

THE BUSINESS OF HUMAN TRAFFICKING: HOW COMBATING
HUMAN TRAFFICKING FROM A COMMERCIAL AND ECONOMIC
APPROACH COULD BE A SOURCE OF PROGRESS

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INTRODUCTION

Modern-day slavery, in the form of human trafficking, is a flourishing criminal enterprise deeply rooted in the exploitation and violation of fundamental human rights.¹ Victims of human trafficking are recruited or lured by traffickers and forced to perform labor against their will through mechanisms of force, threats, and coercion.² As the prevalence of trafficking crimes increases rapidly, traffickers persist in their ability to derive dramatically increasing financial profits from their crimes.³ The International Labor Organization⁴ (“ILO”) estimates that human trafficking in the form of forced labor generates \$150 billion in illegal profits annually, a number that has increased more than three times since 2005.⁵ Moreover, there are direct and indirect links connecting a significant amount of profit generated by businesses in the global economy to the trafficking and enslavement of human beings.⁶ Yet current policy discussions addressing the root causes of

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¹ *Federal Response to Human Trafficking*, U.S. DEP’T OF STATE, <https://www.state.gov/humantrafficking-about-human-trafficking/> (last visited Mar. 21, 2021).

² *What Is Human Trafficking?*, U.S. DEP’T OF HOMELAND SECURITY, <https://www.dhs.gov/blue-campaign/what-human-trafficking> (last visited Mar. 21, 2021).

³ Baylee Eby, *The Economics of Human Trafficking*, INST. FOR FAITH, WORK & ECON. (Apr. 12, 2016), <https://tifwe.org/the-economics-of-human-trafficking/>.

⁴ *About the ILO*, INT’L LAB. ORG., <https://www.ilo.org/global/about-the-ilo/lang--en/index.htm> (last visited Mar. 19, 2021) (discussing that the International Labor Organization is a tripartite U.N. agency that helps advance decent working conditions by setting labor standards and developing policies to promote fundamental rights at work).

⁵ *ILO says forced labour generates annual profits of US \$150 billion*, INT’L LAB. ORG. (May 20, 2014), https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_243201/lang--en/index.htm.

⁶ *Human Trafficking and Business: Good Practices to Prevent and Combat Human Trafficking*, UNITED NATIONS GLOBAL COMPACT 11 (July 12, 2010), <https://www.ilo.org/wcmsp5/groups/public/--->

human trafficking neither recognize the role of corporations in the criminal enterprise nor adequately address two primary drivers of trafficking crimes: high profits and low risks.

This Note challenges the prevailing approaches to human trafficking and offers a solution based on a commercial and economic framework aimed at deterring human trafficking, particularly forced labor, in businesses and economies. It argues that modern-day human trafficking is operating as a worldwide criminal industry, one that is deeply connected to, and in fact operates within, the globalized trade market. Therefore, efforts to dismantle the enterprise and mitigate the widespread illicit operations must consider the driving economic and financial forces sustaining human trafficking.

Furthermore, this Note illustrates that the rise of contemporary corporate global contracting systems creates barriers insulating corporate entities from liability for human trafficking under the current law.⁷ Future legislation must address these difficulties and reform the current level of culpability required to hold corporations liable for trafficking crimes. The businesses discussed in this Note are headquartered in the United States, but many of their supply chains include separate, foreign entities such as suppliers, manufacturers, and distributors.

Part I of this Note will provide a general framework for understanding human trafficking by laying out relevant statistics, describing legislative action in the United States, and discussing measures that business entities have taken to combat trafficking within their operations. Part II then examines the impact of economic forces on human trafficking as an industry, the role of corporations in the illicit market, and the link between revenue stemming from global trade and trafficking crimes. It demonstrates how attacking a corporation's ability to profit from, and escape liability for trafficking crimes could effectively mitigate the trafficking and enslavement of human beings. Part III argues that reforming the required level of criminal culpability for human trafficking to a "willful blindness" standard would more adequately deter corporate entities from directly and indirectly

ed_norm/---declaration/documents/publication/wcms_142722.pdf [hereinafter *Practices to Combat Human Trafficking*].

⁷ See Naomi Jiyoung Bang, *Justice for Victims of Human Trafficking and Forced Labor: Why Current Theories of Corporate Liability Don't Work*, 43 U. MEM. L. REV. 1047, 1049 (2013) [hereinafter *Justice for Victims of Human Trafficking*].

committing trafficking crimes. Additionally, imposing a lower level of criminal culpability would increase corporate accountability and enhance the efficacy of existing legal remedies like the Trafficking Victims Protection Act. It also analyzes corporate directors' fiduciary duties to monitor human trafficking violations⁸ and suggests that future legislation should impose an affirmative obligation on corporations to monitor their business operations for links to human trafficking and establish adequate incentives to do so.

I. UNDERSTANDING HUMAN TRAFFICKING

While formal definitions of “trafficking” can be narrow, this Note takes a broader approach by encompassing a wide range of exploitative labor and sex practices through the use of force, fraud, or coercion.⁹ Traffickers force their victims to perform work, against their free will, through physically and psychologically coercive means including sexual exploitation, forced labor, slavery, and slavery-like practices.¹⁰ The vast majority of human trafficking crimes ultimately supply financial benefits to businesses across a broad range of industries, including agriculture, construction, domestic work, manufacturing, mining, and utilities.¹¹

⁸ See Laura Ezell, *Human Trafficking in Multinational Supply Chains: A Corporate Director's Fiduciary Duty to Monitor and Eliminate Human Trafficking Violations*, 69 VAND. L. REV. 499, 509–11 (2019) [hereinafter *Human Trafficking in Multinational Supply Chains*].

