

Securing Restitution for Victims of Human Trafficking¹

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I. Introduction

Advocating for mandatory restitution for victims² is a core component of the Department of Justice's (Department) victim-centered approach to combating human trafficking.³ The Trafficking Victims Protection Act (TVPA)⁴ mandates that a defendant convicted of a crime under Title 18, chapter 77, pay restitution to the victim.⁵ The most important aspect of this restitution is that it is mandatory.⁶

¹ This article updates and expands on the Department's victim-centered approach to seeking restitution presented in [William E. Nolan, *Mandatory Restitution: Complying with the Trafficking Victims Protection Act*, 65 U.S. ATT'Y'S BULLETIN, Nov. 2017, at 95.](#)

² This article uses the terms "victim" and "survivor" to refer to individuals who were trafficked. Both terms are important and have different implications when used in the context of victim advocacy and service provision. For example, the term "victim" has legal implications within the criminal justice process and refers to an individual who suffered harm as a result of criminal conduct. The laws that give individuals particular rights and legal standing within the criminal justice system use the term "victim." Federal law enforcement uses the term "victim" in its professional capacity. "Survivor" is a term used widely in service providing organizations to recognize the strength and courage it takes to overcome victimization. In this article, both terms are used in the context of victim identification, outreach, and service strategies.

³ [DEPT OF JUST. NATIONAL STRATEGY TO COMBAT HUMAN TRAFFICKING \(2022\).](#)

⁴ [Trafficking Victims Protection Act of 2000, Pub. L. No. 196-386, 114 Stat. 1464.](#)

⁵ [See 18 U.S.C. § 1593\(a\)](#) ("the court *shall* order restitution for any offense under this chapter") (emphasis added).

⁶ [See, e.g., United States v. Culp, 608 F. App'x 390, 392 \(6th Cir. 2015\)](#) (not precedential) ("Courts must award restitution to victims of sex trafficking."); [United States v. Robinson, 508 F. App'x 867, 870 \(11th Cir. 2013\)](#) (not precedential) ("based on the plain language of § 1593, an award of restitution was mandatory"); [In re Sealed Case, 702 F.3d 59, 66 \(D.C. Cir. 2012\)](#)

While a restitution order may seem like a far-off concern after conviction and not as urgent as preparing for a sentencing hearing, a trafficking victim has the right to “full and timely restitution as provided by law,”⁷ and the money associated with a restitution order can be life changing. Restitution can be a catalyst to independence and a critical factor in a survivor’s efforts to avoid re-victimization. It can fund much-needed transportation, which opens doors to employment, school, and childcare; help pay for housing, food, and tuition; and allow the victim to access counseling for trauma or addiction.⁸

II. What is recoverable under 18 U.S.C. § 1593?

Section 1593(b) provides “[t]he order of restitution. . . shall direct the defendant to pay the victim. . . the full amount of the victim’s losses” and defines those losses as the sum of two distinct types of compensation: (1) personal losses, and (2) the economic value of the victim’s services, which are described as *unjust enrichment* or *opportunity loss*.⁹ The court has “no discretion to award restitution for anything less than the full amount of the victim’s losses.”¹⁰

(“Because the appellant pleaded guilty to 18 U.S.C. § 1591, the district court was required to impose restitution under 18 U.S.C. § 1593”).

⁷ 18 U.S.C. § 3771(a)(6).

⁸ See, e.g., [United States v. Rockett](#), 752 F. App’x 448, 450 (9th Cir. 2018) (not precedential) (educational and occupational expenses); [United States v. Speights](#), 712 F. App’x 423, 427 (5th Cir. 2018) (not precedential) (social support and transportation costs); [United States v. Romero-Medrano](#), No. 14-CR-050, 2017 WL 5177647, at *3 (S.D. Tex. Nov. 8, 2017), *aff’d*, 899 F.3d 356 (5th Cir. 2018) (education and vocational losses); [United States v. Laraneta](#), 700 F.3d 983, 990 (7th Cir. 2012) (stating that section 1593 might also cover costs related to schooling, including uniforms and snacks; alternative learning programs to help child victims gain education that was lost; and the costs guardians of child victims incurred by providing care).

⁹ 18 U.S.C. § 1593(b)(1),(3); see also [United States v. Cortes-Castro](#), 511 F. App’x 942, 947 (11th Cir. 2013) (not precedential); [In re Sealed Case](#), 702 F.3d at 66.

¹⁰ [United States v. Whitley](#), 354 F. Supp. 3d 930, 933 (N.D. Ill. 2019) (quoting [United States v. Desnoyers](#), 708 F.3d 378, 389 (2d Cir. 2013); [United States v. Walker](#), 353 F.3d 130, 131 (2d Cir. 2003)) (internal quotations omitted).

A. Personal losses

The first part of the definition, which calculates the victim's personal losses, has the same meaning as the phrase "the full amount of the victim's losses" in 18 U.S.C. § 2259(c)(2),¹¹ the restitution statute applicable to victims of child sexual exploitation. That statute defines such losses to include "any costs incurred by the victim for" medical services (physical, psychiatric, or psychological); rehabilitation (physical and occupational therapy); necessary transportation, temporary housing, and childcare expenses; lost income; attorneys' fees and other legal costs incurred; and any other losses suffered by the victim "as a proximate result" of the offense.¹²

"Section 2259(c)(2) is phrased in generous terms, in order to compensate the victims of sexual abuse for the care required to address the long term effects of their abuse."¹³ Similarly, section 1593 "sets no numeric limits on the amount of restitution that can be ordered"¹⁴ because Congress gave district courts "broad discretion in ordering restitution."¹⁵ Accordingly, a prosecutor's restitution request should include the potential lifetime of rehabilitation and healing.¹⁶ Even a short period of exploitation in commercial sex can cause significant psychological harm to the victim.¹⁷

¹¹ 18 U.S.C. § 1593(b)(3).

