

# When “Mandatory” Does Not Mean Mandatory:

Failure to Obtain Criminal Restitution  
in Federal Prosecution of Human Trafficking  
Cases in the United States



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# When “Mandatory” Does Not Mean Mandatory:

## Failure to Obtain Criminal Restitution in Federal Prosecution of Human Trafficking

### I. INTRODUCTION

The Trafficking Victims Protection Act (TVPA),<sup>1</sup> passed in 2000, broke significant new ground by providing mandatory restitution for trafficking victims. Congress unambiguously directed that “[U.S. federal] court[s] *shall* order restitution for any offense” committed under the anti-trafficking statutes. The mandatory restitution law, 18 U.S.C. § 1593, requires recovery – from the defendant – of the “full amount of the victim’s losses.” Most importantly, Congress supplied a trafficking-specific formula to calculate restitution, defined as:

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.<sup>2</sup>

In the hands of a skilled prosecutor, the mandatory restitution law is a powerful tool. Three decisions illustrate the law’s potential to make victims whole and strip defendants of their ill-gotten gains.

*United States v. Sabhnani*,<sup>3</sup> a case involving labor trafficking, is a model for obtaining restitution under the federal trafficking statutes. A jury in the Eastern District of New York convicted the defendants, husband and wife, of crimes including forced labor and conspiracy, finding that the defendants had trafficked two Indonesian women into forced domestic servitude in their 5,900 square foot Long Island home. The court then sentenced the defendants to lengthy prison terms and entered a comprehensive restitution order in the amount of \$936,546.22, for which the defendants were jointly and severally liable.<sup>4</sup> The defendants appealed to the Second Circuit Court of Appeals.<sup>5</sup>

The Second Circuit endorsed the trial court’s significant restitution order theory, concluding that the victims should receive not only back wages, but also liquidated damages under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 et seq.<sup>6</sup> The Second Circuit remanded a portion of the case for recalculation of the restitution based on the proper legal standard for overtime.<sup>7</sup> After reassessing the hours worked by both victims, the trial court ultimately ordered \$679,866.98 in restitution under 18 U.S.C. § 1593.<sup>8</sup>

*United States v. Edwards*,<sup>9</sup> a criminal case prosecuted in the District of Maryland, took the *Sabhnani* case a step further. While the *Sabhnani* defendants had been convicted of a trafficking crime, the defendants in *Edwards* pled to lesser, non-trafficking crimes. Nevertheless, prosecutors successfully pressed for restitution under 18 U.S.C. § 1593, the trafficking restitution statute. The defendants, also a husband and wife, faced an initial indictment charging them with holding a domestic worker in forced labor in their home for ten years.<sup>10</sup> The defendants each pled guilty to harboring an alien in violation of 18 U.S.C. § 1324(a)(1)(A)(iii) (a non-trafficking offense).<sup>11</sup> The defendants received sentences of three months and one year in prison, respectively.<sup>12</sup>

After obtaining the plea agreement, federal prosecutors filed multiple memoranda advocating for restitution. Prosecutors submitted spreadsheets documenting the number of hours and days the victim worked, and presented expert testimony from a Department of Labor Wage and Hour expert at a sentencing hearing.<sup>13</sup> The restitution request covered minimum wage payments for all labor performed, as well as liquidated damages equal to the back wages, as allowed under the FLSA.<sup>14</sup> In the memorandum requesting restitution, the prosecutors correctly noted that, while the FLSA does not require live-in domestic workers to be paid time-and-a-half for overtime,<sup>15</sup> the workers must be paid for all time during which they are working or on call.<sup>16</sup> By the government's measure, the victim was owed back wages for approximately 100 hours of work per week, without interruption, for 10 years.<sup>17</sup> Although the defendants had pled guilty to a non-trafficking crime, the court awarded the victim \$369,580.80 in restitution.<sup>18</sup>