⁹ See Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, art. 3, Nov. 15, 2000, T.I.A.S. No. 13, 127, 2237 U.N.T.S. 319 (“‘Trafficking in persons’ shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs The consent of a victim of trafficking in persons to the intended exploitation set forth [above] shall be irrelevant where any of the means set forth [above] have been used.”).

¹⁰ *Profits and Poverty: The Economics of Forced Labour*, INT'L LAB. ORG. 4 (May 20, 2014), https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_243391.pdf [hereinafter *Profits and Poverty*].

¹¹ *Id.*

A. Human Trafficking Statistics

The trafficking of persons is shadowed in secrecy, making it impossible to accurately measure how many people have fallen victim to the criminal enterprise. However, the ILO estimates that at least 40.3 million people have fallen victim to human trafficking worldwide.¹² While women and girls are primarily affected by the hidden criminal practice, men and boys still account for 45% of all victims.¹³ Incidents of human trafficking, whether forced labor or sexual exploitation, continue to rise despite increased international attention from states and non-governmental institutions.¹⁴

Of the estimated total number of trafficked victims, 90% are taken advantage of through forced sexual or labor exploitation in the global economy.¹⁵ The ILO estimates that the total worldwide profits generated from exploitation in the form of forced labor are \$150.2 billion per year, \$8 billion of which stems from traffickers' threats and coercion to pay little or no wages for the victims' work.¹⁶ Notably, many of the millions of individuals forced into labor throughout the world are employees of American businesses via global supply chains.¹⁷

A single company headquartered in the United States may operate in numerous countries worldwide, primarily through supply chains consisting of many separate entities that provide services related to the production of

¹² *Global Estimates of Modern Slavery: Forced Labour and Forced Marriage*, INT'L LAB. ORG. 9 (Sept. 19, 2017), https://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/documents/publication/wcms_575479.pdf [hereinafter *Global Estimates of Modern Slavery*].

¹³ *ILO Global Estimate of Forced Labor Executive Summary*, INT'L LAB. ORG. 1 (June 1, 2012), https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_181953.pdf [hereinafter *ILO Summary*].

¹⁴ *ILO Action Against Trafficking in Human Beings*, INT'L LAB. ORG. 13 (Feb. 12, 2008), <https://www.traffickingmatters.com/wp-content/uploads/2018/04/2008-ILO-Action-Against-Trafficking-Report.pdf> [hereinafter *ILO Action*].

¹⁵ *ILO Summary*, *supra* note 13.

¹⁶ *Profits and Poverty*, *supra* note 10, at 13.

¹⁷ *2020 List of Goods Produced by Child Labor or Forced Labor*, DEP'T LAB. 42 (2020), https://www.dol.gov/sites/dolgov/files/ILAB/child_labor_reports/tda2019/2020_TVPRAList_Online_Final.pdf [hereinafter *Goods Produced by Forced Labor*] (illustrating that the U.S. Bureau of International Labor Affairs estimates that, as of September 30, 2020, 155 goods from seventy-seven countries are produced by child labor or forced labor in violation of the TVPRA and, notably, chocolate, batteries, and soap are among the products made by child or forced labor in foreign countries that American consumers eventually purchase).

goods.¹⁸ American companies, particularly those that employ other entities in the production and manufacturing processes, are at a higher risk of acquiring goods through forced labor, implicating them in human trafficking crimes.¹⁹ Future legislation must hold businesses linked to human trafficking through their supply chains liable for their role in the criminal scheme, even if they only benefit indirectly or even unknowingly.

Walmart serves as a case in point, demonstrating the indirect role American corporations play in facilitating human trafficking.²⁰ In 2016, Cambodian villagers filed a lawsuit against four U.S. and Thai companies, accusing them of trafficking and making them work in forced labor conditions in a Thai seafood factory.²¹ Retail giant Walmart purchased shrimp and other seafood from the companies allegedly engaged in human trafficking and forced labor practices.²² While Walmart was never directly implicated in the crimes, many consumers and labor rights activists pressured the company to use its purchasing power to demand better labor conditions and ensure that its suppliers abide by human rights standards.²³

B. Human Trafficking Legislation

There have been various federal efforts to curb trafficking in the United States over the past two decades; still, the most significant was the enactment of the Trafficking Victims Protection Act (“TVPA”).²⁴ Passed in 2000, the TVPA was the first comprehensive federal law designed to combat human trafficking.²⁵ The TVPA criminalizes a broad range of trafficking-related

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Ratha v. Patthana Seafood Co.*, No. CV 16-4271-JFW (ASx), 2016 WL 11020222, at *1 (C.D. Cal. Nov. 9, 2016).

²¹ *Id.*

²² John Sifton, *Walmart’s Human Trafficking Problem*, HUM. RTS. WATCH (Sept. 17, 2012, 5:43 PM), <https://www.hrw.org/news/2012/09/17/walmarts-human-trafficking-problem>.

²³ *Id.*

²⁴ Victims of Trafficking and Violence Protection Act of 2000, H.R. 3244, 106th Cong. (2000) (enacted).

