

Willful Blindness: Applying a Drug Trafficking Theory of Liability to International Human Trafficking Prosecution

Anne Miller Welborn Young*

ABSTRACT

Evidentiary issues regarding the requisite mens rea for human trafficking complicate how and when corporations with human trafficking in their supply chains can be brought to justice. Currently, corporations need to have actual knowledge of trafficking in their supply chain in order to establish liability for labor trafficking. This Note argues that the willful blindness doctrine could and should be used to satisfy mens rea in human trafficking. The willful blindness doctrine is commonly used as a substitute for actual knowledge to satisfy mens rea in drug trafficking cases despite clear statutory guidance that the mens rea element of the crime of drug trafficking is actual knowledge. In the context of human trafficking cases, the willful blindness doctrine would be applied to a corporation that turned a blind eye to human trafficking in its supply chain, replacing the element of actual knowledge of human trafficking. This Note addresses the history of human trafficking and the Trafficking Victims Protection Reauthorization Act (TVPRA), the precedent of the willful blindness doctrine in drug trafficking prosecution, the mens rea standard in human trafficking cases, arguments for applying the willful blindness doctrine to human trafficking cases, and case studies that illustrate how to do so. The extension of the willful blindness doctrine to human trafficking cases will usher in an overdue era of corporate supply chain accountability under the TVPRA, a US law with an international reach.

* J.D. Candidate, 2022, Emory University School of Law; B.A., 2019, Wake Forest University. Many thanks to the *Berkeley Journal of International Law* staff, Professor John Witte Jr., and the *Emory International Law Review* staff for their immense contributions of time and talent to this piece. Any errors and omissions are my own.

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I. INTRODUCTION

In 2020 an estimated eighty-nine percent of children in the Ivory Coast labored in the nation's vast cocoa farming industry.¹ Under the leadership of Chief Executive Officer Mark Schneider,² Nestlé purchases nearly ten percent of all cocoa produced globally and sources thirty percent of its cocoa from the Ivory Coast.³ Few would suggest that Schneider and Nestlé are unaware of the high likelihood of forced child labor in the company's supply chain.⁴ Nonetheless, US

1. Jonathan Copulsky et al., *Supply Unchained: Fighting Labor Abuse in Your Supply Chain*, 15 DELOITTE REV. 24, 31 (2014); U.S. Dep't of State, Office to Monitor and Combat Trafficking in Persons, 2019 Trafficking in Persons Report: Côte d'Ivoire 157 (June 2019), <https://www.state.gov/wp-content/uploads/2019/06/2019-Trafficking-in-Persons-Report.pdf>.

2. *Nestle Board of Directors*, NESTLE, <https://www.nestle.com/aboutus/management/boardofdirectors> (last visited Oct. 16, 2020).

3. Copulsky et al., *supra* note 1, at 31.

4. Nestlé has been lauded as a leader among food companies for joining the Fair Labor Association (FLA) in 2012. Through the FLA, Nestlé subjected its supply chain to intense scrutiny. Forced child labor, among other violations, were found. In response, a four-year plan to implement

law provides no clear theory of liability by which Schneider or Nestlé can be held liable for this form of human trafficking⁵ and US courts have historically found the linkage between such corporations and trafficking too attenuated to successfully prosecute.⁶

Compare Nestlé and *human* trafficking to FedEx and *drug* trafficking. Under the leadership of Chief Executive Officer Frederick Smith,⁷ FedEx facilitates shipments spanning the globe, including shipments across the US-Mexico border.⁸ Various actors traffic significant quantities of illegal drugs, including marijuana, fentanyl, cocaine, heroin, and methamphetamine across the US-Mexico border annually.⁹ Under the framework provided by the Ninth Circuit decision *United States v. Heredia*, FedEx can be held criminally liable for shipments that, unbeknownst to FedEx, contain illegal drugs; it does not matter whether FedEx, in order “to save time, or money, or offense to customers,” fails to search for and therefore does not gain actual knowledge of the presence of this contraband.¹⁰ Since FedEx and Smith are aware of a high probability that contraband is present in these cross-border shipments, they are subject to liability regardless of actual knowledge of contraband.¹¹ This theory of criminal liability is known as willful blindness.¹²

eleven changes was developed and acted upon. Nonetheless, Nestlé is used in this introduction by way of example. *Id.* at 31–32.

5. Angela Mudukuti, *The Mighty Apple, Google, Tesla, Dell and Microsoft in “the Dock” – A Look at the Child Labour Lawsuit*, OPINIOJURIS (Jan. 13, 2020), <http://opiniojuris.org/2020/01/13/the-mighty-apple-google-tesla-dell-and-microsoft-in-the-dock-a-look-at-the-child-labour-lawsuit/>.

6. See Naomi Jiyoung Bang, *Justice of Victims of Human Trafficking and Forced Labor: Why Current Theories of Corporate Liability Do Not Work*, 43 U. MEM. L. REV. 1047, 1049–50, 1054 (2013) (identifying the inadequacy of agency theories of liability for prosecuting corporations for human trafficking in their supply chains).

7. *FedEx Corp. Leadership*, FEDEX, <https://www.fedex.com/en-us/about/leadership.html> (last visited Oct. 17, 2020).

8. *Reach Customers in Mexico*, FEDEX, <https://www.fedex.com/en-us/shipping/freight-services/itl/international-services/mexico.html> (last visited Oct. 17, 2020).

9. U.S. DEP’T. JUST. DRUG ENF’T. ADMIN., 2019 DRUG ENF’T. ADMIN. NAT’L. DRUG THREAT ASSESSMENT 99 (2019), https://www.dea.gov/sites/default/files/2020-01/2019-NDTA-final-01-14-2020_Low_Web-DIR-007-20_2019.pdf.

10. *United States v. Heredia*, 483 F.3d 913, 928 (9th Cir. 2007) (en banc) (Kleinfeld, J., concurring in the result).

11. *Id.*

12. Robin Charlow, *Willful Ignorance and Criminal Culpability*, 70 TEX. L. REV. 1351, 1352 (1992). Legal scholarship has multiple names for this theory, including deliberately choosing not to learn; deliberately omitting to make further inquiries; studied ignorance; conscious avoidance; purposely abstaining from all inquiry; deliberately avoiding knowing; knowledge of the second degree; conscious purpose to avoid learning the truth; avoidance of any endeavor to know; connivance; willful shutting of the eyes; and deliberate ignorance, among others. This Note will use the language “willful blindness” to refer to this theory of liability. *Id.* at 1352 n.1.

Willful blindness is “a technical, stipulative term of legal art with no precise analog in everyday speech.”¹³ The Model Penal Code provides the following explanation of the term: “[w]hen knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist.”¹⁴ Commentaries to the Model Penal Code further articulate that a “defendant who only believed a fact to be highly probable would not be said to know it unless his lack of genuine knowledge were due to wil[l]ful [sic] ignorance.”¹⁵ Similar to the Model Penal Code, the common law mens rea¹⁶ standard of knowledge “includes guilty belief *and a guilty avoidance of knowledge*.”¹⁷ Willful blindness and actual knowledge therefore both satisfy the common law mens rea standard of knowledge and are equally culpable.¹⁸

The issue of the knowledge element is pertinent to the interpretation and application of the Trafficking Victims Protection Reauthorization Act (TVPRA).¹⁹ The TVPRA is landmark legislation in the fight against the form of human labor trafficking described in the Nestlé supply chain.²⁰ The TVPRA, in part, provides a right of action against corporations²¹ that know or should have known about trafficking in their supply chains.²² However, over twenty years

13. Douglas N. Husak & Craig A. Callender, *Willful Ignorance, Knowledge, and the Equal Culpability Thesis: A Study of the Deeper Significance of the Principle of Legality*, 1994 WIS. L. REV. 29, 35 (1994).

14. MODEL PENAL CODE § 2.02(7) (Proposed Official Draft 1962).

15. Husak & Callender, *supra* note 13, at 36 (citing Model Penal Code § 2.02(2)(b)(i) (Official Draft, review and commentary at 228, 1985)).

16. The meaning and significance of mens rea is as follows: “No problem of criminal law is of more fundamental importance or has proved more baffling through the centuries than the determination of the precise mental element or *mens rea* necessary for crime. For hundreds of years the books have repeated with unbroken cadence that *Actus non facit reum nisi mens sit rea*. ‘There can be no crime, large or small, without an evil mind,’ says Bishop. ‘It is therefore a principle of our legal system, as probably it is of every other, that the essence of an offence is the wrongful intent, without which it cannot exist.’” Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 974 (1932) (internal citations omitted).

17. Rollin M. Perkins, *Knowledge as a Mens Rea Requirement*, 29 HASTINGS L.J. 953, 959 (1978) (emphasis added).

18. *Id.*

19. 22 U.S.C. §§ 7101–7114.

20. 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, 501–02 (2016).

21. Corporations play a significant role in perpetuating human trafficking, as scholar Naomi Jiyoung Bang describes: “Human trafficking and forced labor reflect the dark side of globalization, where illicit enterprises trade people through a rapidly growing network of electronic communications and support. Unfortunately, it is not just the criminal element that is complicit in these activities. Multinational corporations who produce goods through massive global production chains also increase chances that their products could be made by trafficked workers.” Bang, *supra* note 6, at 1048.