¹² 18 U.S.C. § 2259(c)(2)(A)–(F).

¹³ *United States v. Laney*, 189 F.3d 954, 966 (9th Cir. 1999).

¹⁴ *See Whitley*, 354 F. Supp. 3d at 933–34 (quoting *United States v. Dillard*, 891 F.3d 151, 158 (4th Cir. 2018)).

¹⁵ *Id.* (quoting *Laney*, 189 F.3d at 966); *see, e.g., In re Sealed Case*, 702 F.3d at 62 (ordering restitution of up to \$800,000 per victim based off of a psychologist's mental health assessment for each victim).

¹⁶ *See Whitley*, 354 F. Supp. 3d at 938 (emphasizing that courts must consider the lifetime of rehabilitation and healing when calculating restitution); *see also United States v. Pearson*, 570 F.3d 480, 486 (2d Cir. 2009) ("Three of our sister circuits have considered this language and concluded that § 2259 authorizes compensation for future counseling expenses.") (citing *United States v. Doe*, 488 F.3d 1154, 1159–60 (9th Cir. 2007); *United States v. Danser*, 270 F.3d 451, 455 (7th Cir. 2001); *United States v. Julian*, 242 F.3d 1245, 1247 (10th Cir. 2001)).

¹⁷ *See In re Sealed Case*, 702 F.3d at 67 (rejecting the defendant's argument that the victims he trafficked for a shorter time should not receive similar restitution for PTSD as the victims he trafficked for longer).

In addition to recovering for prospective costs, victims are also entitled to recover relevant costs incurred before commencement of the case and during the investigation and prosecution, even if the victims did not pay for the services themselves.¹⁸ Despite this broad discretion, however, pain and suffering are not recoverable;¹⁹ only quantifiable pecuniary losses are recoverable.²⁰

How personal losses are calculated differs among the circuits. For instance, the D.C. Circuit recognized a “sufficient causation” standard in *In re Sealed Case*, when child sex-trafficking victims experienced prior psychological harm in addition to the trauma of the offenses.²¹ The defendant argued he should not pay for a lifetime of treatment because he did not cause all of the harm.²² The D.C. Circuit rejected the defendant’s argument, citing to expert testimony stating that the defendant was the “most significant cause” of the victims’ harm and that they would have needed identical treatment even if they had had “no previous trauma.”²³ The D.C. Circuit held that a defendant does not have to be the sole cause of harm: “entire liability for harm may be imposed . . . if two or more causes produce [a] single result and either one cause would be sufficient alone to produce [the] result or each cause is essential to [the] harm.”²⁴

Conversely, in *United States v. Anthony (Anthony I)*, the Tenth Circuit rejected the D.C. Circuit’s sufficient causation standard and held that strict but-for causation is required for restitution under the TVPA.²⁵ The Tenth Circuit stated, “the obligation to make victims

¹⁸ See *Whitley*, 354 F. Supp. 3d at 935–37 (finding the defendant owed restitution for a minor victim’s past health treatment, participation in residential programs, and expenses incurred during her involvement in the investigation and prosecution of the case, even if she had not paid for those expenses).

¹⁹ See *United States v. Fu Sheng Kuo*, 620 F.3d 1158, 1166 (9th Cir. 2010) (stating victims could sue civilly to recover damages for pain and suffering).

²⁰ See *United States v. Toure*, 965 F.3d 393, 395 (5th Cir. 2020); *United States v. Saddler*, 789 F. App’x 952, 952 (4th Cir. 2019) (not precedential).

²¹ *In re Sealed Case*, 702 F.3d at 66.

²² See *id.* at 66.

²³ See *id.* at 67.

²⁴ See *id.* at 66 (citing *United States v. Monzel*, 641 F.3d 528, 538 (D.C. Cir. 2011)).

²⁵ See *United States v. Anthony (Anthony I)*, 942 F.3d 955, 964–68 (10th Cir. 2019).

whole does not obviate the need to limit restitution to losses resulting from the defendant's convicted conduct."²⁶ The Tenth Circuit held that the TVPA limits restitution to losses that the defendant "directly and proximately caused," especially where it is possible to attribute the amount of a trafficking victim's losses to the trafficker.²⁷ While the prosecution need not calculate restitution with "exact precision," it must set an amount that is "rooted in a calculation of actual loss."²⁸ Thus, according to the Tenth Circuit, the prosecution must disaggregate the losses that the defendant caused through the offenses charged as distinct from other causes of harm, such as a victim's prior abuse.²⁹ In a second appeal, the Tenth Circuit affirmed

²⁶ *Id.* at 968.

²⁷ See 18 U.S.C. §§ 1593, 3663A; *Anthony I*, 942 F.3d at 965–66 (citing 18 U.S.C. § 2259, the Mandatory Restitution for Sexual Exploitation of Children Act, and the Supreme Court's interpretation of it in *Paroline v. United States*, 572 U.S. 434, 458 (2014) that the MVRA imposes a proximate-cause limitation but not a "strict but-for causation" test). Cf. *Paroline*, 572 U.S. at 450 (finding child pornography possession a "special context" where the court could not attribute a victim's losses to a single possessor when there were multiple, unconnected possessors).