²⁵ See *Corporate Liability for Forced Labour and Human Trafficking*, INST. FOR HUMAN RIGHTS & BUS. 17 (Oct. 24, 2016), https://www.ihrb.org/uploads/reports/IHRB%2C_Corporate_Liability_for_Forced_Labour_and_Human_Trafficking%2C_Oct_2016.pdf [hereinafter *Corporate Liability for Forced Labour*]; see also *The 2019 Trafficking Victims Protection Reauthorization Act: A Topical Summary and Analysis of Four Bills*, POLARIS PROJECT (Jan. 14, 2020), <https://polarisproject.org/wp->

activities domestically and abroad.²⁶ The legislation promotes a policy of the “3 Ps”: “[p]rosecuting traffickers,” “[p]reventing trafficking,” and “[p]rotecting victims and survivors of trafficking.”²⁷ Since the passage of the TVPA, Congress and several states have taken steps to attack the human trafficking infrastructure.²⁸ Congressional tactics have focused on targeting specific corporations and their supply chains and criminalizing human trafficking and forced labor more generally.²⁹

With respect to corporate liability for human trafficking, Congress enacted critical amendments to the TVPA in 2008 when it passed the William Wilberforce Trafficking Victims Protection Reauthorization Act (“TVPRA”).³⁰ The amendments created a criminal offense of “knowingly” benefiting from forced labor,³¹ authorized a civil cause of action for victims,³² and caused mandatory restitution and forfeiture.³³ Under the TVPRA, a victim may bring a civil action against “whoever knowingly benefits . . . from participation in a venture which that person knew or should have known has engaged in” human trafficking.³⁴ The TVPRA imposes criminal liability upon corporations that “knowingly” benefi[t] (“financially or by receiving anything of value”) from human trafficking in “reckless disregard” of the fact that [their business] venture[s] engaged in such [exploitation].³⁵

Furthermore, the TVPRA created extraterritorial jurisdiction over trafficking offenses committed overseas.³⁶ This jurisdictional expansion empowers courts to hold corporations headquartered in the United States

content/uploads/2020/01/Polaris-TVPRA-2019-Analysis.pdf (illustrating that the TVPA has had four separate reauthorizations since it was passed—in 2003, 2005, 2008, and 2013).

²⁶ See *Corporate Liability for Forced Labour*, *supra* note 25, at 17; see also POLARIS PROJECT, *supra* note 25, at 35.

²⁷ See *Corporate Liability for Forced Labour*, *supra* note 25, at 17.

²⁸ *Id.* at 17–18.

²⁹ *Id.* at 19–23.

³⁰ See William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (codified as amended in scattered sections of 18 U.S.C.) [hereinafter Wilberforce Act].

³¹ *Id.* at 5068 (amending 18 U.S.C. § 1589).

³² *Id.* at 5067 (amending 18 U.S.C. § 1595).

³³ *Id.* (amending 18 U.S.C. § 1593(b)).

³⁴ *Id.* (amending 18 U.S.C. § 1595(a)).

³⁵ *Id.* at 5070 (amending 18 U.S.C. § 1593A).

³⁶ *Id.* at 5071 (amending 18 U.S.C. § 1596).

criminally liable for human trafficking even in circumstances when the exploitation occurs abroad or when the direct perpetrator is a separate legal entity in the corporation's supply chain.³⁷

C. Shortcomings in Current Human Trafficking Legislation

While the TVPRA provides important civil and criminal provisions intended to counter human trafficking, gaps remain in the availability of critical protections and interventions.³⁸ The anti-trafficking advocacy group, Polaris Project, rates states based on whether they have passed laws that effectively combat trafficking, punish traffickers, and support survivors.³⁹ According to their rating system, thirty-nine states have enacted "significant laws to combat human trafficking," while nine states and the District of Columbia should take more steps to improve and implement their laws.⁴⁰ Two states, North Dakota and South Dakota, have made only "nominal efforts" to combat human trafficking and must strengthen their laws.⁴¹

The TVPRA's current standard of culpability required to impose criminal and civil liability on businesses indirectly involved in human trafficking is too challenging to meet.⁴² Since 2003, trafficking victims have filed only 152 cases nationwide, and only eighty-seven of those cases include corporate entities as defendants.⁴³ Additionally, the restitution mandate in the TVPRA is not consistently enforced, particularly in cases of sex trafficking.⁴⁴ The shortcomings in anti-trafficking legislation and the scarcity of criminal

³⁷ *Id.*

³⁸ See *A Look Back: Building a Human Trafficking Legal Framework*, POLARIS PROJECT (Sept. 23, 2019), <https://polarisproject.org/wp-content/uploads/2019/09/2014-Look-Back.pdf>.

³⁹ *Id.*

⁴⁰ See *2014 State Ratings on Human Trafficking Laws*, POLARIS PROJECT (Sept. 1, 2014), <https://polarisproject.org/wp-content/uploads/2019/09/2014-State-Ratings.pdf>.

⁴¹ *Id.*

⁴² See Mohamed Y. Mattar, *Interpreting Judicial Interpretations of the Criminal Statutes of the Trafficking Victims Protection Act: Ten Years Later*, 19 AM. U. J. GENDER SOC. POL'Y & L. 1247, 1295 (2011) (explaining that the TVPA's definition of trafficking in persons focuses on "illegal means," which is narrowly defined under the Act).

⁴³ See Martina E. Vandenberg, *Ending Impunity, Securing Justice*, HUM. TRAFFICKING PRO BONO LEGAL CTR., at 13 (Dec. 15, 2015), <https://htlegalcenter.org/wp-content/uploads/Ending-impunity-securing-justice.pdf> [hereinafter *Ending Impunity*].

⁴⁴ *How to Dismantle the Business of Human Trafficking*, HUM. RTS. FIRST, at 5 (Nov. 24, 2015), <https://www.humanrightsfirst.org/sites/default/files/HRF-Dismantle-Trafficking-Blueprint.11.24.15.pdf>.

prosecutions effectively results in impunity for corporations linked to human trafficking crimes. Consequently, the prospect of financial benefits gained from the use of trafficking and the seemingly low risk of criminal penalties bolster willing perpetrators and prompt the multinational corporations receiving benefits to turn a blind eye to the crimes.