22. “[B]usinesses can no longer turn a blind eye to the problem of child sex trafficking, because they run the risk of being held liable for their part in the problem simply because they should have known it was occurring.” Erika R. George & Scarlet R. Smith, *In Good Company: How Corporate*

after the inception of the TVPRA, it remains unclear what facts are needed to establish that a corporation knew or should have known about trafficking in its supply chain.²³ In fact, a recent case²⁴ against Apple, Google, Tesla, Dell, and Microsoft is one of the first in which plaintiffs argued that corporations were willfully blind to human trafficking in their supply chains.²⁵ Specifically, the plaintiffs contended that if the aforementioned tech giants “d[id] not have specific knowledge of forced child labor in their cobalt supply chain ventures, then this [wa]s an extreme form of willful ignorance.”²⁶

This Note argues that the willful blindness doctrine, commonly used to establish the mens rea element of knowledge in drug trafficking cases,²⁷ could and should satisfy the mens rea required in international human trafficking cases.²⁸ In human trafficking cases, the willful blindness doctrine would permit the mens rea standard to be satisfied where a corporation knows of a high probability of human trafficking in their global supply chains instead of requiring actual knowledge to satisfy the mens rea element of the crime.²⁹ The extension of the willful blindness doctrine to human trafficking cases will usher in an overdue era of corporate supply chain accountability under the TVPRA, a US law with international reach.

Part II of this Note provides a brief summary of human trafficking and the TVPRA. Part III addresses the development of the willful blindness doctrine in several seminal cases concerning drug trafficking. Part IV applies the willful blindness doctrine to human labor trafficking. Part V explores the international significance of the TVPRA, a US law combating trafficking in global supply chains. Part VI provides recommendations for corporate compliance and corporate social responsibility. Lastly, Part VII addresses the gaps between the purpose, current application, and potential of the TVPRA in the fight against human trafficking. This Note primarily compares human trafficking to drug trafficking, but the analysis could apply to other crimes for which knowledge is a mens rea element.³⁰

Social Responsibility Can Protect Rights and Aid Efforts to End Child Sex Trafficking in Modern Slavery, 46 N.Y.U. J. INT’L L. & POL. 55, 92 (2013).

23. Ezell, *supra* note 20, at 539.

24. International Rights Advocates, plaintiffs’ counsel in this class action case, filed an amended complaint in the US District Court for the District of Columbia on June 26, 2020. It states that “[a]s a direct and proximate result of [the d]efendants’ conduct, [the p]laintiffs have suffered damages in an amount to be ascertained at trial.” This trial has yet to take place. Plaintiff’s First Amended Complaint, Jane Doe 1 et al. v. Apple, Inc. et al., No. CV: 1:19-cv-03737 (CJN) (D.D.C. June 26, 2020).

25. Mudukuti, *supra* note 5.

26. Plaintiff’s First Amended Complaint, *supra* note 24, at 89.

27. Atossa Katharine Jackson, *Willful Blindness: The Threat to Innocent Property Owners of Recent Federal Drug Law Amendments*, 31 THOMAS JEFFERSON L. REV. 191, 198 (2008).

28. 18 U.S.C. § 1589(b).

29. *Id.*

30. For example, the Eighth Circuit established that knowledge is an element of the crime of aiding-and-abetting. Perhaps willful blindness could serve as a substitute for actual knowledge in the

Combating human trafficking is now an important moral and financial issue for businesses as “[c]ivil society and victims’ rights groups are finding new ways to hold accountable not only the perpetrators, but also the beneficiaries of [forced labor], increasingly targeting supply chains.”³¹ Thus, as shown by the recent case against Apple, Google, Tesla, Dell, and Microsoft, corporations must scrutinize their supply chains to avoid liability for human trafficking.³² This Note provides a unique application of the willful blindness doctrine to litigation that invokes the TVPRA to hold corporations accountable for human trafficking in their supply chains. In doing so, this Note offers a new avenue to help corporate directors, legal practitioners, and human rights advocates advance justice for survivors.

II.

HUMAN TRAFFICKING AND THE TVPRA

Consider the plight of one trafficked individual: a citizen of India recruited to work in the United States with promises of a green card and permanent residence, “and forced ... to pay inbound travel expenses, visa expenses, and other recruiting expenses.”³³ He is lured to the job with “false promises and representations,” but upon arrival in the United States he is confronted with “deplorable conditions,” faces high debts he must repay, and is forced to continue working despite being “discriminated against.”³⁴ Furthermore, he is fearful of bringing legal action due to his employer’s threats, and he fears leaving because he believes that staying with the employer is the only way to keep his proper immigration status.³⁵ Similar iterations of this story still exist and “will continue to exist” so long as “the profit to traffickers from using fear or fraud to subject workers to harmful conditions is greater than the cost to traffickers of legal penalties.”³⁶

The term human trafficking is generally used to describe modern-day slavery whereby an individual is forced by deceit, demand, or fear to work in order to survive.³⁷ Human trafficking is marked not only by unfair wages or the complete denial of wages, but also by an inability to escape poor working conditions.³⁸ It includes “the giving or receiving of payments or benefits to achieve the consent

context of the crime of aiding-and-abetting as well. *Metge v. Baehler*, 762 F.2d 621, 623 (8th Cir. 1985).

31. *Corporate Liability and Human Trafficking*, HUMAN RIGHTS FIRST 1 (Dec. 2015), <http://www.humanrightsfirst.org/sites/default/files/HRFCorporateLiabilityTraffickingreport.pdf>.

32. Mudukuti, *supra* note 5.

33. Ezell, *supra* note 20, at 505 (footnotes omitted).

34. *Id.*

35. *Id.*

36. *Id.*

37. GARY A. HAUGEN & VICTOR BOUTROS, *THE LOCUST EFFECT: WHY THE END OF POVERTY REQUIRES THE END OF VIOLENCE* 67–68 (2014).

38. *Roe v. Bridgestone Corp.*, 492 F. Supp. 2d 988, 991, 1013 (S.D. Ind. 2007).

of a person having control over another person, for the purpose of exploitation.”³⁹ Exploitation can take multiple forms, including prostitution, slavery, organ removal, forced labor, and servitude.⁴⁰ According to the United Nations Human Rights Office of the High Commissioner for Human Rights, recruiting, transporting, transferring, harboring, or receiving persons subjected to exploitation constitutes human trafficking.⁴¹ In summary, human trafficking is an expansive and abhorrent crime founded on the “abuse of power or [...] a position of vulnerability.”⁴²

Among different forms of human trafficking, labor trafficking in particular yields major financial benefits for corporations by reducing the cost of labor which, in turn, reduces the cost of goods sold.⁴³ Labor trafficking creates an estimated \$150.20 billion in profits per year.⁴⁴ A US Department of Labor report provides a list of 418 line items ranging from sugarcane to textiles to gold that forced labor around the globe widely produces. It is evident that traces of human trafficking are in the supply chains of many corporations,⁴⁵ yet most corporations benefiting from it are geographically distanced from the trafficking locations, hiding the practice and complicating prosecution.⁴⁶ The practice of subcontracting labor also complicates prosecution as it creates even greater distance between corporations and traffickers.⁴⁷

Impunity is therefore common, as evidenced by the statistic that “[i]n 2014 there were only 216 criminal convictions based on labor trafficking worldwide – a stark number compared to estimates of over twenty million people in various forms of human trafficking globally.”⁴⁸ However, the TVPRA, the first federal law to combat human trafficking, provides an opportunity to change this situation.⁴⁹ The TVPRA was “designed to combat trafficking in the United States by establishing it as a federal crime and providing assistance programs to

39. UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMM’R, HUMAN RIGHTS AND HUMAN TRAFFICKING, at 2, (2014), https://www.ohchr.org/Documents/Publications/FS36_en.pdf.

40. *Id.*

41. *Id.*

42. *Id.*

43. Naomi Jiyoung Bang, *Unmasking the Charade of the Global Supply Contract: A Novel Theory of Corporate Liability in Human Trafficking and Forced Labor Cases*, 35 Hous. J. Int’l L. 255, 262-63, 268 (2013).

44. INT’L LABOUR OFFICE, PROFITS AND POVERTY: THE ECONOMICS OF FORCED LABOUR 13 (2014), https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_243391.pdf.

45. U.S. DEP’T OF LABOR, THE 2018 LIST OF GOODS PRODUCED BY CHILD LABOR OR FORCED LABOR 16 (2018), <https://www.dol.gov/sites/dolgov/files/ILAB/ListofGoods.pdf>.

46. Cynthia A. Williams, *Corporate Social Responsibility in an Era of Economic Globalization*, 35 U.C. DAVIS L. REV. 705, 750 (2002).

47. Bang, *supra* note 43, at 257.

48. Ezell, *supra* note 20, at 508; 22 U.S.C. § 7101 (explaining the historically low regulation of trafficking in the United States).