²⁸ *Anthony I*, 942 F.3d at 967, 970 (quoting *United States v. Ferdman*, 779 F.3d 1129, 1133 (10th Cir. 2015)) (finding that the prosecution did not attempt to disaggregate the victim's harms from the defendant from a past trafficker because it reused the same victim impact statement and same expert witness calculation for the harm caused by the second trafficker); see *Fu Sheng Kuo*, 620 F.3d at 1164 (emphasizing that restitution under section 3663 is limited to the victim's actual losses).

²⁹ See, e.g., *Anthony I*, 942 F.3d at 959 (vacating and remanding on the issue of restitution "to ensure that no restitution is awarded for the harms [the victim] suffered during the earlier sex-trafficking offense"). On remand, the United States filed an amended second motion for restitution. See *United States v. Anthony*, No. cr-15-126-c, 2020 WL 6468166, at *5 (W.D. Okla. 2020). And while the government's expert report asserted the victim would need identical treatment for defendant's offenses even if she had never sustained prior traumas, the district court found the report failed to explain what led to the expert's conclusion. See *id.* at *5. The district court consequently found that the government failed to prove defendant's acts justified the requested restitution. See *id.* Even though restitution is mandatory under section 1593, the district court concluded that no restitution could be calculated in accordance with the Tenth Circuit's instructions, and it denied the government's amended second motion for restitution. See *id.* The government subsequently appealed, and the Tenth

the lower court's decision not to order any restitution on remand and reiterated its holding from *Anthony I* that the harms the defendant caused must be disaggregated from the harms other defendants caused or from harms the trafficking victim suffered over the course of his or her life.³⁰

The approach in the Tenth Circuit has not been followed by other courts at the time of this publication. One criticism of the *Anthony* opinions is that such an attempt to disaggregate the expenses associated with mental health treatment caused by the defendant's infliction of trauma, from the expenses associated with treatment for other traumatic events in the victim's life, is a near impossible task from a social science perspective. And because of that, the practical application of the *Anthony* "but-for" approach leaves open the very real possibility that the trafficker who victimized vulnerable persons with pre-existing trauma (a common scenario in human trafficking cases) cannot be ordered to pay restitution for the treatment associated with the trauma that he or she inflicted upon that victim, as that victim was already in a position of needing mental health treatment from prior traumatic experiences.

At present, prosecutors within the Tenth Circuit are working with the Human Trafficking Prosecution Unit (HTPU), the Criminal Division's Child Exploitation and Obscenities Section ("CEOS"), and psychology experts to determine how to comply with the Tenth Circuit's holding to meet the burden in presenting evidence to support a restitution order. We encourage prosecutors within that jurisdiction to continue reaching out to HTPU and CEOS for support on these matters.

B. Economic value of victim's services

The second part of the "the full amount of the victim's losses" compensates the victim for the value of the services the defendant caused the victim to perform, or to restore to the survivor the profits and wages that the trafficker stole during the commission of the

Circuit affirmed. See [United States v. Anthony \(Anthony II\)](#), 22 F.4th 943 (10th Cir. 2022).

³⁰ *Anthony II*, 22 F.4th at 951–52 (explaining that the expert "needed to show that, had [the victim] never encountered [the defendant], she would not have needed the requested therapy and medications" and finding that [b]ecause [the expert] failed to do so, [the court could not] find error in the district court's denial of restitution").

trafficking offense.³¹ The statute entitles the victim to the *greater* of (1) the value to the defendant of the victim’s services or labor (calculated as the income generated by the victim while trafficked), or (2) the value of the victim’s labor under the Fair Labor Standards Act (FLSA).³² The difference can be substantial.³³ For purposes of this article, we refer to the first of these calculations as “unjust enrichment” and the second as “opportunity loss.”

Courts have used various methods to calculate “the gross income or value to the defendant of the victim’s services or labor,” including victims’ accounts of the work they performed and prices charged for such work, as well as evidence gathered during the government’s investigation to demonstrate that value. The defendant must pay the victim(s) either what the victim would have earned in minimum wages and overtime pay under the FLSA or, if the work performed was valued higher than minimum wage, what the victim would have earned at that rate.³⁴ The below sections walk through the “unjust enrichment” and “opportunity loss” calculations to calculate the economic value of the victim’s services.

1. Unjust enrichment

As stated above, the prosecution can calculate the value of a victim’s services to a defendant in two ways. In sex trafficking cases, however, the most common way that often permits the larger restitution award is to calculate the defendant’s gross income from the commercial sex

³¹ 18 U.S.C. § 1593(b)(3).

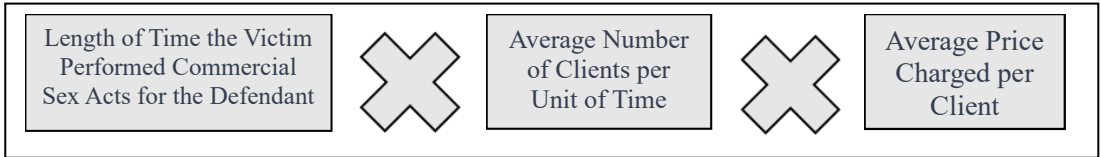
³² *Id.* (“the greater of the gross income or value to the defendant of the victim’s services or labor or the value of the victim’s labor as guaranteed under the minimum wage and overtime guarantees of the Fair Labor Standards Act”); see *Fair Labor Standards Act of 1938*, 29 U.S.C. §§ 201–219.