The unsettling reality is that many businesses across the United States and the world are entrenched in the multibillion-dollar human trafficking industry.⁴⁵ Despite this fact, most corporations have not taken adequate steps to integrate measures that deter trafficking crimes and increase awareness of trafficking risks into their corporate responsibility programs.⁴⁶ The perception of corporate roles is beginning to slowly change as employers and businesses recognize that they have an opportunity to play a pivotal role in the fight against human trafficking.⁴⁷ However, because only a few corporations have made any meaningful changes, the need to strengthen corporate monitoring and prevention efforts remains.⁴⁸

II. CORPORATE BENEFIT FROM HUMAN TRAFFICKING

Human trafficking is not only a profitable crime and becoming more widespread, but it is also a worldwide industry fueled by the globalization of corporate entities.⁴⁹ The ILO estimates that out of the 24.9 million victims of forced labor, traffickers exploit 16 million in the global economy.⁵⁰ The business decisions made by multinational corporations and the entities in their supply chains have distinct but closely-related effects that exacerbate the human trafficking industry. Anti-trafficking solutions employing a commercial and economic framework, such as the supply-and-demand

⁴⁵ See *Practices to Combat Human Trafficking*, *supra* note 6, at 11; see also *Combating Forced Labour: A Handbook for Employers & Business*, INT'L LAB. ORG., at 9 (June 25, 2015), https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_101171.pdf [hereinafter *Combating Forced Labour*] (explaining that profits generated by the use of forced labor in the private economy worldwide is estimated to be \$150 billion per year).

⁴⁶ See generally *Practices to Combat Human Trafficking*, *supra* note 6, at 11; see also *Combating Forced Labour*, *supra* note 45, at 9.

⁴⁷ See generally *Combating Forced Labour*, *supra* note 45, ch. 5; see also *Goods Produced by Forced Labor*, *supra* note 17, at 40.

⁴⁸ See *Ending Impunity*, *supra* note 43, at 13.

⁴⁹ See *ILO Action*, *supra* note 14, at 17.

⁵⁰ *Global Estimates of Modern Slavery*, *supra* note 12, at 10.

theory, are equipped to delineate the root causes of forced labor in the global market.⁵¹

A. Human Trafficking in the Private Economy

The increase in the flow of goods, services, capital, and people across international boundaries due to globalization prompted large, consumer-based companies to operate their businesses on an international scale.⁵² Global market expansion exposes corporate entities to a wide range of new markets, prompting the rapid formation of new business relationships among multinational companies and smaller, often foreign, entities operating as producers, manufacturers, and distributors in sourcing consumer goods.⁵³ As a result, competition among increasingly large chains of suppliers spanning multiple countries with radically different legal, regulatory, and human rights practices now dominate the world economy.⁵⁴ The fragmentation of the production process and competitive commercial landscape created by market globalization foster an environment that presents serious human rights risks and drives human trafficking.⁵⁵

The subsequent rise in competition among new market participants has elevated consumers' demands and imposed powerful economic forces on the business decisions of multinational corporations and their suppliers.⁵⁶ The companies directing supply chains employ business models characterized by fast, high-turnover production and seek strategies to reduce costs associated with production as a way to maximize profit and maintain competitive prices.⁵⁷ These profits serve as a driving force behind contemporary international trade and influence multinational corporations in choosing

⁵¹ See Elizabeth M. Wheaton, Edward J. Schauer & Thomas V. Galli, *Economics of Human Trafficking*, 48 INT'L ORG. FOR MIGRATION 114, 123 (2010) [hereinafter *Economics of Human Trafficking*].

⁵² See generally Thomas Hatziaronoglou, *Globalisation and Competitiveness: Relevant Indicators*, ORG. FOR ECON. COOP. & DEV. (Jan. 1, 1996), <https://www.oecd-ilibrary.org/docserver/885511061376.pdf?expires=1643947064&id=id&accname=guest&checksum=42200A3D362B5DA6AD21614673EFE4A8> [hereinafter *Globalization and Competitiveness*].

⁵³ See *id.*

⁵⁴ See *Corporate Liability for Forced Labour*, *supra* note 25, at 6.

⁵⁵ *Id.*

⁵⁶ See *Globalization and Competitiveness*, *supra* note 52.

⁵⁷ See *Economics of Human Trafficking*, *supra* note 51, at 130.

suppliers to source their goods and, importantly, setting the price these downstream entities will receive.⁵⁸

Multinational corporations hold enormous market power, enabling them to consistently drive down production costs by demanding from their suppliers even lower prices at “razor thin margins.”⁵⁹ Armed with the power to set prices and make decisions about suppliers, major firms dictate both value distribution and the profit margins allocable to entities along the supply chain.⁶⁰ In other words, suppliers not only face pressure from inherent market competition, but also from top-tier entities that shift every charge, risk, and penalty associated with the cost of production down the supply chain. Confronted by demands for cost reduction and the need to maintain their operations, manufacturers are forced to either accept the top-tier entities’ terms or be replaced.⁶¹

The downward pressure from multinational companies causes suppliers to seek ways in which they can offer the lowest price to the top-tier corporations.⁶² As labor is usually the largest expense for manufacturers, these businesses resort to lowering their labor costs and seek trafficked individuals as the cheapest source of labor.⁶³ Entities in tiers below the consumer-facing companies employ exploitative practices to lower their cost of labor and, consequently, lower production costs for multinational corporations. The primary methods by which suppliers reduce labor costs include not paying the promised wage, paying below the minimum wage, and providing substandard accommodations for workers.⁶⁴ Suppliers also respond to commercial pressures by configuring their business models directly around forced labor practices such as debt bondage, forced overtime, illegal wage deductions, and physical, psychological, or other forms of coercion to further lower labor costs.⁶⁵

⁵⁸ See Genevieve LeBaron et al., *Confronting root causes: forced labour in global supply chains*, OPENDEMOCRACY (Mar. 19, 2019, 4:58 PM), <https://www.opendemocracy.net/en/beyond-trafficking-and-slavery/confronting-root-caus-5/#> [hereinafter *Root Causes*].