49. Ezell, *supra* note 20, at 518.

survivors, including visa protections for victims trafficked across international borders.”⁵⁰ Since its original passage in 2000, the TVPRA has been reauthorized five times: in 2003, 2005, 2008, 2013, and 2019.⁵¹ Each iteration addresses the crime of human trafficking more comprehensively.⁵² The 2008 iteration, in particular, contained a significant addition.⁵³ It expanded liability beyond direct perpetrators of labor trafficking to corporations with labor trafficking in their supply chains.⁵⁴ It “applies to corporations that financially benefit from trafficked labor even if the labor-trafficking violation occurred abroad or was perpetuated in the supply chain of the corporation by a separate legal entity.”⁵⁵ The TVPRA reads, in pertinent part:

Whoever knowingly benefits, financially or by receiving anything of value, from participation in a venture which has engaged in the providing or obtaining of labor or services by [labor trafficking], knowing or in reckless disregard of the fact that the venture has engaged in the providing or obtaining of labor or services by any of such means, shall be punished as provided in subsection (d).⁵⁶

However, despite the introduction of this provision, the cases on the matter remain sparse.⁵⁷ Many factors could explain the continued dearth of human trafficking cases despite the passage and expansion of the TVPRA. One factor is that survivors of human trafficking are often both difficult to find and reluctant to self-identify.⁵⁸ Additionally, most survivors may be unable to fund the cost of litigation,⁵⁹ and external funding for these cases may be lacking.⁶⁰ Finally, litigators may be reluctant to bring cases under the TVPRA because they are unfamiliar with the law and the best strategies for applying it in court due to the lack of case law.⁶¹

50. *Trafficking Victims Protection Reauthorization Act*, THE FREEDOM COMMONS, <https://freedomcommons.ijm.org/resources/about-tvptra>.

51. Ezell, *supra* note 20, at 500; *Policy and Legislation*, POLARIS PROJECT, <https://polarisproject.org/policy-and-legislation/> (last visited Feb. 12, 2021).

52. H.R. Rep. 106-939, at 1 (2000) (Cong. Rep.); *Current Federal Laws*, POLARIS PROJECT, <http://www.polarisproject.org/current-federal-laws> (last visited Oct. 26, 2020).

53. Ezell, *supra* note 20, at 502.

54. 18 U.S.C. § 1589.

55. Ezell, *supra* note 20, at 502; 18 U.S.C. §§ 1589, 1595-96.

56. 18 U.S.C. § 1589(b).

57. Ezell, *supra* note 20, at 508.

58. Jennifer S. Nam, *The Case of the Missing Case: Examining the Civil Right of Action for Human Trafficking Victims*, 107 COLUM. L. REV. 1655, 1678, 1687 (2007).

59. SIDDHARTH KARA, BONDED LABOR 6 (2012).

60. Martina E. Vandenberg, *Ending Impunity, Securing Justice*, THE HUMAN TRAFFICKING PRO BONO LEGAL CENTER AND THE FREEDOM FUND 2 (2015), <http://freedomfund.org/wp-content/uploads/STRATEGIC-LITIGATION-FINAL-FOR-EMAIL.pdf>.

61. *Id.*

Just as the United States has failed to combat human trafficking through existing domestic law (*i.e.*, the TVPRA),⁶² the United States has also failed to combat human trafficking via international law.⁶³ The United States has failed to ratify the United Nations Convention on the Rights of the Child (“Convention”).⁶⁴ The Convention is the “world’s most comprehensive framework for the protection of children’s rights” and “supports protections for children from forced labor.”⁶⁵ The United States has asserted that ratification of the Convention would threaten the US constitutional system, which “gives the exclusive authority for the creation of law and policy on issues about families and children to state governments.”⁶⁶ Regardless of the policy reasons, the failure of the United States to comprehensively address human trafficking in both international conventions and domestic prosecution underscores the need for new strategies to seek justice for survivors.

This Note offers one such strategy: applying the willful blindness doctrine as used in drug trafficking prosecution to human trafficking prosecution. An analysis of the willful blindness doctrine follows.

III.

WILLFUL BLINDNESS AND DRUG TRAFFICKING

Willful blindness provides a substitute for actual knowledge.⁶⁷ According to the Model Penal Code, the doctrine of willful blindness can be used as follows: “[w]hen knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if [1] a person is aware of a high probability of its existence, [2] unless he actually believes that it does not exist.”⁶⁸

While the willful blindness doctrine can promote justice in cases where establishing actual knowledge would be difficult, the doctrine can also lead to unjust outcomes if not applied carefully.⁶⁹ It can lead to “the unfair conviction of defendants whose actions are less culpable than those of the knowledgeable actor.”⁷⁰ By differentiating between reckless⁷¹ actors and willfully blind actors,

62. Ezell, *supra* note 20, at 508.

63. Karen Attiah, *Why Won't the U.S. Ratify the U.N.'s Child Rights Treaty?*, WASH. POST (Nov. 21, 2014, 4:12 PM), <https://www.washingtonpost.com/blogs/post-partisan/wp/2014/11/21/why-wont-the-u-s-ratify-the-u-n-s-child-rights-treaty>.

64. *Id.*

65. *Id.*

66. *Id.*

67. MODEL PENAL CODE § 2.02(7) (1985).

68. *Id.*

69. *Recent Cases: Criminal Law – Willful Blindness – Ninth Circuit Holds That Motive Is Not An Element of Willful Blindness – United States v. Heredia*, 121 HARV. L. REV. 1245, 1248 (2008).

70. *Id.*

71. Knowledge and recklessness fall on a spectrum of mens rea requirements: “Purpose and knowledge are entirely on the subjective side, focusing completely on the individual actor’s state of

courts can avoid unfair convictions.⁷² This is demonstrated by the use of the willful blindness doctrine in drug trafficking litigation.

The doctrine of willful blindness is often used as a substitute for actual knowledge in drug trafficking prosecution.⁷³ For example, consider the following “classic scenario” at a border checkpoint.⁷⁴ A third party recruits the defendant to drive a certain car to a specific location across the border.⁷⁵ A rational driver in this scenario should suspect the presence of illegal contraband in the car; the request for a driver in this cross-border scenario makes it likely that there is contraband in the car given local drug trafficking trends.⁷⁶ The defendant claims to have no actual knowledge of illegal contraband in the car, but does not investigate the contents of the car, so the defendant is purposefully ignorant regarding the presence of illegal contraband.⁷⁷ An officer finds marijuana at the border checkpoint,⁷⁸ and the defendant is charged with drug trafficking, a crime for which the mens rea element is knowledge of the likely presence of illegal contraband on the part of the defendant.⁷⁹ Here, the willful blindness of the defendant regarding the presence of illegal contraband in the car serves “as a substitute for actual knowledge ... to prevent [the] culpable [defendant] from escaping liability by purposely avoiding the requisite state of mind.”⁸⁰ Because the defendant was aware of the likelihood of contraband in the car and still failed to investigate the car for contraband, the defendant is culpable under the willful blindness theory.

A seminal case in the development of the willful blindness doctrine is *United States v. Jewell*.⁸¹ In *Jewell*, a stranger paid the defendant to drive a car across the US-Mexico border.⁸² Border agents stopped the defendant and found a significant

mind; negligence is almost entirely on the objective side, focusing on the actor’s failure to be aware of a risk and gross deviation from reasonable care; and recklessness is somewhere in between, with a purely subjective focus on consciousness of risk but also the same objective “gross deviation” standard that the negligence test provides.” Kenneth W. Simons, *Should the Model Penal Code’s Mens Rea Provision Be Amended?*, 1 OHIO STATE J. CRIM. L. 181 n.5 (2003).

72. *Recent Cases: Criminal Law – Willful Blindness – Ninth Circuit Holds That Motive Is Not An Element of Willful Blindness – United States v. Heredia*, *supra* note 69, at 1248.

73. Jackson, *supra* note 27, at 199.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. 532 F.2d 697, 698 (9th Cir. 1976); *Recent Cases: Criminal Law – Willful Blindness – Ninth Circuit Holds That Motive Is Not An Element of Willful Blindness – United States v. Heredia*, *supra* note 69, at 1249. *See also* Global-Tech Appliance, Inc. v. SEB S.A., 563 U.S. 754, 775 n.9 (2011); *United States v. Sdoulam*, 398 F.3d 981, 993 n.8 (8th Cir. 2005); *United States v. Jaffe*, 387 F.3d 677, 681 (7th Cir. 2004); *United States v. Espinoza*, 244 F.3d 1234, 1242 (10th Cir. 2001); *United States v. Scott*, 159 F.3d 916, 922 (5th Cir. 1998).

82. *United States v. Jewell*, 532 F.2d 697, 698 (9th Cir. 1976).

amount of marijuana in the vehicle.⁸³ The defendant stated that he was unaware of the presence of the marijuana in the vehicle.⁸⁴ At trial, the court instructed the jury according to the willful blindness doctrine stating:

The Government can complete their burden of proof by proving, beyond a reasonable doubt, that if the defendant was not actually aware that there was marijuana in the vehicle he was driving when he entered the United States his ignorance in that regard was solely and entirely a result of his having made a conscious purpose to disregard the nature of that which was in the vehicle, with a conscious purpose to avoid learning the truth.⁸⁵

Under this standard, the trial court convicted Jewell of drug trafficking.⁸⁶ The Ninth Circuit affirmed.⁸⁷ The court relied on the language of the Model Penal Code, stating that “[t]o act ‘knowingly’ . . . is not necessarily to act only with positive knowledge, but also to act with an awareness of the high probability of the existence of the fact in question.”⁸⁸ However, the court also clarified that the “required state of mind differs from positive knowledge only so far as to encompass a calculated effort to avoid the sanctions of the statute while violating its substance.”⁸⁹ This Ninth Circuit opinion has been widely applied across the United States.⁹⁰

The effect of the willful blindness jury instruction⁹¹ on the outcome in *Jewell* cannot be overstated. The Drug Control Act provides that it is criminal for a defendant to “knowingly” bring marijuana across the border; the statute does not

83. *Id.*; *Recent Cases: Criminal Law – Willful Blindness – Ninth Circuit Holds That Motive Is Not An Element of Willful Blindness – United States v. Heredia*, *supra* note 69, at 1249.