³³ See *United States v. Hamilton*, No. 17-cr-89, 2018 WL 2770638 (E.D. Va. June 8, 2018) (holding that, per the TVPA, the defendants had to pay “the greater of the gross income or value to the defendant of the victim’s services or labor or the value of the victim’s labor as guaranteed under the minimum wage” when the minimum wage calculation was \$6,102 but the gross income to the defendant was \$119,300).

³⁴ Prevailing wage data may be found at FOREIGN LABOR CERTIFICATION DATA CENTER, www.flcdatcenter.com (last visited Feb. 14, 2022). See U.S. Department of Labor Office of Foreign Labor Certification, *Online Wage Library*, FOREIGN LABOR CERTIFICATION DATA CTR, www.flcdatcenter.com (last visited Feb. 14, 2022).

acts performed by the victim—the “unjust enrichment” calculation. The defendant must pay restitution to victims equal to the sum of the defendant’s earnings from that victim’s acts, regardless of whether such acts were legal.³⁵

An example of the unjust enrichment calculation in the sex trafficking context looks something like this:



Estimates of earnings need only be calculated with reasonably certainty; they need not be mathematically precise.³⁶ For example, if a trafficker hypothetically trafficked a victim for 10 days, and during that time the victim engaged in commercial sex with approximately five clients per day, and each client paid on average \$200 for the commercial sex act, then the gross income or value to the defendant or the defendant’s unjust enrichment would amount to \$10,000 (10 x 5 x 200).

In addition, because the statute defines losses by the “gross income or value to the defendant,” prosecutors should not offset the proceeds generated by expenses the defendant incurred or shared with the victims. For example, in most trafficking cases, traffickers pay for the hotel rooms where the victims engage in commercial sex and for their food, clothing, hair styling, and even “gifts,” all with the proceeds of the victims’ commercial sex acts. These are not deductible in the restitution calculation.³⁷

³⁵ See *Cortes-Castro*, 511 F. App’x at 947; *United States v. Mammedov*, 304 F. App’x 922 (2d Cir. 2008) (not precedential).

³⁶ See *Lewis*, 791 F. Supp. 2d at 92–94 (calculation based upon daily quotas imposed by trafficker multiplied by number of days victim was held); see also *United States v. Nash*, 558 F. App’x 741, 742 (9th Cir. 2014) (not precedential) (finding the district court “appropriately ‘estimate[d], based upon facts in the record,’ the victims’ losses ‘with some reasonable certainty’”) (quoting *United States v. Doe*, 488 F.3d 1154, 1160 (9th Cir. 2007)).

³⁷ See *United States v. Williams*, 5 F.4th 1295, 1304–08 (11th Cir. 2021) (holding that, when calculating “the greater of the gross income or value to the defendant of the victim’s services or labor,” the TVPA does not require that the award be offset for any benefits received or earnings kept by victim).

2. Opportunity loss

“Opportunity Loss” is shorthand for “the value of the victim’s labor as guaranteed under the minimum wage and overtime guarantees of the [(FLSA)] (29 U.S.C. § 201 et seq.).”³⁸ In short, the goal is to calculate how much money the victim would have earned if paid minimum wage.

The FLSA calculation is derived by multiplying the number of hours worked by the applicable minimum or prevailing wage rate in effect at the relevant time and place; one can then add overtime pay, if applicable, and subtract any money actually paid to the victim.³⁹

The FLSA also provides that an employer who violates the FLSA’s minimum wage and overtime provisions will be liable for liquidated damages in an amount equal to double the amount of back wages owed.⁴⁰ Specifically, liquidated damages “are awarded to provide employees full compensation for violations of the FLSA and are therefore part of ‘the value of the victim’s labor as guaranteed’ by the FLSA.”⁴¹ Therefore, liquidated damages must be included when calculating restitution under the TVPA according to “the value of the victim’s labor.”⁴²

In a 2021 appeal overturning the district court’s denial of liquidated damages, the Fourth Circuit found that:

it would be inconsistent with the TVPA’s requirement of providing restitution in ‘the full amount of the victim’s losses’ not to compensate a victim for losses incurred as

³⁸ 18 U.S.C. § 1593(b)(3).

³⁹ The U.S. Department of Labor’s Wage and Hour Division often plays an invaluable role in performing this calculation by reviewing the evidence, interviewing the victim, and computing lost wages in accordance with the FLSA. See *Wage and Hour Division*, DEP’T OF LABOR, <https://www.dol.gov/whd> (last visited Feb. 14, 2022).

⁴⁰ 29 U.S.C. § 216(b); see also *United States v. Edwards*, 995 F.3d 342, 354–47 (4th Cir. 2021) (finding that that the “TVPA expressly incorporates by reference all of the FLSA’s minimum wage and overtime guarantees, including the liquidated damages provisions in Section 216(b)”; *Sabhnani*, 599 F.3d at 258–61 (finding liquidated damages under FLSA “exclusively tied to violations of the minimum wage and overtime rules in §§ 206 and 207” and appropriately applied as compensation for delay in receiving wages in timely fashion).

⁴¹ *Edwards*, 995 F.3d at 346 (citing 18 U.S.C. § 1593(b)(3)).