⁵⁹ *Id.* at 18.

⁶⁰ *Id.* at 43.

⁶¹ *Id.*

⁶² See *Economics of Human Trafficking*, *supra* note 51, at 129.

⁶³ *Id.* at 128.

⁶⁴ *Root Causes*, *supra* note 58, at 44.

⁶⁵ *Id.*

The financial benefits achieved through trafficked individuals in global supply chains motivate large corporations to turn a blind eye to illicit activities within their operations.⁶⁶ The Coalition of Immokalee Workers, a community-based worker organization, evidences this relationship between consumer-facing businesses and forced labor in examining the practice throughout farms in Florida.⁶⁷ According to their study, the farms require their employees to work long hours in poor working conditions for meager wages or no pay at all.⁶⁸ The farms imposing these exploitative labor practices can simultaneously forego the costs of hiring and providing adequate accommodations and wages for their workers, as well as generate a higher profit for the major supermarkets ultimately supplied with the goods.⁶⁹

Corporations attempt to avoid liability for the crimes of entities in their supply chains by shifting the blame onto their overseas suppliers and subcontractors, claiming that they have no knowledge of the illicit practices and no control over the working conditions.⁷⁰ A recent report from the Australian Strategic Policy Institute (“ASPI”) illustrates the pervasion of human trafficking in supply chains and offers evidence of forced labor in large American companies’ supply chains.⁷¹ According to the study, factories in China hired to manufacture shoes for Nike and technological components for Apple employ workers under forced labor conditions.⁷² ASPI identified numerous other American companies “potentially directly or indirectly benefiting” from abusive labor transfer programs in China, including Amazon, General Motors, and Google.⁷³ The exploitative labor transfer scheme relied on the detainment and forced relocation of tens of thousands

⁶⁶ See *Human Trafficking in Multinational Supply Chains*, *supra* note 8, at 507.

⁶⁷ *Harvard Business Review: The Fair Food Program is among the 15 “most important social-impact success stories of the past century,”* COALITION IMMOKALEE WORKERS (Aug. 25, 2017), <https://ciw-online.org/about/>.

⁶⁸ See *id.*

⁶⁹ See *Human Trafficking in Multinational Supply Chains*, *supra* note 8, at 507; see also *Economics of Human Trafficking*, *supra* note 51, at 124, 129–30.

⁷⁰ See *Justice for Victims of Human Trafficking*, *supra* note 7, at 1048–49; see also *Human Trafficking in Multinational Supply Chains*, *supra* note 8, at 517.

⁷¹ See Vicky Xiuzhong Xu et al., *Uyghurs for sale: ‘Re-education,’ forced labour and surveillance beyond Xinjiang*, AUSTRALIAN STRATEGIC POL’Y INST. (Mar. 1, 2020), <https://ad-aspi.s3.ap-southeast-2.amazonaws.com/2021-10/Uyghurs%20for%20sale%20OCT21.pdf?VersionId=zIRFV8AtLg1ITtRpzBm7ZcfnHKm6Z0Ys>.

⁷² *Id.* at 4.

⁷³ *Id.* at 5.

of individuals to Chinese factories operated by supplier entities, where traffickers forced them to work for little or no pay.⁷⁴ Ultimately, the consumer-facing corporations headquartered in the United States financially benefit from their subcontractors' use of forced labor because the illicit practices lower the cost of production, thereby increasing profit.⁷⁵

B. Corporate Accountability for Human Trafficking

Addressing the corporate demand for trafficked individuals and the underlying economic mechanisms that drive human trafficking in the global market situates trafficking as, among other things, a problem of corporate accountability.⁷⁶ Instead of simply shifting liability to subcontractors and foreign supply chain entities, large-scale corporations must take accountability for their role in the trafficking industry.⁷⁷ Both small, local networks and large multinational corporations play a role in advancing human trafficking crimes in the global market.⁷⁸ A single corporation's primary exposure to human trafficking is through the recruitment of agency workers and the actions of employment agencies that supply workers to subcontractors in their supply chains.⁷⁹ Corporations can be indirectly implicated in trafficking in this way by sourcing goods that trafficked individuals produce.⁸⁰

The coffee industry exemplifies the indirect link between American corporations and forced labor crimes.⁸¹ The U.S. Department of Labor's Bureau of International Labor Affairs reports widespread labor violations and evidence of forced labor in coffee bean production.⁸² The United States is the largest importer of coffee beans globally; however, before coffee goods reach consumers, millions of individuals employed by American

⁷⁴ *Id.* at 4.

⁷⁵ See *Economics of Human Trafficking*, *supra* note 51, at 128.

⁷⁶ *ILO Action*, *supra* note 14, at 6.

⁷⁷ *Id.*

⁷⁸ *An Introduction to Human Trafficking: Vulnerability, Impact and Action*, UNITED NATIONS OFF. ON DRUGS & CRIME, at 96 (2008), https://www.unodc.org/documents/human-trafficking/An_Introduction_to_Human_Trafficking_-_Background_Paper.pdf.

⁷⁹ *Corporate Liability for Forced Labour*, *supra* note 25, at 5.

⁸⁰ See *id.*

⁸¹ *Goods Produced by Forced Labour*, *supra* note 17, at 10.