84. *Jewell*, 532 F.2d at 698; *Recent Cases: Criminal Law – Willful Blindness – Ninth Circuit Holds That Motive Is Not An Element of Willful Blindness – United States v. Heredia*, *supra* note 69, at 1249.

85. *Jewell*, 532 F.2d at 700; *Recent Cases: Criminal Law – Willful Blindness – Ninth Circuit Holds That Motive Is Not An Element of Willful Blindness – United States v. Heredia*, *supra* note 69, at 1249.

86. *Jewell*, 532 F.2d at 698; *Recent Cases: Criminal Law – Willful Blindness – Ninth Circuit Holds That Motive Is Not An Element of Willful Blindness – United States v. Heredia*, *supra* note 69, at 1249.

87. *Jewell*, 532 F.2d at 704; *Recent Cases: Criminal Law – Willful Blindness – Ninth Circuit Holds That Motive Is Not An Element of Willful Blindness – United States v. Heredia*, *supra* note 69, at 1249.

88. *Jewell*, 532 F.2d at 700; *Recent Cases: Criminal Law – Willful Blindness – Ninth Circuit Holds That Motive Is Not An Element of Willful Blindness – United States v. Heredia*, *supra* note 69, at 1249.

89. *Jewell*, 532 F.2d at 704; *Recent Cases: Criminal Law – Willful Blindness – Ninth Circuit Holds That Motive Is Not An Element of Willful Blindness – United States v. Heredia*, *supra* note 69, at 1249.

90. *United States v. Flores*, 454 F.3d 149, 156 (3d Cir. 2006); *United States v. Ruhe*, 191 F.3d 376, 384 (4th Cir. 1999); *United States v. Fuchs*, 467 F.3d 889, 902 (5th Cir. 2006); *United States v. Beaty*, 245 F.3d 617, 621 (6th Cir. 2001); *United States v. McClellan*, 165 F.3d 535, 549 (7th Cir. 1999); *United States v. King*, 3531 F.3d 859, 866 (8th Cir. 2003).

91. *Jewell*, 532 F.2d at 700.

indicate that a mens rea standard less than actual knowledge is sufficient to convict an individual of drug trafficking.⁹² The facts of the case were insufficient to establish actual knowledge, as “there was evidence from which the jury could conclude that [Jewell] spoke the truth” and lacked “positive knowledge of the presence of the contraband.”⁹³ Nonetheless, despite clear statutory guidance that the requisite mens rea for drug trafficking is actual knowledge, the court stated that the lower mens rea standard of willful blindness is sufficient to convict an individual of the crime.⁹⁴ The majority indicated that there was no need for statutory permission to accept willful blindness in lieu of actual knowledge because, in the words of English scholar John Llewelyn Jones Edwards, “[f]or well-nigh a hundred years, it has been clear from the authorities that a person who deliberately shuts his eyes to an obvious means of knowledge has sufficient mens rea for an offence based on such words as . . . ‘knowingly.’”⁹⁵ The court found it appropriate to accept willful blindness as sufficient to establish knowledge generally—not just for drug trafficking cases alone.⁹⁶ Thus, the court laid the foundation for the willful blindness doctrine to apply to a variety of crimes.

Courts have subsequently applied the willful blindness doctrine in varying ways within the context of drug trafficking.⁹⁷ When applying the willful blindness doctrine to drug trafficking, some courts require only two elements: “awareness of a high probability of criminal circumstances and deliberate avoidance of steps to confirm those criminal circumstances.”⁹⁸ This is how FedEx, in deliberately failing to inspect cross-border shipments in order “to save time, or money, or offense to customers” could be held liable for drug trafficking.⁹⁹ Other courts require an additional element: “that the deliberate avoidance be motivated by a desire to avoid criminal responsibility.”¹⁰⁰ This additional element was illustrated in *Jewell* as the court highlighted that “there was evidence . . . [Jewell] deliberately avoided positive knowledge of the presence of the contraband to avoid responsibility in the event of discovery.”¹⁰¹

92. 21 U.S.C.S. § 841(a).

93. *Jewell*, 532 F.2d at 698.

94. *Id.* at 700.

95. *Id.*

96. *Id.*

97. *Recent Cases: Criminal Law – Willful Blindness – Ninth Circuit Holds That Motive Is Not An Element of Willful Blindness – United States v. Heredia*, *supra* note 69, at 1249.

98. *Id.*

99. *United States v. Heredia*, 483 F.3d 913, 928 (9th Cir. 2007) (en banc) (Kleinfeld, J., concurring in the result).

100. *Recent Cases: Criminal Law – Willful Blindness – Ninth Circuit Holds That Motive Is Not An Element of Willful Blindness – United States v. Heredia*, *supra* note 69, at 1249.

101. *United States v. Jewell*, 532 F.2d 697, 698 (9th Cir. 1976)..

In 2007, the Ninth Circuit revisited the doctrine of willful blindness in *United States v. Heredia*.¹⁰² There, the defendant agreed to drive her aunt's car from Nogales, Arizona to Tucson, Arizona. The defendant, her aunt, her mother, and two of her children occupied the car.¹⁰³ The defendant admitted that she noticed a strong scent resembling detergent or perfume in the car.¹⁰⁴ Although the defendant thought the smell was likely marijuana due to her mother's anxiousness and great supply of cash on hand, the defendant's mother told her that the smell was simply fabric softener that had been spilled in the car days prior.¹⁰⁵ When the car was stopped at a border checkpoint, authorities searched the car due to the strong smell.¹⁰⁶ They found some 350 pounds of marijuana.¹⁰⁷ Heredia was prosecuted for drug trafficking, and the trial court gave the following instructions to the jury:

You may find that the defendant acted knowingly if you find beyond a reasonable doubt that the defendant was aware of a high probability that drugs were in the vehicle driven by the defendant and deliberately avoided learning the truth. You may not find such knowledge, however, if you find that the defendant actually believed that no drugs were in the vehicle driven by the defendant, or if you find that the defendant was simply careless.¹⁰⁸

102. *Heredia*, 483 F.3d at 922; *Recent Cases: Criminal Law – Willful Blindness – Ninth Circuit Holds That Motive Is Not An Element of Willful Blindness – United States v. Heredia*, *supra* note 69, at 1245.

103. *Heredia*, 483 F.3d at 917; *Recent Cases: Criminal Law – Willful Blindness – Ninth Circuit Holds That Motive Is Not An Element of Willful Blindness – United States v. Heredia*, *supra* note 69, at 1245.

104. *Heredia*, 483 F.3d at 917; *Recent Cases: Criminal Law – Willful Blindness – Ninth Circuit Holds That Motive Is Not An Element of Willful Blindness – United States v. Heredia*, *supra* note 69, at 1245.

105. *Heredia*, 483 F.3d at 917; *Recent Cases: Criminal Law – Willful Blindness – Ninth Circuit Holds That Motive Is Not An Element of Willful Blindness – United States v. Heredia*, *supra* note 69, at 1245–46.

106. *Heredia*, 483 F.3d at 917; *Recent Cases: Criminal Law – Willful Blindness – Ninth Circuit Holds That Motive Is Not An Element of Willful Blindness – United States v. Heredia*, *supra* note 69, at 1245–46.

107. *Heredia*, 483 F.3d at 917; *Recent Cases: Criminal Law – Willful Blindness – Ninth Circuit Holds That Motive Is Not An Element of Willful Blindness – United States v. Heredia*, *supra* note 69, at 1246.

108. *Heredia*, 483 F.3d at 917; *Recent Cases: Criminal Law – Willful Blindness – Ninth Circuit Holds That Motive Is Not An Element of Willful Blindness – United States v. Heredia*, *supra* note 69, at 1246.

The defendant was found guilty.¹⁰⁹ On appeal, the Ninth Circuit reversed the trial court's decision.¹¹⁰ Nonetheless, after rehearing en banc, the Ninth Circuit later affirmed the conviction.¹¹¹ The court determined it was unnecessary to establish that the "defendant's motive in deliberately failing to learn the truth was to give himself a defense in case he should be charged with the crime."¹¹² The court reasoned that "the requirement that the defendant have *deliberately* avoided learning the truth" was sufficient to protect defendants.¹¹³ Thus, according to the Ninth Circuit, a defendant must only seek to avoid learning the truth in order to be found willfully blind.¹¹⁴ The *Heredia* decision has been critiqued for significantly weakening the traditional mens rea requirement by removing the requirement that a willfully blind defendant had the motive to evade criminal liability.¹¹⁵ Nonetheless, jurisdictions across the United States¹¹⁶ and even the Supreme Court¹¹⁷ have cited the *Heredia* decision.