⁴² See *id.*

a result of the delay in paying required wages and overtime compensation. And failing to compensate for delay would be particularly egregious in this case, where [the victim] was not paid for many years.”⁴³

III. How to seek restitution

A. Generally

The United States bears the burden of proving the proper amount of restitution by a preponderance of the evidence.⁴⁴ Because some courts are unfamiliar with the mandatory nature of section 1593 and with the methods of calculating the victim’s losses under the statute, filing a written restitution motion that cites pertinent authorities and attaches relevant evidence can significantly enhance the likelihood of securing a restitution order that properly accounts for the full scope of the victim’s losses. This can be done as part of a sentencing memorandum or separately as an independent motion.

The restitution amount requested need not be exact, but it must be supported with “sufficient indicia of reliability”⁴⁵ and “some reasonable certainty.”⁴⁶ While the defendant must have proximately caused all costs for which restitution is sought, the defendant need not be the sole cause.⁴⁷ In addition, in cases with multiple defendants, the

⁴³ *Id.* at 346–47 (citations omitted). The Second Circuit, however, held that victims used as live-in domestic servants could not receive restitution based on overtime pay because, under the FLSA, 29 U.S.C. § 213(b)(21), overtime provisions do not apply to employees working in domestic service for a household when they reside in that household. See *United States v. Sabhnani*, 599 F.3d 215, 256–57 (2d Cir. 2010).

⁴⁴ See 18 U.S.C. § 3664(e); see, e.g., *Anthony I*, 942 F.3d at 964 (citing *United States v. Galloway*, 509 F.3d 1246, 1253 (10th Cir. 2007)).

⁴⁵ See *In re Sealed Case*, 702 F.3d at 67.

⁴⁶ See *United States v. Williams*, 319 F. Supp. 3d 812, 816 (E.D. Va. 2018) (quoting *United States v. Doe*, 488 F.3d 1154, 1160 (9th Cir. 2007)); *United States v. Monzel*, 641 F.3d 528, 540 (D.C. Cir. 2011).

⁴⁷ *In re Sealed Case*, 702 F.3d at 66 (citing *Monzel*, 641 F.3d at 538 and stating, “In other words, the defendant should not be required to pay restitution for harm he did not cause. This does not mean, however, that the defendant must be the sole cause of the harm.”). *But see Anthony I*, 942 F.3d at 969–70 (holding defendant must pay restitution only for the harm that he caused when the victim had been previously trafficked by another defendant).

defendants can be held jointly and severally liable for the full amount of the restitution even if the defendants kept different amounts of the illicit profits.⁴⁸ It is critical that, during the investigation, at trial, and in plea agreements, prosecutors develop evidence that can support a defensible estimation of the amount of the victim's loss.

Eliciting this evidence can be challenging, however, particularly when trauma symptoms or substance abuse issues complicate victims' ability to recount chronology or when sex traffickers keep victims unaware of how much customers are charged. Prosecutors should aim to develop the necessary evidence for a restitution calculation from the earliest stages of the investigation. While much of the evidence relevant to calculating the value of the victim's labor or services likely will be obtained through the investigative process, the restitution analysis can benefit from additional specifics on dates, hours, prices, and volume of customers served to aid in calculating the monetary value of the labor or services performed. The victim's account of dates and times can be corroborated by hotel receipts, travel reservations, text messages, or internet advertisements. Similarly, prices, average numbers of clients, and quotas can often be corroborated, at least circumstantially, by text messages between the trafficker and the victim.

Victim statements given to law enforcement or memorialized in grand jury transcripts, along with corroborating evidence, can form the basis for the restitution calculation and be sufficient to meet the government's burden of proving the victim's losses.⁴⁹ In establishing proof for the restitution calculation, the government may rely on the evidence presented at trial, including expert testimony;⁵⁰ items presented to the grand jury;⁵¹ testimony elicited by hearsay;⁵² or evidence obtained during the government's investigation. A victim is

⁴⁸ See [Hamilton](#), 2018 WL 2770638, at *4 (finding four defendants jointly and severally liable for the full \$119,300 even though two had pleaded guilty for aiding and abetting the others and had passed most of the victims' prostitution profits to the others).

⁴⁹ See, e.g., [Williams](#), 319 F. Supp. 3d at 816.

⁵⁰ See [United States v. Baston](#), 818 F.3d 651, 665 (11th Cir. 2016); [United States v. Palmer](#), 643 F.3d 1060, 1068 (8th Cir. 2011).

⁵¹ See [In re Sealed Case](#), 702 F.3d at 67.

⁵² See [United States v. Hairston](#), 888 F.2d 1349, 1354 n.7 (11th Cir. 1989).

not required to testify at a restitution hearing.⁵³ Additionally, a defendant cannot object to the sufficiency of the government's evidence when the defendant failed to keep records regarding the hours worked by the victim or caused such records to be destroyed.⁵⁴

Because restitution is mandatory, prosecutors have a duty to advocate for restitution even if the dollar amount of the economic value of the victim's labor or services is extremely low. In such cases, they should present arguments, as necessary, to establish that the economic value of the victim's labor or services is a statutory measure of the defendant's unjust enrichment or the victim's lost opportunity and emphasize that the amount, while possibly low, does not purport to account for the pain and suffering associated with the degrading and dehumanizing experience of being compelled into forced labor or commercial sex. While the calculation of the value of the victim's services may produce a small dollar amount, when they are added to other losses listed in section 2259(c)(2), particularly future mental health care expenses, the final amount may be more proportionate to the defendant's sentence and more accurately reflect the survivor's victimization.