*Edwards* broke new ground in three ways. First, the plea agreement required the defendants to pay \$50,000 into an escrow account *prior to* sentencing.<sup>19</sup> Second, the government successfully obtained the restitution under 18 U.S.C. § 1593,<sup>20</sup> rendering the amount exempt from federal taxation as income.<sup>21</sup> Finally, the court awarded liquidated damages under the Fair Labor Standards Act, as well as back wages.<sup>22</sup>

In contrast to these labor trafficking restitution successes, sex trafficking prosecutions frequently fail to live up to the restitution requirements of the TVPA. The law requires a human trafficking restitution award to include whichever is greater: the value of the victim's work under the FLSA or the value to the defendant of the services the victim was forced (or induced, in the case of children) to provide.<sup>23</sup> The value to a defendant of commercial sexual services tends to vastly exceed the minimum wage.<sup>24</sup> One would expect restitution amounts in sex trafficking cases to dwarf those awarded in forced labor cases. This rarely occurs.<sup>25</sup>

However, one District of Columbia case stands out as an example of effective recovery of restitution in a sex trafficking prosecution. Indicted for sex trafficking of children and interstate transportation of a minor for purposes of prostitution,<sup>26</sup> defendant Shelby Lewis pled guilty to multiple counts of sex trafficking of children.<sup>27</sup> The court sentenced Lewis to twenty years in prison and ordered him to pay \$3,892,055 in restitution to four child victims.<sup>28</sup> In calculating the restitution award, the court multiplied the average daily amount that each victim testified she earned for the defendant by the number of days the defendant held her. For example, one victim testified that she typically earned \$400 per day for her trafficker by performing commercial sex acts. The court multiplied this amount by 914 – the number of days the defendant forced her to provide commercial sexual services – and used this amount as the basis for one portion of her restitution payment.<sup>29</sup> The court also appointed a guardian *ad litem* (GAL) for the girls. On behalf of the minors, the GAL, a pro bono attorney, submitted extensive evidence of other harms the children had suffered, all documented in an expert witness report. The restitution ultimately ordered by the court included not only the defendant's income obtained through the victims' services, but also money to cover medical, psychiatric, and educational expenses that the expert witness determined the children would incur during their recoveries.

*Sabhnani*, *Lewis*, and *Edwards* have three features in common: first, the victims had pro bono legal representation from outside attorneys; second, federal prosecutors handling these matters applied a victim-centered approach and affirmatively sought restitution in recovery; and finally, in each of these cases, the courts enforced the federal restitution statute in the manner Congress intended.

Unfortunately, a year-long investigation into restitution for trafficking crimes in the United States reveals that the restitution outcomes in these cases are outliers. Restitution orders in trafficking cases are the exception, not the rule. The TVPA’s mandatory restitution provision is frequently overlooked, leaving trafficking victims empty-handed, deprived of the resources that would enable them to rebuild their lives.

The Human Trafficking Pro Bono Legal Center, in collaboration with WilmerHale, conducted an in-depth examination of all federal criminal human trafficking cases brought between 2009 and 2012. A total of 306 federal indictments for human trafficking brought under Chapter 77 of Title 18 of the United States Code between 2009 and 2012 were identified.<sup>30</sup> Researchers examined a subset of these cases to discern trends in restitution requests and awards.

The key finding: restitution was awarded in just 36% of cases.<sup>31</sup> For trafficking victims, mandatory does not mean mandatory.

The criminal restitution ordered for the 2009-2012 cases identified totaled just \$11,279,009.51. This amount reflects \$3,568,842.35 awarded in 15 labor trafficking cases and \$7,834,696.30 ordered to victims in 52 sex trafficking cases.<sup>32</sup>

This research leads to the troubling conclusion that restitution is rarely awarded. And the paltry amount that has been awarded – less than \$3 million per year on average for each of the four years – should spark considerable concern among those who advocate for the rights of trafficking victims.