This Note proceeds to apply the willful blindness doctrine, exemplified in drug trafficking cases such as *Jewell* and *Heredia*, to the crime of human trafficking.¹¹⁸

IV.

APPLYING THE WILLFUL BLINDNESS DOCTRINE TO HUMAN TRAFFICKING PROSECUTION

Although the willful blindness doctrine is traditionally used in drug trafficking prosecution,¹¹⁹ it could and should be applied to human trafficking prosecution as well. Various aspects of applying the willful blindness doctrine to human trafficking prosecution are explored in the sub-parts that follow. These sub-parts address: the mens rea standard in human trafficking cases, the reasons

109. *Heredia*, 483 F.3d at 918; *Recent Cases: Criminal Law – Willful Blindness – Ninth Circuit Holds That Motive Is Not An Element of Willful Blindness – United States v. Heredia*, *supra* note 69, at 1246.

110. *Heredia*, 483 F.3d at 922; *Recent Cases: Criminal Law – Willful Blindness – Ninth Circuit Holds That Motive Is Not An Element of Willful Blindness – United States v. Heredia*, *supra* note 69, at 1246.

111. *Heredia*, 483 F.3d at 922; *Recent Cases: Criminal Law – Willful Blindness – Ninth Circuit Holds That Motive Is Not An Element of Willful Blindness – United States v. Heredia*, *supra* note 69, at 1247.

112. *Heredia*, 483 F.3d at 919.

113. *Id.* at 920.

114. *Id.*

115. *Recent Cases: Criminal Law – Willful Blindness – Ninth Circuit Holds That Motive Is Not An Element of Willful Blindness – United States v. Heredia*, *supra* note 69.

116. *See e.g.*, *United States v. Azubike*, 564 F.3d 59, 66 (1st Cir. 2009).

117. *Global-Tech Appliance, Inc. v. SEB S.A.*, 563 U.S. 754, 769 n.9. (2011).

118. *United States v. Jewell*, 532 F.2d 697, 697–98 (9th Cir. 1976); *United States v. Heredia*, 483 F.3d 913, 919 (9th Cir. 2007).

119. *Jackson*, *supra* note 27, at 199.

for applying the willful blindness doctrine to human trafficking cases, how to apply the willful blindness doctrine to human trafficking prosecution, and case studies.

*A. The Appropriate Mens Rea Standard for Human Trafficking:
Knowledge, Recklessness, or Willful Blindness?*

Currently, the mens rea element of human trafficking can be satisfied by proving either knowledge of the trafficking or reckless disregard of the existence of the trafficking.¹²⁰ Criminal knowledge and criminal recklessness are similar insofar as they require awareness on the part of the perpetrator.¹²¹ However, the degree of awareness differs between the two.¹²² That is, “in order to act knowingly the actor must be aware of an actual fact” whereas “[i]n order to be reckless the actor must be aware of the possibility or at most the substantial probability of a fact.”¹²³ Furthermore, among other differences, “[k]nowledge and recklessness also differ in that the former is an entirely subjective concept, while the latter requires both a subjective and objective assessment.”¹²⁴

Both the knowledge standard and the reckless standard are insufficient in the context of human trafficking prosecution, as evidenced in part by the lack of cases¹²⁵ that have been brought forth under the TVPRA standards. The reckless standard is impractical; it requires so little in the way of mens rea that many courts are uncomfortable applying the standard.¹²⁶ The knowledge standard is also impractical; it is difficult to prove that corporations are aware of the presence of trafficking in their supply chains in the context of our interconnected, globalized world.¹²⁷ Thus, a substitute is needed for one of these two impractical standards. Willful blindness, a substitute for actual knowledge, is an appropriate and effective “hybrid mental state that is neither quite like knowledge nor quite like recklessness.”¹²⁸

Admittedly, some scholars have criticized equating knowledge and willful blindness.¹²⁹ As one scholar contends, “[k]nowledge and wil[l]ful [sic] ignorance . . . are simply not the same thing. Therefore, wil[l]ful [sic] ignorance cannot be

120. 18 U.S.C. § 1589(b).

121. Charlow, *supra* note 12, at 1380.

122. *Id.*

123. *Id.*

124. *Id.*

125. Ezell, *supra* note 20, at 508.

126. *See* Global-Tech Appliance, Inc. v. SEB S.A., 563 U.S. 754, 769 (2011) (emphasizing the Court’s reticence to water down a mens rea standard by stating “[w]e think these requirements give willful blindness an appropriately limited scope that surpasses recklessness and negligence”).

127. *See* Bang, *supra* note 6, at 1054 (identifying the inadequacy of agency theories of liability for prosecuting corporations for human trafficking in their supply chains); Ezell, *supra* note 20, at 516.

128. Charlow, *supra* note 12, at 1382.

129. *Id.* at 1355.

used legitimately, or constitutionally, in place of statutorily required knowledge.”¹³⁰ However, substantial support for the use of willful blindness, particularly in the context of human trafficking litigation, exists and follows in the subsection below.

B. *The Case for Willful Blindness*

There are several reasons why it is both legally permissible and normatively desirable for the doctrine of willful blindness to apply to human trafficking prosecution. First, the crimes of drug trafficking and human trafficking both have a mens rea knowledge element, and courts have made clear that willful blindness can apply to crimes other than drug trafficking that have a mens rea knowledge requirement. The Ninth Circuit in *Jewell* quoted Professor Rollin M. Perkins:

[O]ne with a deliberate antisocial purpose in mind . . . may deliberately ‘shut his eyes’ to avoid knowing what would otherwise be obvious to view. In such cases, so far as criminal law is concerned, the person acts at his peril in this regard, and is treated as having ‘knowledge of the facts as they are ultimately discovered to be.’¹³¹

In recognizing the long tradition of the willful blindness doctrine in criminal common law, the *Jewell* court emphasized that willful blindness is sufficient to establish the mens rea of knowledge generally, not just in drug trafficking cases. The applicability of the willful blindness doctrine to satisfy the mens rea element of knowledge in non-drug trafficking cases is further evidenced in the Supreme Court’s 2011 opinion in *Global-Tech Appliances v. SEB S.A.*¹³² There, the Court highlighted that “every Court of Appeals . . . has fully embraced willful blindness, applying the doctrine to a wide range of criminal statutes.”¹³³ Thus, in analyzing “whether a party who ‘actively induces infringement of a patent’ . . . must know that the induced acts constitute patent infringement,” the Court held that willful blindness can substitute for actual knowledge.¹³⁴ The application of the willful blindness doctrine to the patent infringement matter in *Global-Tech* indicates that courts are willing to expand the willful blindness doctrine beyond drug trafficking to other areas of law that require a mens rea element of actual knowledge.¹³⁵

Additionally, the use of the willful blindness doctrine in human trafficking prosecution expands access to justice for survivors. Actual knowledge of forced labor, which is an element of the crime of human trafficking,¹³⁶ is difficult to

130. *Id.* at 1355–56.

131. *United States v. Jewell*, 532 F.2d 697, 700 (9th Cir. 1976).

132. *Global-Tech Appliance, Inc. v. SEB S.A.*, 563 U.S. 754, 755 (2011).

133. *Id.* at 768.

134. *Id.* at 757, 771.

135. *Id.* at 766–67.

136. 18 U.S.C. § 1589(b).

establish.¹³⁷ This is largely because corporations point to “the extraterritorial location of suppliers, and the appearance of ‘arm’s length’ contracts with suppliers” to indicate a lack of knowledge and thus evade criminal liability.¹³⁸ By lowering the mens rea requirement from requiring actual knowledge¹³⁹ to including willful blindness, the knowledge element of the crime could be established with greater ease, allowing more survivors of human trafficking to achieve justice in court.

Finally, applying the willful blindness doctrine to human trafficking prosecution aligns with legislative intent. The stated purposes of the legislature in enacting the TVPRA are, in part, “to combat trafficking in persons, a contemporary manifestation of slavery whose victims are predominantly women and children, to ensure just and effective punishment of traffickers, and to protect their victims.”¹⁴⁰ As scholar Naomi Jiyoung Bang notes, “Congress’ urgency in addressing the scope of human trafficking and forced labor is [further] reflected in . . . language urging both national and international cooperation to eradicate this serious offense.”¹⁴¹ The legislative history of the TVPRA, including House Reports on the matter, “illustrat[e] the legislators’ awareness of the suspect tactics of foreign contractors and expresses a desire to monitor corporations’ use of these contractors.”¹⁴² Thus, holding corporations widely liable for profiting from “using unmonitored, unscrupulous foreign contractors, is completely consistent with the motives of this statute.”¹⁴³ Lowering the mens rea requirement¹⁴⁴ through the application of the willful blindness doctrine in order to increase survivors’ access to justice is therefore consistent with the purpose of the TVPRA.¹⁴⁵ An explanation of how to apply the willful blindness doctrine to human trafficking prosecution follows.

C. How to Apply the Willful Blindness Doctrine to Human Trafficking Prosecution

Past application of the willful blindness doctrine to various crimes, from drug trafficking¹⁴⁶ to patent infringement,¹⁴⁷ should inform the application of the

137. See Bang, *supra* note 43, at 257 (discussing the ease by which corporations can avoid accountability through numerous layers of subcontracting and outsourcing in global production chains).

138. *Id.* at 257.

139. 18 U.S.C. § 1589(b).