Sometimes, especially in plea agreements, there may not be enough evidence available at the time of sentencing to calculate restitution. District courts have been permitted to take longer than the 90-day statutory period to calculate restitution amounts as long as the sentencing court "made clear prior to the deadline's expiration that it would order restitution" and only left open the amount.⁵⁵

Because the restitution order is mandatory, a defendant's inability to pay is irrelevant.⁵⁶ The defendant's ability to pay, however, is

⁵³ See *Sabhnani*, 599 F.3d at 258–59 (stating district courts have broad discretion in choosing the procedures to employ at a restitution hearing "so long as the defendant is given an adequate opportunity to present his position").

⁵⁴ See *Fu Sheng Kuo*, 620 F.3d at 1167.

⁵⁵ See *Dolan v. United States (Dolan I)*, 560 U.S. 605, 607–08 (2010); *Fu Sheng Kuo*, 620 F.3d at 1162–63; *United States v. Dolan (Dolan II)*, 571 F.3d 1022, 1030 (10th Cir. 2009).

⁵⁶ See 18 U.S.C. § 1593(a); *Lewis*, 791 F. Supp. 2d at 92 (awarding restitution despite defendant's inability to pay).

relevant to the court's duty to order a payment schedule.⁵⁷ The Second Circuit held that, when the defendant lacks the ability to pay, a court imposing restitution without a payment schedule, thereby implicitly ordering the amount be paid immediately, is an abuse of discretion that constitutes plain error.⁵⁸

Finally, restitution is mandatory, even when the forced labor occurred outside of the United States. The Eleventh Circuit held, as a matter of first impression, that section 1593 requires international sex traffickers tried in the United States to pay restitution to their victims even if the sex trafficking occurred exclusively in another country.⁵⁹

B. Who is entitled to restitution

Section 1593 requires that a defendant pay restitution to all “victims,” defining a “victim” as “the individual harmed as a result of a crime under this chapter [(chapter 77)].”⁶⁰ Questions have arisen as to whether section 1593 mandates restitution to victims the defendant harmed whom the prosecution did not name in the indictment or whom were named in the indictment for charges the defendant was not convicted of. For forced labor (section 1589) or sex trafficking charges (section 1591), prosecutors generally identify the affected victim in each substantive count.

For other TVPA offenses, however, there is less consistency among prosecutors on whether the victim is identified in the counts. For example, if the prosecution charges the defendant with section 1591 and section 1594(c) (conspiracy to commit sex trafficking), prosecutors do not always identify each victim in the conspiracy charge. Sometimes the evidence at trial will show that the victims of the conspiracy are identical to those listed in the substantive charged counts, but in other cases, a trafficker's conspiracy affects more victims than the prosecution may choose to charge with substantive counts. In those cases, the prosecution should seek restitution for all

⁵⁷ See *Mammedov*, 304 F. App'x at 926–28 (vacating the restitution order and remanding because the sentencing judge did not consider the defendant's inability to pay in “symbolic[ally]” ordering restitution payable immediately).

⁵⁸ See *id.* at 927.

⁵⁹ See *Baston*, 818 F. 3d at 666, 671 (vacating the order of restitution and remanding to increase the award of restitution to cover the victim's sex trafficking that occurred in Australia).

⁶⁰ 18 U.S.C. § 1593(b)(1), (c).

victims of the conspiracy that is supported by the evidence admitted at trial and during the restitution hearing.

Similarly, in some cases, a jury may convict a defendant of the trafficking conspiracy but acquit the defendant of the substantive counts. There are some examples of courts having awarded mandatory restitution even to trafficking victims whom the prosecution did not name in the section 1594(c) count.⁶¹

Because restitution is such a critical component of survivor empowerment and recovery, prosecutors should standardize the language used for victims in indictments and consistently state the victims associated with each count of the indictment. There is no single way prosecutors name or refer to victims in trafficking indictments. Some list the relevant victims' names or initials in each count of the indictment.⁶² Others include one list of victim names or initials at the introduction of the indictment and refer to the group of names as persons affected by some or all of the charges.⁶³ While in a few cases courts have awarded restitution to victims not named in the

⁶¹ See, e.g., [Judgment as to Jorge Estrada-Tepal at 1–2, 6, United States v. Estrada-Tepal, No. 14-cr-00105 \(E.D.N.Y. Dec. 15, 2015\), ECF No. 136](#) (defendant pled guilty to section 1594(c), was convicted of additional trafficking charges, and judge ordered restitution for four Jane Does numbering up to Jane Doe 5); [Superseding Indictment \(S-2\) at 1–4, Estrada-Tepal, No. 14-cr-00105, ECF No. 90](#) (section 1594(c) count referred to “one or more persons” and other trafficking counts named three Jane Does); [Second Superseding Indictment at 2, 4–13, United States v. Mendez-Hernandez, No. 13-cr-00004 \(S.D. Ga. Aug. 7, 2013\), ECF No. 517](#) (section 1594(c) charge referred to “a person and persons, known and unknown, to the Grand Jury,” and the alleged overt acts committed in furtherance of the conspiracy related to Jane Doe victims 1, 2, 4, 7, 8, 9, 10 11, and 15); [Judgement as to Joaquin Mendez-Hernandez at 1, 5, Mendez-Hernandez, No. 13-cr-00004, ECF No. 775](#) (two defendants pled guilty to section 1594(c) alone, and judge ordered \$705,000 in restitution apportioned among Jane Doe victims 1, 4, 6, 9, and 17).

