, the facilities where the refugees and other immigrants work is, in effect, localized globalization. In these facilities, due to economic need for immigrants and refugees to sustain themselves and some companies' exploitation of a vulnerable population, informality, illegality, and inequality have flourished.

Yet, despite these conditions, the facilities provide jobs when jobs are needed for refugees and other immigrants. In *Informality, Illegality, and Inequality*, Larson urged adoption of a new legal approach that provides flexibility and progressive implementation of laws that do not decrease opportunity for vulnerable populations. I urge that a similar approach should be taken to decrease illegality and inhumanity in facilities for refugees and other immigrants, yet still maintain job opportunities. Through the SEC rule-making authority, the public may be involved in the process of creating disclosure requirements that fulfill the necessary regulation but do not overburden the affected companies. The process I suggest will provide increased transparency into company conduct and, therefore, encourage corporate social responsibility. In this way, the law responds to a need and public opinion, yet it also leads the way to justice.

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*Corporate Human Rights Compliance*, 48 TEX. INT'L L.J. 33, 60 (2012), for an example of a brief discussion of the anticipated costs to the corporation due to litigation and public opinion in the realm of corporate social responsibility. See WILLIAM K. MUIR, JR., LAW AND ATTITUDE CHANGE (1984), for a general, yet related, discussion on the impact of public opinion on the Supreme Court. *But see* Arthur Acevedo, *Responsible Profitability? Not on My Balance Sheet!* 61 CATH. U. L. REV. 651 (2012).

159. PIPHER, *supra* note 8, at 56.

160. RILEY, *supra* note 22, at 69.

161. See Stephanie Richard, *State Legislation and Human Trafficking: Helpful or Harmful*, 38 U. MICH. J. L. REFORM 447, 450 (2005) (discussing human trafficking and exploitative labor).