140. 22 U.S.C. § 7101(a).

141. Bang, *supra* note 6, at 1093.

142. *Id.* at 1094.

143. *Id.*

144. 18 U.S.C. § 1589(b).

145. Bang, *supra* note 6, at 1094.

146. *United States v. Jewell*, 532 F.2d 697, 700 (9th Cir. 1976).

147. *Global-Tech Appliance, Inc. v. SEB S.A.*, 563 U.S. 754, 769–71 (2011).

willful blindness doctrine to human trafficking prosecution. The Supreme Court has articulated that “a willfully blind defendant is one who takes deliberate action to avoid confirming a high probability of wrongdoing and who can almost be said to have actually known the critical facts.”¹⁴⁸ This comports with the holding in *Heredia* that, while a defendant need not be willfully blind for the purpose of evading criminal activity, the defendant cannot be blind by happenstance; the blindness must be purposeful.¹⁴⁹ In the context of a corporation culpable of human trafficking in its supply chain, this could look like choosing to not investigate a supplier that provides notably lower priced goods as compared to other suppliers.¹⁵⁰ Alternatively, it could look like choosing to not perform due diligence concerning a supplier of a good that is widely known to be trafficked. In either of the aforementioned hypothetical scenarios, it would not be necessary for the corporation to turn a blind eye deliberately to evade criminal liability.¹⁵¹ Rather, if the corporation turns a blind eye deliberately for business-related reasons, such as to save money or time, this would warrant a jury instruction of willful blindness. In practice, a jury instruction of willful blindness would likely resemble the following sample from the Eighth Circuit:

You may find that the defendant [(name)] acted knowingly if you find beyond a reasonable doubt that the defendant [(name)] was aware of a high probability that (state fact as to which knowledge is in question (e.g., that ‘drugs were contained in his suitcase’)) and that [he] [she] deliberately avoided learning the truth. The element of knowledge may be inferred if the defendant [(name)] deliberately closed [his] [her] eyes to what would otherwise have been obvious to [him] [her]. [You may not find the defendant acted ‘knowingly’ if you find he/she was merely negligent, careless or mistaken as to (state fact as to which knowledge is in question (e.g., that “drugs were contained in his suitcase”)).]¹⁵²

D. Hypothetically Applying the Willful Blindness Doctrine to Current Litigation

As previously mentioned, a recent case¹⁵³ against Apple, Google, Tesla, Dell, and Microsoft is one of the first in which plaintiffs argued that corporations should have known about human trafficking in their supply chains.¹⁵⁴ The plaintiffs were children who “assert[ed] claims for forced child labor and

148. *Id.* at 769.

149. *United States v. Heredia*, 483 F.3d 913, 918 (9th Cir. 2007).

150. *Ezell*, *supra* note 20, at 529.

151. Notably, the burden of proof in a TVPRA case is a preponderance of the evidence, which the plaintiff must prove. *United States v. Sabhnani*, 599 F.3d 215, 261 (2d Cir. 2010); *Aguirre v. Best Care Agency, Inc.*, 961 F. Supp. 2d 427, 443 (E.D.N.Y. 2013) (citing to 18 U.S.C. § 1589); *Shukla v. Sharma*, No. 07-CV-2972, 2012 WL 481796, at *2 (E.D.N.Y. Feb. 14, 2012).

152. KEVIN F. O’MALLEY, ET AL., *FEDERAL JURY PRACTICE AND INSTRUCTIONS: CRIMINAL* § 17.09 (5th ed. 2000).

153. Plaintiff’s First Amended Complaint, *supra* note 24.

154. *Mudukuti*, *supra* note 5.

trafficking” under the TVPRA following their work in the cobalt mines of the Democratic Republic of the Congo (DRC).¹⁵⁵ The Amended Complaint notes that “[a]pproximately two-thirds of the global supply of cobalt is mined in the ‘copper belt’ . . . of the DRC.”¹⁵⁶ Significant amounts of cobalt are used to make rechargeable lithium-ion batteries, which power every device the defendants made.¹⁵⁷

The willful blindness doctrine could have assisted the plaintiffs in the case. The prosecution had to prove that the defendants both received something of value from the human trafficking and knew about the human trafficking.¹⁵⁸ However, even in the absence of proof of actual knowledge of human trafficking, the defendants are almost certainly aware of a high likelihood that their supply chain involves human trafficking as cobalt sourced from the DRC is noted on the US Department of Labor’s published “List of Goods Produced by Child Labor.”¹⁵⁹ The US Department of State’s 2020 Trafficking in Persons report further cautions about the presence of labor trafficking in the cobalt industry in the DRC:

Traffickers, including mining bosses, other miners, family members, government officials, and armed groups, exploit some men, women, and children working in artisanal mines in eastern DRC in forced labor, including through debt-based coercion. Traffickers subject some children to forced labor in the illegal mining of diamonds, copper, gold, cobalt, tungsten ore, tantalum ore, and tin, as well as the smuggling of minerals. In January 2016, an international organization reported widespread abuse, including forced labor, of some children in artisanal cobalt mines in southern DRC; some children reported extremely long working hours and physical abuse by security guards employed by the state mining company.¹⁶⁰

The extensive media reporting beyond what is mentioned in the Trafficking in Persons Report also provides notice regarding child labor in the DRC’s cobalt mines.¹⁶¹ Finally, each defendant has corporate social responsibility reports “on their cobalt supply chains that have specifically flagged the horrors of child miners in the companies’ cobalt supply chains.”¹⁶² The Amended Complaint states:

Plaintiffs’ research team across 2017 to 2019 easily observed, interviewed, and

155. Plaintiff’s First Amended Complaint, *supra* note 24, at 5, 7.

156. *Id.* at 5.

157. *Id.*

158. *Id.* at 74.

159. *Id.* at 8.

160. Office to Monitor and Combat Trafficking in Persons, *2020 Trafficking in Persons Report: Democratic Republic of the Congo*, U.S. Department of State (Feb. 16, 2020), <https://www.state.gov/reports/2020-trafficking-in-persons-report/democratic-republic-of-the-congo/> (last visited Nov. 21, 2021).

161. Plaintiff’s First Amended Complaint, *supra* note 24, at 8.

162. *Id.* at 85.

photographed children performing hazardous work mining cobalt under horrific conditions. They interviewed and photographed a parade of children maimed by cobalt mining accidents at mines owned, operated, and/or controlled by the suppliers to both ventures, Glencore/Umicore and Huayou Cobalt. Unless Defendants have never had a representative visit the cobalt mining areas of the DRC, which is extremely unlikely, then Defendants themselves have observed the same horrible conditions under which children mine cobalt for them under extremely hazardous conditions. Indeed, as previously alleged, Defendants all have internal or external CSR reports on their cobalt supply chains that have specifically flagged the horrors of child miners in the companies' cobalt supply chains.¹⁶³

To be blind to the presence of human trafficking in their cobalt supply chains despite such reports and other media reports, the defendants would have had to avoid knowledge purposefully. Prosecutors can satisfy the willful blindness doctrine by establishing defendants “made a conscious purpose to disregard” the likely commission of a crime via a “conscious purpose to avoid learning the truth.”¹⁶⁴ Here, while the defendants may lack actual knowledge of specific instances of trafficking in their supply chain, they are at a minimum willfully blind to the presence of it in the face of the aforementioned media reports regarding the industry,¹⁶⁵ CSR reports,¹⁶⁶ and more. Therefore, by applying the willful blindness doctrine, prosecutors could have plausibly satisfied the mens rea standard of knowledge in the case.¹⁶⁷ That is, under the willful blindness standard established in *Heredia*, prosecutors could have likely satisfied the mens rea standard of knowledge by proving that the defendants were “aware of a high probability that [human trafficking was present in their cobalt supply chains] and deliberately avoided learning the truth.”¹⁶⁸

E. How Far: Exploring the Boundaries of the Willful Blindness Doctrine's Applicability

How closely must trafficking in a supply chain be linked to a corporation to hold the corporation liable under the TVPRA? Although the paucity of case law applying the TVPRA¹⁶⁹ leaves this question unanswered, the statutory language of the TVPRA provides some guidance.¹⁷⁰ The 2008 iteration of the TVPRA provides this legal connection between the supplier and the corporation because it encompasses *anyone who benefits from participation in a venture*. The language

163. *Id.*

164. *Recent Cases: Criminal Law – Willful Blindness – Ninth Circuit Holds That Motive Is Not An Element of Willful Blindness – United States v. Heredia*, *supra* note 69.

165. Plaintiff's First Amended Complaint, *supra* note 24, at 8.

166. *Id.*

167. 18 U.S.C. § 1589(b).

168. *United States v. Heredia*, 483 F.3d 913, 917 (9th Cir. 2007).