## II. METHODOLOGY

Researchers culled the 306 Title 18, Chapter 77 trafficking cases identified by the WilmerHale pro bono team to remove cases that would skew the data. In all, the research team ultimately excluded 120 cases from the data set. The cases were removed for the following reasons:

- the case remained open<sup>33</sup> (59);
- the defendant was acquitted (3);
- the defendant was charged with attempt only (i.e., there were no victims) (9);
- the case was dismissed (9); or
- the case had insufficient documentation to provide useful data<sup>34</sup> (40).

Cases were coded to indicate the presence and type of written restitution request.<sup>35</sup> Researchers then categorized restitution requests by restitution outcomes (Category A or B, for “restitution not requested” or “restitution requested,” respectively). Within the two categories, the circumstances surrounding the requests and their dispositions fit into eight subcategories:

### Category A, Restitution Not Requested:

1. No indication

2. Affirmatively denied
3. Brought up *sua sponte* by the court.

Category B, Restitution Requested:

4. In a plea agreement, using boilerplate language
5. In a plea agreement, using particularized language
6. In a sentencing memorandum<sup>36</sup>
7. In a separate restitution request
8. In writing elsewhere.<sup>37</sup>

Cases also were sorted by jurisdiction, amount of restitution awarded, and outcome of the criminal prosecution. Cases involving pleas were further sorted according to the crime to which the defendant pled, since the mandatory restitution provision of the TVPA only applies to criminal offenses enumerated in Chapter 77 of Title 18 of the United States Code.<sup>38</sup>

Of the 186 cases that met the criteria for evaluation<sup>39</sup>, 170 involved sex trafficking, 15 involved labor trafficking, and 1 involved both forms of trafficking. Only 67, or 36%, of the cases ended with restitution orders. Even including only those cases in which defendants pled guilty or were convicted of human trafficking crimes, courts ordered restitution in just 38% of cases.<sup>40</sup>

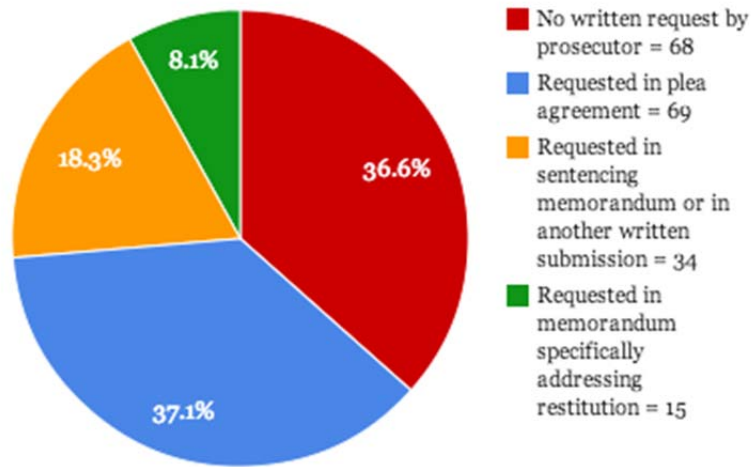
### **III. SUMMARY OF RESULTS**

#### **A. Restitution Requests as a Factor in Restitution Outcomes**

In 68 of the 186 total cases, the prosecutor did not make a restitution request. In 10 of the cases in which no restitution was requested, the prosecutors explicitly declined to request restitution; in 55 cases, the dockets had no mention of restitution. In 3 of the 68 cases, researchers found only a *sua sponte* mention of restitution by the court.

Of the 118 cases with restitution requests, the requests were made in a variety of ways: 64 included boilerplate restitution requests in the plea agreements; 5 included non-boilerplate restitution requests in the plea agreements; 29 included restitution requests in sentencing memoranda; 5 included written restitution requests elsewhere on the docket; and 15 included separate restitution requests.