⁶² [Indictment at 2, United States v. Saddler, No. 16-cr-00251 \(E.D.N.C. Oct. 5, 2016\), ECF No. 1](#) (the indictment named victim “T.W.” in the section 1591(a)(1) and section 1594(c) charges); [Amended Judgment as to William Maurice Saddler at 1,7, Saddler, No. 16-cr-00251, ECF No. 431](#) (judge convicted the defendant of both charges and ordered him to pay T.W. \$477,618.20 in restitution).

⁶³ [Indictment at 8–9, United States v. Medeles-Arguello, No. 13-CR-628 \(S.D. Tex. Oct. 9, 2013\), ECF No. 1.](#)

indictment at all, the theory has not been widely tested. In the closest issue heard, whether a judge could order restitution to a victim not named in the Pretrial Investigation Report (PSR), the Fifth Circuit affirmed the district court's restitution order to three victims of a human trafficking conspiracy under § 1594(c), holding "there is no requirement that a victim of the charged offense be identified in the PSR."⁶⁴ Prosecutors should bring uniformity to these practices to ensure their language does not preclude a victim from receiving mandatory restitution upon conviction.

When a victim becomes uncommunicative with the prosecution team after the conviction, it is still necessary to seek restitution, to the extent possible, based on the evidence in the record because the court is still required to order restitution. In addition, the government must make reasonable efforts to contact the victim and provide the restitution recovered. In such cases, the record may not contain enough information to calculate losses under section 2259(c)(2) or an "unjust enrichment" estimate. In most cases, however, there is enough evidence to at least put forth an "opportunity loss" estimate under the FLSA.

C. Restitution as part of the plea agreement

A plea agreement is another way to secure restitution for a victim prosecutors did not name in a substantive count or the indictment at all. When entering into a plea agreement, the government and a defendant may agree to a restitution order for specifically identified victims, to a stipulated amount of restitution, or that restitution will be calculated in accordance with section 1593, even in cases where the defendant is not pleading guilty to a chapter 77 offense. Similarly, prosecutors can require that the defendant agree to pay restitution to, for example, "the victim(s) regardless of the count(s) of conviction"⁶⁵ or to "every identifiable victim who may have been harmed by [defendant's] scheme or pattern of criminal activity."⁶⁶

⁶⁴ [United States v. Batres](#), 731 F. App'x 341, 343 (5th Cir. 2018) (not precedential).

⁶⁵ [See Plea Agreement as to Adelio De Jesus Batres at 10, United States v. Melendez-Gonzalez](#), No. 14-cr-497 (S.D. Tex. 2016), ECF No. 156; [Judgment as to Adelio De Jesus Batres at 1, 5, Melendez-Gonzalez](#), No. 14-cr-497, ECF No. 269.

⁶⁶ [See, e.g., Government's Response to Defendants' Motion for Clarification Regarding Restitution at 2, United States v. Simmons](#), No. 15-cr-00695

For example, a provision of the plea agreement may read:

The defendant understands and agrees that, as a result of pleading guilty to violating 18 U.S.C. § 1591, an order of restitution is mandatory pursuant to 18 U.S.C. § 1593. The defendant agrees to pay restitution to victims 1, 2, and 3 in the following amounts:

Victim 1: \$10,000

Victim 2: \$2,000

Victim 3: \$100,500

If the parties cannot agree to a specific amount of restitution, but can agree to include restitution to specific victims, then the plea agreement might read:

The defendant understands and agrees that, as a result of pleading guilty to violating 18 U.S.C. § 1591, an order of restitution is mandatory pursuant to 18 U.S.C. § 1593. The defendant agrees to pay restitution to Victims 1, 2, and 3 despite the fact that he is only pleading guilty to Count 2 of the Indictment (Sex Trafficking of Victim 1). There is no agreement as to the amount of restitution. Defendant understands and agrees that, if an amount of restitution is not agreed upon by the date of sentencing, then government will present the Court with evidence in support of a restitution request at the sentencing hearing, and the Court will determine a restitution amount to be ordered within 90 days of the sentencing hearing.

The parties do not need to agree on the exact amount of restitution in the plea agreement, but if the agreement does not specify the exact

[\(D.S.C. Oct. 4, 2017\), ECF No. 147](#) (quoting Dkt. 108, p. 3–4; Dkt. 105, p. 3–4 (The defendant pled guilty to violating section 1594(c) and several firearm charges. The section 1594(c) charge referred to “minor victims and young women” generally, and the defendant agreed “to make full restitution to every identifiable victim who may have been harmed by [his] scheme or pattern of criminal activity.”); [Amended Judgment as to Ashford James Simmons at 1, 5, Simmons, No. 15-cr-00695, ECF No. 200](#) (the court ordered \$14,480 in restitution to two victims not named in the indictment).

amount, the defendant has the right to appeal the restitution ordered.⁶⁷

Further, even when the parties do agree in the plea agreement to the exact restitution amount, to who will receive restitution, or to how the restitution shall be calculated, unless the parties are proceeding under Federal Rule of Criminal Procedure 11(c)(1)(C), the court likely retains the authority to veer from the restitution provisions of the plea agreement and order restitution in accordance with the applicable statutory procedure as if the parties had not agreed to an exact dollar amount, to specified victims, or to a calculation formula.