169. Ezell, *supra* note 20, at 508.

170. *Id.* at 528.

of the 2008 TVPRA eclipses the need for complicated legal theories of vicarious liability or joint employment to hold corporations accountable for the actions of their suppliers under § 1589(a), since the remedy for both § 1589(a) and (b), the financial benefits subsection of the criminal provision, is the same.¹⁷¹ That is, the financial benefits provision of the TVPRA clearly provides a path to hold corporations liable as it states that “[w]hoever knowingly benefits, financially or by receiving anything of value, from participation in a venture which has engaged in the providing or obtaining of labor or services by any of the means described in subsection (a) . . . shall be punished.”¹⁷²

This broad text clearly intends to expand liability beyond perpetrators of human trafficking to corporations benefitting from human trafficking.¹⁷³ Indeed, “[a]s of 2008, the TVPRA is unique compared to other laws because the financial benefits provisions create liability for entities distinct from the actual perpetrators of the crime without requiring an agency relationship.”¹⁷⁴ Nonetheless, “[b]ecause the TVPRA’s financial benefits provisions have not yet been applied to a large corporation, activists, judges, and lawyers may lack a general understanding of how to apply the language of the criminal and civil provisions to traffickers’ actions.”¹⁷⁵

Due to this lack of understanding, several factors may prove useful in determining how far the theory of willful blindness should extend in the corporate world.¹⁷⁶ One such factor is the relationship between corporations, suppliers, and suppliers’ employees.¹⁷⁷ Courts applying the TVPRA may use the corporate supply contract¹⁷⁸ and parties’ negotiating power within the context of the corporate supply contract to examine the dependence of laborers.¹⁷⁹ Consider the following example:

[I]f examined closely, supply-contract terms may indicate the labor conditions of a supplier. While relevant for the joint employer test, contract terms also give notice to a corporation to be skeptical about true working conditions. Considering how many workers are on staff, how much they are paid, and what their rate of production is may indicate whether the labor costs meet a reasonable wage or reasonable number of hours worked. Red flags may also include reports of concern from NGOs or media outlets. If there were trafficking in the workforce of a supplier but nothing hinted about the actual conditions to the corporation, a corporation would not be on notice of potential

171. *Id.* (emphasis added) (internal citations omitted).

172. 18 U.S.C. § 1589(b).

173. Ezell, *supra* note 20, at 527.

174. *Id.*

175. *Id.*

176. *Id.* at 528.

177. *Id.*

178. “[C]ontract terms concerning price and deadlines are the factors forming the crux of the economic realities test.” Bang, *supra* note 43, at 298.

179. *See id.* at 300–02; Ezell, *supra* note 20, at 528–29.

TVPRA violations, and there would be insufficient evidence for reckless disregard of trafficking, absent other factors.¹⁸⁰

Consider this factor again in the context of Nestlé. Nestlé could take certain discrete actions including (1) reviewing supply contract terms to ensure they contain information regarding working conditions, pay of staffers, and rates of production, and (2) monitoring NGO and media reports regarding geographical areas in which suppliers operate.¹⁸¹ Just as it would be untenable for FedEx to inspect every package it transports across the United States-Mexico border, it would be impossible for Nestlé to review every employment agreement in which its suppliers engage or to read every news article regarding a region of cocoa production. Nonetheless, simple monitoring systems, such as automated email alerts for news reports using search terms like “Ivory Coast and cocoa and human trafficking” could aid in the fight against human trafficking abroad without unduly burdening corporations.¹⁸² So long as a metric within such a monitoring system raises concern (e.g., an automated email alert is sent to a human resources professional due to an article being published that uses all the aforementioned search terms), a sufficient linkage between a corporation and human trafficking in its supply chain would create liability under the TVPRA through the willful blindness doctrine.¹⁸³ Ultimately, “[i]ndividual corporations will have to determine how best to incorporate these recommendations, as they may vary based on the industry and the board’s perception of the actual or perceived risk of corporate and suppliers’ violations.”¹⁸⁴ Monitoring systems are addressed more specifically in Section VI.

However, “[u]ntil courts decide more TVPRA cases on the merits and establish precedent for what degree of benefit results in liability or culpability, corporations should be wary of the liability risk from any degree of reduced costs from which they profit by relying on suppliers that used forced labor.”¹⁸⁵ How far liability extends from suppliers to corporations will likely remain a case-by-case issue; nonetheless, the TVPRA extends liability across a supply chain to potentially include multinational corporations such as Nestlé.¹⁸⁶

180. Ezell, *supra* note 20, at 529 (internal citations omitted).

181. *Id.*

182. *Id.* at 512.

183. *See* 18 U.S.C. § 1589(b).

184. Ezell, *supra* note 20, at 542.

185. *Id.* at 529.

186. *Id.*

V.

A NATIONAL LAW OF INTERNATIONAL SIGNIFICANCE

While the United States is not immune to the horrors of human trafficking,¹⁸⁷ human trafficking occurs at extraordinarily high levels abroad.¹⁸⁸ A 2012 estimate by the International Labour Office suggested that 10.7 million individuals are trafficked annually outside the United States.¹⁸⁹ Each of these individuals, in turn, yields an estimated average of \$4,000 in profits annually as a result of their unpaid labor.¹⁹⁰ Because local law enforcement does not protect trafficking survivors, traffickers enjoy widespread immunity in many countries.¹⁹¹ This reality underscores the importance of the TVPRA: it provides recourse to survivors that otherwise have no avenues to pursue justice.¹⁹² That is, since the TVPRA establishes criminal liability for corporations “even if the labor-trafficking violation occurred abroad or was perpetuated in the supply chain of the corporation by a separate legal entity,”¹⁹³ survivors unable to bring suit in their respective countries can bring suit in the United States if they meet certain criteria.¹⁹⁴ The TVPRA extends beyond US borders to provide:

[E]xtra-territorial jurisdiction over any offense . . . if—(1) an alleged offender is a national of the United States or an alien lawfully admitted for permanent residence . . . ; or (2) an alleged offender is present in the United States, irrespective of the nationality of the alleged offender.”¹⁹⁵

The US Department of Labor highlights the importance of the TVPRA by explaining that:

[E]fforts to address child labor and forced labor worldwide depend, first and foremost, on government leadership and action. By ratifying international conventions such as ILO Convention 182 on the Worst Forms of Child Labor and Convention 29 on Forced Labor, governments commit themselves to upholding the international standards enshrined in these instruments. Yet the gap between standards and on-the-ground realities is often wide: many countries have ratified international standards but do not meaningfully implement them, for lack of will, capacity, or resources.¹⁹⁶

187. U.S. Dep’t of State, Office to Monitor and Combat Trafficking in Persons, 2015 Trafficking In Persons Report 352 (July 2015), <https://2009-2017.state.gov/documents/organization/245365.pdf>.

188. INT’L LABOUR OFFICE, *supra* note 44.

189. *Id.* at 21.

190. *Id.*

191. HAUGEN & BOUTROS, *supra* note 37, at 69.

192. *See* Ezell, *supra* note 20, at 502; 18 U.S.C. § 1589; 18 U.S.C. §§ 1595-96.

193. Ezell, *supra* note 20, at 502.

194. *See* 18 U.S.C. § 1589; 18 U.S.C. §§ 1595-96.

195. 18 U.S.C. § 1596.

196. U.S. DEP’T OF LABOR, 2018 LIST OF GOODS PRODUCED BY CHILD LABOR OR FORCED LABOR, *supra* note 45.

It is therefore important to increase access to justice for survivors by enabling them to pursue legal remedies in courts in the United States. Strategic litigation by human rights lawyers, the potential to use the willful blindness doctrine, and the recent spike in fervent advocacy for survivors all pave a promising path for justice to proceed in US courts.¹⁹⁷

In response to the widespread global occurrence of human trafficking, recent actions by the House of Representatives demonstrate legislative intent to continue their efforts to reduce trafficking.¹⁹⁸ In 2020, the House passed a resolution to “ensur[e] that goods made with forced labor in the Xinjiang Uyghur Autonomous Region of the People’s Republic of China do not enter the US market.”¹⁹⁹ Congress found that in Xinjiang the Chinese government “since 2017, arbitrarily detained as many as 1.8 million Uyghurs, Kazakhs, Kyrgyz, and members of other Muslim minority groups in a system of extrajudicial mass internment camps, and has subjected detainees to forced labor, torture, political indoctrination, and other severe human rights abuses.”²⁰⁰ They further found that the practice of forced labor there “is confirmed by the testimony of former camp detainees, satellite imagery, and official leaked documents from the Government of the People’s Republic of China as part of a targeted campaign of repression of Muslim ethnic minorities.”²⁰¹

The increasing frequency of human trafficking worldwide makes it particularly important to combat human trafficking through litigation.²⁰² The US State Department’s 2020 Trafficking in Persons report highlights that, despite the COVID-19 pandemic, “[t]raffickers did not shut down. They continue to harm people, finding ways to innovate and even capitalize on the chaos. The ratio between risk and reward is expanding in their favor.”²⁰³ Data has evidenced this sad reality:

The number of crisis trafficking cases handled by the Trafficking Hotline increased by more than 40 percent in the month following the shelter-in-place orders compared to the prior month (from approximately 60 in a 30 day period to 90). Crisis cases are those in which some assistance – such as shelter, transportation, or law enforcement involvement – is needed within 24 hours. The number of situations in which people needed immediate emergency shelter nearly doubled (from around 29 cases in Feb. 14th – March 15th, 2020

197. Vandenberg, *supra* note 60, at 16; Ezell, *supra* note 20, at 509.

198. Uyghur Forced Labor Prevention Act, H.R. 6210, 116th Cong. § 2 (2020).

199. *Id.*

200. *Id.*

201. *Id.*

202. U.S. Dep’t of State, Office to Monitor and Combat Trafficking in Persons, 2020 Trafficking in Persons Report: Message from the Ambassador-at-Large (June 2020), <https://www.state.gov/wp-content/uploads/2020/06/2020-TIP-Report-Complete-062420-FINAL.pdf> (last visited Nov. 21, 2021).