Graph 1: Percentage of Cases in Which Restitution Requests Were Made, and in What Manner



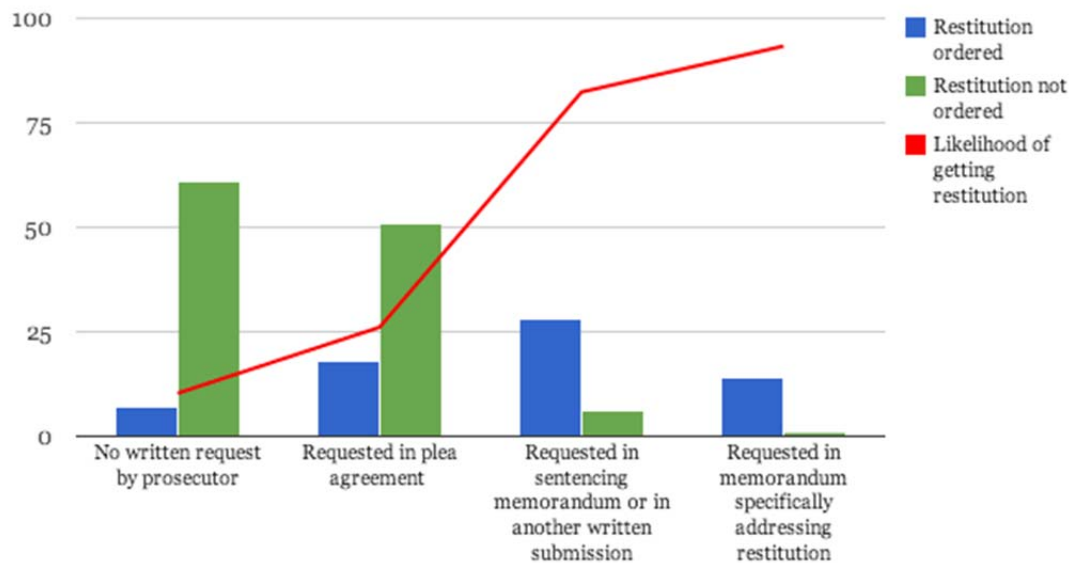
The research identified a key determinant of whether restitution would be ordered in a particular case: whether the prosecutor requested restitution. In cases in which the prosecutor did not request restitution, restitution was granted in only 7 out of 68 cases (12%). In other words, the victim was extremely unlikely to receive restitution if the prosecutor failed to request it. The manner in which a request was made appeared to have a profound effect on the likelihood of success. Notably, restitution was granted in 14 out of 15 cases (93%) in which the prosecutor requested restitution in a memorandum dedicated to addressing restitution. A request in the government’s sentencing memorandum or another written submission (not entirely dedicated to addressing restitution issues) resulted in restitution orders in 28 out of 34 cases (82%). A request in the plea agreement yielded a success rate in 18 out of 69 cases (25%).

Table 1: Number of Cases in Which Restitution Requests Were Made, and in What Manner

	No restitution request by prosecutor	Requested in plea agreement	Requested in sentencing memorandum or another written submission	Requested in a memorandum specifically addressing restitution
Restitution ordered	7	18	28	14
No restitution ordered	61	51	6	1
Total	68	69	34	15



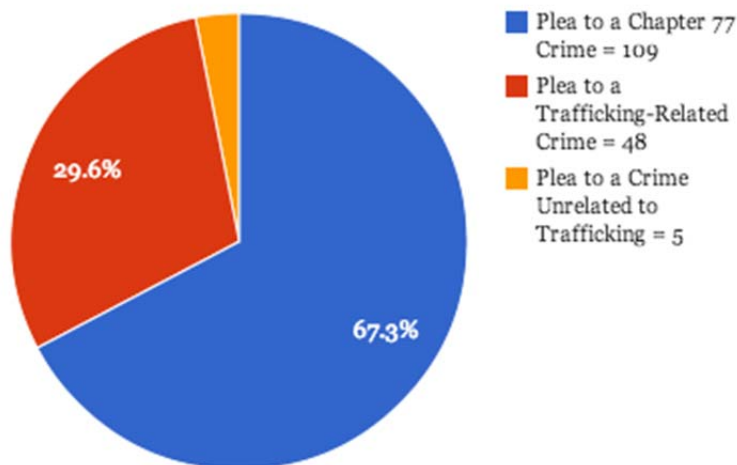
Graph 2: Number of Cases in Which Restitution Requests Were Made and the Likelihood of Obtaining Restitution Orders