D. Seeking restitution under other statutes

Trafficking cases brought under a chapter 77 offense, including section 1589 (forced labor) and section 1591 (sex trafficking), are often brought alongside other charges outside of chapter 77, such as Mann Act charges involving interstate transportation for the purposes of prostitution.⁶⁸ Sometimes, either as the result of plea negotiations or acquittal, the defendant is not convicted of the charged chapter 77 offense. Unless set forth in the plea agreement, prosecutors in these instances cannot use section 1593 to calculate restitution.⁶⁹ Instead, unless provided otherwise by statute, restitution for all other Title 18 offenses is calculated under 18 U.S.C. §§ 3663 (discretionary restitution) or 3663A (mandatory restitution for certain offenses that cause bodily harm, or “MVRA”).⁷⁰ For this reason, prosecutors must

⁶⁷ See [United States v. Tosie](#), 639 F.3d 1213, 1217 (9th Cir. 2011) (“appeal waiver was not knowing because [defendant] was not afforded notice of the amount of restitution to be ordered”).

⁶⁸ See 18 U.S.C. § 2421. As of December 2018, the Mann Act has its own mandatory restitution provisions. See 18 U.S.C. § 2429.

⁶⁹ See [Fu Sheng Kuo](#), 620 F.3d at 1160–61, 1164 (when the defendants pled guilty to 18 U.S.C. § 241, conspiracy to violate civil rights, and the district court calculated restitution using the “unjust enrichment” calculation under section 1593, the Ninth Circuit reversed, holding that because the defendants were not convicted of a Chapter 77 crime, “the restitution provisions of the Trafficking Act simply do not apply. Instead, the restitution provisions of § 3663 apply. And the calculation methods under § 3663 do not include a defendant’s ill-gotten gains.”).

⁷⁰ See 18 U.S.C. § 2259 (mandatory restitution for Chapter 110 offenses).

understand how restitution works for each charge included in an indictment and plea agreement.⁷¹

And, in cases in which the defendant is pleading guilty to an offense not included in chapter 77, and therefore not covered by section 1593, a provision in a plea agreement to use the formula set forth in section 1593 to calculate restitution is beneficial for trafficking victims because the loss calculations are generally broader under section 1593's "unjust enrichment" measure than section 3663 (restitution for most other offenses), and restitution awarded pursuant to section 1593 is not taxable.⁷² The plea agreement must expressly stipulate that restitution will be calculated pursuant to section 1593; otherwise, applying section 1593 to calculate restitution for non-trafficking offenses (statutes not codified under chapter 77) constitutes reversible error.⁷³

1. Differences between the TVPA and MVRA

TVPA (18 U.S.C. § 1593)	MVRA (18 U.S.C. § 3663A)
<ul style="list-style-type: none">• Actual past/future losses + (greater of unjust enrichment or value under FLSA)• No bodily injury required for psychological counseling costs• Forfeited assets must go toward restitution• Restitution not subject to tax	<ul style="list-style-type: none">• Only actual past/future losses• Requires bodily injury for psychological counseling• Forfeited assets may be applied to restitution• Unclear whether restitution is taxable

⁷¹ See, e.g., *Fu Sheng Kuo*, 620 F.3d at 1165–66 (remanding a restitution order that was erroneously based on the defendant's ill-gotten gains because the defendant was charged with a civil rights conspiracy (18 U.S.C. § 241) rather than a human trafficking violation under Chapter 77).

⁷² I.R.S. Notice 2012-12, 2012-6 I.R.B.

⁷³ See *Fu Sheng Kuo*, 620 F.3d at 1164.

VI. Conclusion

Restitution can be a life-changing resource for trafficking survivors. It serves to restore a victim's losses, both the personal losses enumerated in section 2259(c)(2) and those losses measured either by the unjust enrichment the defendant derived from exploiting the victim or by the lost opportunity to the victim in obtaining legitimate work. The mandatory nature of the TVPA's restitution provision highlights the significance of restitution, both as a means of stabilizing and empowering a trafficking survivor and as a means of deterring trafficking conduct. Advocating effectively for restitution is, therefore, a critical component of prosecuting a trafficking case. Effective enforcement of the mandatory restitution provision requires that prosecutors investigate evidence related to the victim's losses from the earliest stages of the investigation, file motions or memoranda setting forth the applicable calculations, and present evidence of the victim's losses at contested restitution hearings. Federal prosecutors encountering restitution-related issues are encouraged to contact the Civil Rights Division's Criminal Section, Human Trafficking Prosecution Unit, for assistance in pursuing restitution orders.

About the Author

Brandy Wagstaff is currently serving as Legal Counsel for Litigation in the Criminal Section's HTPU at the U.S. Department of Justice, Civil Rights Division. In this capacity, she provides legal and strategic analysis in support of HTPU-led enforcement activities and initiatives. Before joining the HTPU, Ms. Wagstaff served for seven years as an Attorney with the Civil Rights Division's Disability Rights Section, where she engaged in litigation and developed regulations to enforce the Americans with Disabilities Act. Ms. Wagstaff is also an adjunct professor who teaches courses in appellate writing, appellate advocacy, legislative and regulatory drafting, and civil rights prosecutions at George Mason University School of Law (GMU). She received her J.D., magna cum laude, from GMU and served as a judicial law clerk to the Honorable Alan Kay on the U.S. District Court for the District of Columbia.