⁸² See *id.* at 9–10.

corporations' supply chain entities pick and process the beans.⁸³ There is ample evidence that the workers employed by these supply chain entities face abusive labor conditions.⁸⁴ In 2018, the Brazilian government published reports illustrating evidence of forced labor on plantations where Starbucks, an American company, purchased its coffee beans.⁸⁵ Brazilian labor inspectors discovered that the farms forced employees to work up to fourteen-hour shifts under degrading conditions that lacked proper sanitation facilities and housing.⁸⁶

“[T]he recruitment, transport, harboring, or receipt of a person for the purpose of exploitation” can serve as a direct link between businesses and human trafficking crimes.⁸⁷ In 2011, more than 350 Filipino teachers filed a lawsuit against a teacher recruiting service in the United States, alleging that the company and its officers engaged in forced labor practices in violation of the TVPRA.⁸⁸ The plaintiffs asserted that after they made substantial investments to move to the United States, the recruiters forced them to pay additional fees and confiscated their passports and visas until they paid.⁸⁹ The court held that the plaintiffs' allegations of threats and fraud sufficiently alleged that the defendants violated the TVPRA.⁹⁰ The case went to trial, and a jury found the labor recruiter guilty, ordering the company to pay \$4.5 million to the teachers.⁹¹

⁸³ *Id.* at 10.

⁸⁴ *Id.*

⁸⁵ Anna Canning, *Starbucks has a Slave Labor Problem*, FAIR WORLD PROJECT (June 17, 2019), <https://fairworldproject.org/starbucks-has-a-slave-labor-problem/>. See also Daniela Penha, *Slave labor found at Starbucks-certified Brazil coffee plantation*, MONGABAY (Sept. 18, 2018), <https://news.mongabay.com/2018/09/slave-labor-found-at-starbucks-certified-brazil-coffee-plantation/>.

⁸⁶ Daniela Penha, *Slave labor found at Starbucks-certified Brazil coffee plantation*, MONGABAY (Sept. 18, 2018), <https://news.mongabay.com/2018/09/slave-labor-found-at-starbucks-certified-brazil-coffee-plantation/>.

⁸⁷ *Practices to Combat Human Trafficking*, *supra* note 6, at 11.

⁸⁸ *Nunag-Tañedo v. E. Baton Rouge Par. Sch. Bd.*, 790 F. Supp. 2d. 1134, 1138 (C.D. Cal. 2011).

⁸⁹ *Id.* at 1144–45.

⁹⁰ *Id.* at 1143.

⁹¹ *Mairi Nunag-Tañedo et al. v. East Baton Rouge Parish School Board et al.*, SOUTHERN POVERTY L. CTR., <https://www.splcenter.org/seeking-justice/case-docket/mairi-nunag-tañedo-et-al-v-east-baton-rouge-parish-school-board-et-al> (last visited Mar. 21, 2021).

III. A NEW APPROACH TO CORPORATE HUMAN TRAFFICKING LIABILITY

Due to the TVPRA's applicability to corporate entities through the actions of their associated entities, corporate directors should implement systems to oversee and monitor supply chains to eliminate and prevent trafficking and exploitative labor practices.⁹² However, human trafficking still pervades global production and manufacturing processes despite the TVPRA's provisions.⁹³ Current human trafficking legislation does not adequately hold corporations liable for their crimes. Moreover, corporations benefiting from forced labor lack meaningful incentives to monitor their supply chains. Corporate entities continue to sustain human trafficking crimes due to the difficulty of holding corporate defendants directly liable under the TVPRA and the current legislation's lack of a sufficient incentive structure for corporations to monitor their labor conditions.⁹⁴

A. Limitations for Corporate Accountability

Since the TVPA's 2003 addition of a civil remedy for human trafficking, civil litigators, mainly trafficking victims, have filed only 152 cases alleging forced labor.⁹⁵ Notably, only 87 of those cases include corporate entities as defendants.⁹⁶ Prosecutors have used the financial benefit provisions of the 2008 TVPRA even less frequently—since 2008, only 44 published cases even cited the financial benefit provision.⁹⁷ Moreover, foreign victims of

⁹² Wilberforce Act, *supra* note 30, at 5071–72 (amending 18 U.S.C. § 1596). See *Corporate Liability and Human Trafficking*, HUM. RTS. FIRST, at 1–2 (Dec. 9, 2015), <https://www.humanrightsfirst.org/sites/default/files/HRFCorporateLiabilityTraffickingreport.pdf> [hereinafter *Corporate Liability and Human Trafficking*] (explaining that potential corporate liability for supply-chain trafficking should result in “companies [that are] engaged in businesses where trafficking is known to occur [being] vigilant in investigating their suppliers, rooting out the problem at its source, and establishing solid prevention policies and practices”).

⁹³ Naomi Jiyoung Bang, *Navigating the Complexities of Corporate Liability in Human Trafficking and Forced Labor Cases*, TEX. B. J., at 767 (Nov. 2012), https://www.texasbar.com/AM/Template.cfm?Section=Texas_Bar_Journal&Template=/CM/ContentDisplay.cfm&ContentID=20266.

⁹⁴ Sarah C. Pierce, *Turning a Blind Eye: U.S. Corporate Involvement in Modern Day Slavery*, 14 J. GENDER RACE & JUST. 578–79, 509 (2011) [hereinafter *Turning a Blind Eye*] (explaining that few trafficking cases are ever prosecuted).

⁹⁵ *Ending Impunity*, *supra* note 43, at 13.