### B. Disposition of Criminal Prosecution as a Factor in Restitution Outcomes

In the 186 cases examined, 162 cases resulted in plea agreements.<sup>41</sup> Of those cases, 109 cases (67.3%) involved pleas to Chapter 77 trafficking crimes; 48 cases (29.6%) included pleas to trafficking-related crimes<sup>42</sup>; and 5 cases included pleas to unrelated crimes only.<sup>43</sup> Although not all pled-to offenses included mandatory restitution provisions,<sup>44</sup> prosecutors may require restitution as part of the agreement for criminal activity not included in the indictment or charging documents. For example, in *United States v. Penzato*,<sup>45</sup> a case brought in the Northern District of California in 2012, the defendants pled guilty to conspiracy to possess illegal identification documents.<sup>46</sup> Despite the fact that the plea was to a non-trafficking crime, the defendants agreed to pay restitution in the amount of \$13,000 to the victim – an amount calculated based on the value of the labor performed by the victim for the defendants.<sup>47</sup>

Graph 3: Plea Agreements Involving Chapter 77 and Non-Chapter 77 Offenses



In plea bargains, prosecutors have a unique opportunity to secure restitution for the victims. Following a conviction, a court calculating restitution may only consider the restitution provision corresponding to the crime charged.<sup>48</sup> But a court may accept a plea agreement that stipulates to restitution. In addition, parties may stipulate to the calculation of restitution under another statute.<sup>49</sup> Although a plea agreement need not contain a specific restitution amount, it must contain at least an estimate. Otherwise, a defendant may be allowed to appeal the plea agreement, even if he signed a waiver of appeal.<sup>50</sup>

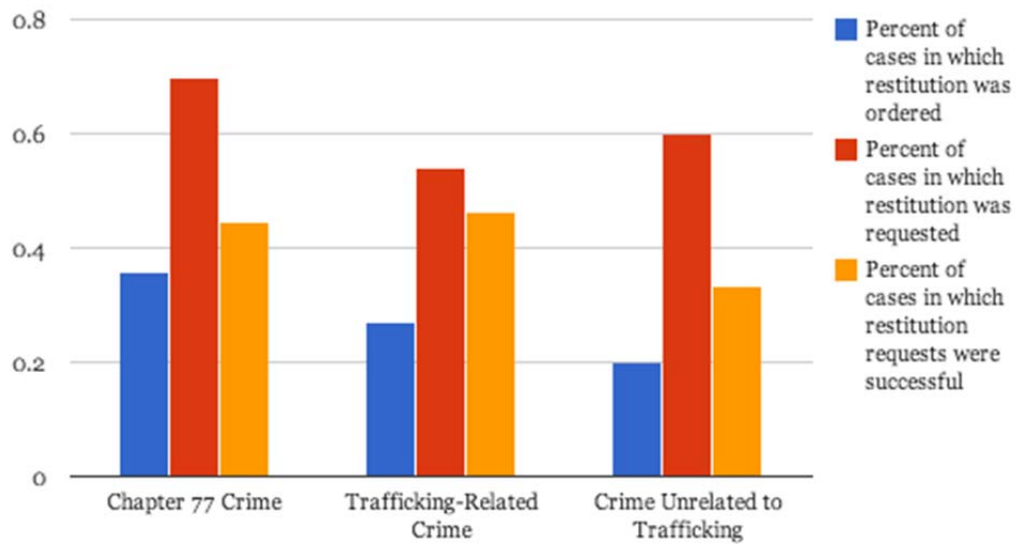
It is worth noting that, whether the outcome of the criminal case is a plea or a conviction, the court may use its discretionary authority under 18 U.S.C. § 3663 (order of restitution) and 18 U.S.C. § 3663A (mandatory restitution to victims of certain crimes) to order additional restitution.<sup>51</sup> And, as illustrated in the *United States v. Edwards* case discussed above, that restitution may be ordered under 18 U.S.C. § 1593.