203. *Id.*

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to 54 in April 2020).²⁰⁴

This data underscores the need for revitalized strategies to combat the growing practice of human trafficking around the world.

VI.

RECOMMENDATIONS FOR CORPORATE COMPLIANCE AND CORPORATE SOCIAL RESPONSIBILITY GENERALLY

In light of the internationally significant TVPRA, corporations²⁰⁵ should closely monitor their supply chains to ensure that trafficking does not occur at any point.²⁰⁶ Specifically, this may “require corporations to develop codes of conduct, resolutions, and enforcement plans that prioritize monitoring and eliminating human trafficking from the corporate supply chain.”²⁰⁷ The Trafficking in Persons Report notes that:

[a]n effective policy [to monitor and oversee supply chains]: prohibits human trafficking and those activities that facilitate it - including charging workers recruitment fees, contract fraud, and document retention; responds to industry- or region-specific risks; requires freedom of movement for workers; pays all employees at least the minimum wage in all countries of operation, preferably a living wage; includes a grievance mechanism and whistleblower protections; and applies to direct employees, as well as subcontractors, labor recruiters, and other business partners.²⁰⁸

204. *Human Trafficking During the COVID-19 Pandemic*, POLARIS PROJECT (June 10, 2020), <https://polarisproject.org/press-releases/human-trafficking-during-the-covid-19-pandemic/> (last visited Nov. 21, 2021).

205. States also have an obligation to monitor the occurrence of human trafficking:

“States have an obligation to identify and respond adequately to trafficking- related corruption and complicity—an obligation that should be seen as part of the broader duty to prevent trafficking. The United Nations Convention against Transnational Organized Crime, for example, acknowledges the strong link between organized criminal activities such as trafficking and corruption. It requires State parties to take strong measures to criminalize all forms of corrupt practices (art. 8). State parties are also required to adopt measures designed to promote integrity and to prevent and punish the corruption of public officials. They must also take measures to ensure effective action by their authorities in the prevention, detection and punishment of the corruption of public officials, including providing such authorities with adequate independence to deter the exertion of inappropriate influence on their actions (art. 9). The provisions of this Convention affirm the much more specific obligations of the United Nations Convention against Corruption.”

U.N. Human Rights Office of the High Commissioner, *Human Rights and Human Trafficking* 47 (2014), https://www.ohchr.org/Documents/Publications/FS36_en.pdf (last visited Nov 21, 2021). Nonetheless, this state-level duty is beyond the scope of this Comment.

206. Ezell, *supra* note 20, at 502.

207. *Id.* at 541.

208. TRAFFICKING IN PERSONS REPORT, *supra* note 187, at 7.

The California Transparency in Supply Chains Act²⁰⁹ further articulates best practices for corporations.²¹⁰ According to the Act, “corporations should verify product supply chains for indications of trafficking violations, audit suppliers for labor practices, require certification that materials were made free from trafficking violations, develop and maintain internal governance standards, and provide employee training on trafficking awareness.”²¹¹ Affirmative steps that corporations can take to this end are “(1) implementing monitoring systems, (2) developing a human trafficking resolution or committee prepared to take enforcement action when aware of violations, and (3) giving adequate disclosure of risks.”²¹²

Corporations that do not fulfill this duty may subject themselves not only to reputational harm and financial loss but also to a lawsuit under the TVPRA.²¹³

VII. CONCLUSION

Human trafficking is an abhorrent crime that occurs across the globe, often for the benefit of US corporations.²¹⁴ Although hidden to many consumers, human trafficking enslaves some twenty million individuals²¹⁵ and creates approximately \$150.2 billion in profits around the globe annually.²¹⁶ Labor trafficking is involved in the production of at least 418 goods that are commonly exchanged and used in corporate supply chains.²¹⁷

The TVPRA is a significant law in that it seeks to combat human trafficking in the United States.²¹⁸ Its five amendments since 2000 mark continued progress to that end.²¹⁹ However, the TVPRA as currently applied is insufficient because it has resulted in little litigation for survivors of human trafficking.²²⁰ A look at drug trafficking prosecution, however, provides hope.

209. Cal. Civ. Code § 1714.43 (Deering 2010).

210. Ezell, *supra* note 20, at 540.

211. *Id.* (citing Jonathan Todres, *The Private Sector’s Pivotal Role in Combating Human Trafficking*, 3 CALIF. L. REV. 80, 96–97 (2012)).

212. *Id.*

213. *Id.* at 503 (citing *In re Caremark Int’l*, 698 A.2d 959, 970 (Del. Ch. 1996)).

214. Plaintiff’s First Amended Complaint, *supra* note 24, at 1.

215. Ezell, *supra* note 20, at 508.

216. INT’L LABOUR OFFICE, *supra* note 44, at 13.

217. U.S. DEP’T OF LABOR, 2018 LIST OF GOODS PRODUCED BY CHILD LABOR OR FORCED LABOR, *supra* note 45 at 8, 16.

218. *Trafficking Victims Protection Reauthorization Act*, *supra* note 50.

219. Ezell, *supra* note 20, at 500; *Policy and Legislation*, *supra* note 51; H.R. Rep. 106–939, at 1 (2000) (Cong. Rep.); *Current Federal Laws*, *supra* note 52.

220. Ezell, *supra* note 20, at 508.

Drug trafficking prosecution has applied the willful blindness doctrine to advance justice.²²¹ Under this doctrine, the mens rea knowledge element of the crime of drug trafficking is satisfied if, for example, prosecutors demonstrate that an alleged cross-border drug trafficker did not know of the presence of contraband as “a result of his having made a conscious purpose to disregard the nature of that which was in the vehicle, with a conscious purpose to avoid learning the truth.”²²² In other words, willful blindness is an actual knowledge substitute.²²³

Inspired and informed by the precedent in drug trafficking litigation,²²⁴ the willful blindness doctrine could and should be successfully applied to human trafficking litigation for several reasons. First, drug trafficking case law has made clear that the doctrine of willful blindness can apply generally to crimes that have an actual knowledge element, and the TVPRA includes a knowledge element for human trafficking.²²⁵ Second, applying the willful blindness doctrine to human trafficking litigation, as a substitute for actual knowledge, would reduce the evidentiary requirements on prosecutors,²²⁶ allowing them to convict human traffickers under the TVPRA more easily and thereby increase survivors’ access to justice.²²⁷ Third, applying the willful blindness doctrine to human trafficking litigation aligns with legislative intent, as shown by Congress’s recent resolution banning goods made in the Xinjiang region of China due to reports of human trafficking occurring there.²²⁸

Courts can and should apply the doctrine of willful blindness to cases alleging violations of the TVPRA.²²⁹ Consider the plight of one John Doe 4 in the case against Apple, Google, Tesla, Dell, and Microsoft.²³⁰ In 2016, eleven-year-old John Doe 4, who would have otherwise been in fifth grade, found employment at the Tilwezembe cobalt mining site.²³¹ There, he and three other young boys labored in an open pit mining area.²³² Their adult supervisors often deceived the boys concerning the true value of the cobalt they mined, cheating them out of pay.²³³ Thus, John Doe 4 received compensation averaging only \$1.00 per day

221. Jackson, *supra* note 27, at 199.

222. United States v. Jewell, 532 F.2d 697, 700 (9th Cir. 1976).

223. *Id.*

224. United States v. Heredia, 483 F.3d 913, 917 (9th Cir. 2007); *Jewell*, 532 F.2d at 698.

225. Global-Tech Appliance, Inc. v. SEB S.A., 563 U.S. 754, 771 (2011).

226. Charlow, *supra* note 12, at 1355–56 (footnotes omitted).

227. GWYNNE SKINNER ET AL., THE THIRD PILLAR: ACCESS TO JUDICIAL REMEDIES FOR HUMAN RIGHTS VIOLATIONS BY TRANSNATIONAL BUSINESS, <http://www.bhrinlaw.org/the-third-pillar-final1.pdf>.

228. 22 U.S.C. § 7101.

229. See *Heredia*, 483 F.3d at 917; *Jewell*, 532 F.2d at 698.

230. Plaintiff’s First Amended Complaint, *supra* note 24, at 33–34.

231. *Id.*

232. *Id.*

233. *Id.*

for highly dangerous mining work.²³⁴ He surrendered all earnings to his father to cover the basic living expenses of his large family of nine brothers and two sisters.²³⁵ Tragically, on May 7, 2019, a wall of the mining pit collapsed on John Doe 4 and five other miners, including his brother, Robert Doe 4, who also worked in the mine.²³⁶ John Doe 4 survived the incident, but his leg required the insertion of a metal bar to hold the bone in place.²³⁷ John Doe 4 now lives in chronic pain, cannot use his injured leg, and can no longer work at an age when most children would not have even started working.²³⁸ Robert Doe 4 did not survive the incident. He was twenty-five years old and is survived by his two children and wife.²³⁹ For John Doe 4, Robert Doe 4, their families, and all the men, women, and children similarly robbed of their freedom and livelihoods, justice must advance through a novel application of the time-tested legal theory of willful blindness.

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*