⁹⁶ *Id.*

⁹⁷ According to a Westlaw Edge search, since 2008, only forty-four cases were brought citing § 1595 and mentioning the “knowingly benefits, financially” language.

human trafficking face increasingly limited, challenging, and expensive avenues to pursue their claims.⁹⁸

The scarcity of cases brought under the TVPRA illustrates how traffickers are still benefiting from their participation in the human trafficking market.⁹⁹ Current trafficking laws are too weak to impose adequate penalties that deter traffickers and outweigh the benefits they gain from participating in the crime.¹⁰⁰ The federal government should increase its efforts in prosecuting corporations that they find indirectly linked to trafficking through their supply chain entities.¹⁰¹ Such action would increase the stigma associated with trafficking crimes and decrease the demand for trafficked individuals.¹⁰²

The significant limitations in holding corporations liable for human trafficking crimes are in part due to current laws surrounding federal corporate liability.¹⁰³ Contemporary forms of federal corporate liability law provide that corporations can “be held liable for crimes committed by employees while acting in the scope of their employment with the intent to benefit the employer.”¹⁰⁴ The law requires proof that the person or entity that committed the crime is an agent of the corporation for a court to hold a corporation liable for the agent’s actions.¹⁰⁵ Moreover, there must be evidence that the corporation consented to the subcontractor acting on the corporation’s behalf and that the subcontractor was subject to its control to prove that a subcontractor is an agent of the corporation.¹⁰⁶ Often, the corporation does not oversee or manage the subcontractor’s operations, but rather the subcontractor simply sells its services to the corporation.¹⁰⁷ Therefore, it is difficult to prove that the subcontractor was subject to the

⁹⁸ *Justice for Victims of Human Trafficking*, *supra* note 7, at 1049.

⁹⁹ See Morgan Brown, *Targeting Demand: A New Approach to Curbing Human Trafficking in the United States*, 11 RICH. J. GLOBAL L. & BUS. 357, 368 (2012).

¹⁰⁰ *See id.*

¹⁰¹ *See id.* at 379 (suggesting that the federal government should focus on “prosecuting the clients of individuals trafficked into sexual exploitation”).

¹⁰² *Id.*

¹⁰³ *Turning a Blind Eye*, *supra* note 94, at 589–90.

¹⁰⁴ *Id.* (quoting Harvey L. Pitt & Karl A. Groskaufmanis, *Minimizing Corporate Civil and Criminal Liability: A Second Look at Corporate Codes of Conduct*, 78 GEO. L.J. 1559, 1570 (1990)).

¹⁰⁵ *Id.* at 590.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

corporation's control, particularly when the corporation only instructs the subcontractor what to do and not how to do it.¹⁰⁸

B. Transforming the Legal Standard under the TVPRA

Perhaps the most significant flaw in the TVPRA is that the legislation only holds liable individuals or entities that “knowingly benefit” from human trafficking crimes.¹⁰⁹ The “knowingly” standard requires proof that the corporation had “actual knowledge” of the benefit gained from trafficking to be held liable.¹¹⁰ This provision sets forth an incredibly high standard that, given the rise in corporations with distant supply chains, is insufficient to allow the statute to reach corporations. It is nearly impossible to prove that a corporate entity had actual knowledge of its subcontractors' wrongful conduct because of its ability to distance itself from the crimes by pointing to its foreign supply chain entities.¹¹¹

The TVPRA further provides that an individual or entity that “knowingly benefits . . . from participation in a venture which has engaged in” human trafficking may be held liable even if they are “in reckless disregard of the fact that the venture has engaged in such violation.”¹¹² In other words, the TVPRA imposes liability on corporations that proceed to do business with entities in their supply chains and business operations with a conscious awareness that these entities are engaged in human trafficking.¹¹³ Even with the addition of the “reckless disregard” provision, many corporations can escape liability for trafficking crimes.¹¹⁴ For example, as the statutory scheme stands, courts cannot hold liable a corporation that turns a blind eye to the human trafficking crimes committed by the entities and subcontractors in its supply chains.

¹⁰⁸ *Id.*

¹⁰⁹ Wilberforce Act, *supra* note 30, at 5070 (amending 18 U.S.C. § 1593A).

¹¹⁰ *Id.*

¹¹¹ *Turning a Blind Eye*, *supra* note 94, at 589.

¹¹² Wilberforce Act, *supra* note 30, at 5070 (amending 18 U.S.C. § 1593A).

¹¹³ See *City of Jackson v. Calcote*, 910 So. 2d 1103, 1110 (Miss. Ct. App. 2005) (quoting *Mississippi Dept. of Public Safety v. Durn*, 861 So. 2d 990, 995 (Miss. 2003) (“We find reckless disregard when the conduct involved evinced not only some appreciation of the unreasonable risk involved, but also a deliberate disregard of that risk and the high probability of harm involved.”)).

¹¹⁴ See Wilberforce Act, *supra* note 30, at 5070 (amending 18 U.S.C. § 1593A).

Congress should amend the TVPRA to hold liable all corporations “willfully blind” to the benefits they gain from the human trafficking crimes committed by their subcontractors and supply chain entities.¹¹⁵ Imposing a “willful blindness” level of criminal culpability would open the door to increased corporate liability by only requiring that “reasonable inferences support a finding that [a corporation’s] failure to investigate is equivalent to burying one’s head in the sand.”¹¹⁶ In effect, the legislative reform would impose an affirmative obligation on corporations to become aware of, or actively monitor, trafficking within their business operations and the benefits they receive from exploitative practices. Regardless of whether or not the corporation had actual knowledge or conscious awareness that the violations existed, companies that fail to observe the criminal activities of the entities they are in business with could be held criminally and civilly liable.

The “willful blindness” standard would incentivize corporations to monitor their supply chains for indications of trafficked labor to avoid legal and financial consequences for human trafficking crimes.¹¹⁷ Moreover, it would deter businesses from contracting with suspicious entities due to the lower level of proof required to impose liability compared to the current standard in the TVPRA. It would also give plaintiffs and prosecutors a better opportunity to reach corporations under the TVPRA. It would simply require prosecutors to find employees of a corporation that dealt with the subcontractor or supply chain entity while remaining consciously separate from the benefits the corporation gained from their labor practices, rather than having to prove an employee’s actual knowledge or awareness of such benefits.

¹¹⁵ See *Turning a Blind Eye*, *supra* note 94, at 590 (explaining that federal courts have applied a “willful blindness” doctrine to corporations in various contexts, holding a corporation criminally liable if it consciously disregards criminal activity).

¹¹⁶ See *United States v. Butler*, 646 F.3d 1038, 1041 (8th Cir. 2011) (quoting *United States v. Chavez-Alvarez*, 594 F.3d 1062, 1067 (8th Cir. 2010)) (holding that the willful blindness doctrine is an exception to the requirement of actual knowledge in a bank fraud case).

¹¹⁷ See *Corporate Liability and Human Trafficking*, *supra* note 92, at 18 (suggesting that directors may have a duty to monitor for human trafficking).

C. Incorporating Corporate Directors' Fiduciary Duties

Future legal consequences for corporate human trafficking crimes should also relate to a corporate director's fiduciary duty to make informed decisions in good faith.¹¹⁸ Under the *Caremark* precedent, a corporate director's failure to establish or have in place a "reasonable information and reporting system" may demonstrate a lack of good faith, which exposes a director to liability.¹¹⁹ In the context of *Caremark*'s requirement that corporate directors make "a good faith effort to oversee the company's operations," directors could find themselves liable for breach of their fiduciary duties for failing to comply with the proposed "willful blindness" standard of the TVPRA.

Human trafficking legislation should focus on incorporating a corporate director's fiduciary duty of good faith into a corporation's responsibility to comply with the TVRPA, particularly the proposed "willful blindness" standard. This paradigm-shift would strengthen the affirmative obligation on companies to monitor the labor conditions of the entities that make up their supply chains and to take action to mitigate violations by imposing a higher risk of liability on individual corporate directors.¹²⁰ The provision should specifically require independent supply chain audits, workplace monitoring, and the strengthening of mechanisms through which businesses can identify incidences of trafficking.¹²¹

Furthermore, companies should consider incorporating TVPRA-focused anti-human trafficking due diligence and compliance into their own compliance framework.¹²² Doing so is particularly critical for companies operating or relying on third parties located in high-risk countries that might be benefiting from forced labor.¹²³ In addition, companies should proactively

¹¹⁸ See *In re Caremark Int'l Inc. Derivative Litigation*, 698 A.2d 959, 970 (Del. Ch. 1996) (explaining that a director's duty requires ensuring that adequate "information and reporting systems exist in the organization").

¹¹⁹ *Id.* at 971.

¹²⁰ *Trafficking in Persons & Smuggling of Migrants: Effective prevention strategies*, UNITED NATIONS OFF. ON DRUGS & CRIME, <https://www.unodc.org/e4j/en/tip-and-som/module-7/key-issues/demand-side-strategies-discouraging-or-prosecuting-demand.html> (last visited Mar. 21, 2021) [hereinafter *Effective prevention strategies*].

¹²¹ *Id.*

¹²² See generally *Combating Forced Labour*, *supra* note 45.

¹²³ See *id.* at ch. 7, pp. 9–10.

conduct employee training on how to identify signs of forced labor,¹²⁴ perform internal reviews of existing policies to identify areas that may be subject to exploitation by traffickers (and make needed corrections),¹²⁵ and assess their existing and prospective suppliers' and contractors' practices.¹²⁶

Corporate directors also have a fiduciary duty to protect the interests of shareholders, which generally requires making business decisions that will maximize the effect on a corporation's stock price.¹²⁷ The duty to protect the interests of shareholders has resulted in a greater concern for corporations to behave in a socially responsible manner to avoid reputational risks.¹²⁸ Publicized human trafficking violations and related litigation can result in severe reputational damage to a corporation, potentially harming the corporation's shareholders.¹²⁹ Future trafficking legislation should, in part, derive from this fiduciary duty and focus on integrating corporate social responsibility into corporations' core objectives. It should aim to present corporations with an opportunity to prioritize addressing human trafficking as a way to achieve both profit and social goals.

CONCLUSION

Current efforts to address globalization's exacerbating effect on human trafficking, particularly forced labor, have had limited success. Federal legislation aimed at combating human trafficking in the global marketplace takes a narrow approach by encouraging corporate accountability through litigation. However, the current laws, particularly the TVPRA, fail to provide an adequate statutory scheme whereby a corporation may be held liable for human trafficking crimes committed by entities that make up its supply chains.¹³⁰

¹²⁴ See *id.* at ch. 5, pp. 5–6.

¹²⁵ See *id.*

¹²⁶ See *id.* at ch. 6, p. 2.

¹²⁷ See, e.g., Daniel J. Morrissey, *The Riddle of Shareholder Rights and Corporate Social Responsibility*, 80 BROOK L. REV. 353, 353 (2015) (“Corporations exist primarily to make profit for their shareholders. This has been the black letter rule of law and the reigning orthodoxy of American business for a century.”).

¹²⁸ See *Corporate Liability for Forced Labour*, *supra* note 25, at 9 (explaining that investors view environmental and social issues, like human rights, as risks that can harm a company's reputation).

¹²⁹ See *id.*

¹³⁰ See generally Wilberforce Act, *supra* note 30.

Examining the human trafficking industry reveals how commercial and economic forces drive the business decisions made by corporate entities in global markets. The federal government must reform the TVPRA to deter the demand for forced labor throughout global supply chains and hold liable top-tier entities that turn a blind eye to the exploitative practices taking place within their operations in an effort to maximize profits.