When cases were resolved through plea agreements, prosecutors were more likely to request restitution when the defendant pled to a Chapter 77 violation.<sup>52</sup> In 76 out of 109 cases (70%), federal prosecutors requested restitution when a defendant pled to a Chapter 77 violation, but did so in only 27 out of 48 cases (56%) in which a defendant pled to other trafficking-related crimes. In 3 of 5 total cases (60%) in which a defendant pled to an unrelated crime, prosecutors requested restitution as part of the plea agreement or sentencing memorandum.

Table 2: Restitution Requests and Types of Offense in Plea Agreement

	Plea to Chapter 77 Offense	Plea to Trafficking Related Offense	Plea Offense Unrelated to Trafficking
Restitution requested	76	27	3
No restitution requested	33	21	2
Total	109	48	5

Graph 4: Restitution Requests and Outcomes by Types of Plea



### C. Jurisdiction as a Factor in Restitution Outcomes

Between 2009 and 2012, 51 of the 93 U.S. Attorneys' Offices initiated indictments for Chapter 77 trafficking offenses. The Southern District of Florida brought the highest number of cases of any office, with 18 cases indicted during the period. Of the 51 offices that initiated Chapter 77 prosecutions, approximately half, or 23 offices, did not obtain restitution awards in any of their trafficking cases between 2009 and 2012.<sup>53</sup> The U.S. Attorneys' Offices for the Southern District of Florida and the Northern District of Georgia successfully obtained the largest number of restitution orders. In the Southern District of Florida, federal district courts ordered restitution ranging from \$218 to \$1,239,200 in one forced labor and eight sex trafficking cases.<sup>54</sup> In the Northern District of Georgia, courts ordered restitution ranging from \$525 to \$154,550 in two forced labor and seven sex trafficking cases.<sup>55</sup>

The Southern District of Florida also yielded some of the highest restitution awards. For example, in *United States v. Velazquez*,<sup>56</sup> the defendants had participated in an elaborate scheme to convince Mexican women to migrate to the United States illegally. The traffickers then compelled the women to provide sexual services to migrant farm workers.<sup>57</sup> The court held three defendants jointly and severally liable for \$1,239,200 in restitution to five victims.<sup>58</sup>

It is important to note, however, that a high restitution award does not necessarily mean a large recovery for victims. In *United States v. Terechina*,<sup>59</sup> a labor trafficking case involving H-2B hotel guest workers, the victims only received \$9,109.75 of the \$241,979.92 restitution award.<sup>60</sup> The court ordered the remaining funds be paid to the Internal Revenue Service and to the Department of Labor.<sup>61</sup>

#### D. Type of Trafficking Case as a Factor in Restitution Outcomes

Forced labor prosecutions were significantly more likely to involve restitution requests and awards than forced prostitution or even child sex trafficking cases. Of the 16 forced labor cases identified,<sup>62</sup> all but 2 included restitution requests (87%), and all but 1 (94%) included restitution orders. Of the 170 sex trafficking cases, 66 (39%) did not include restitution requests, and only 52 (31%) included restitution orders. Moreover, only 44% of restitution requests in sex trafficking cases were successful, compared to 93% of requests in labor trafficking cases.<sup>63</sup>

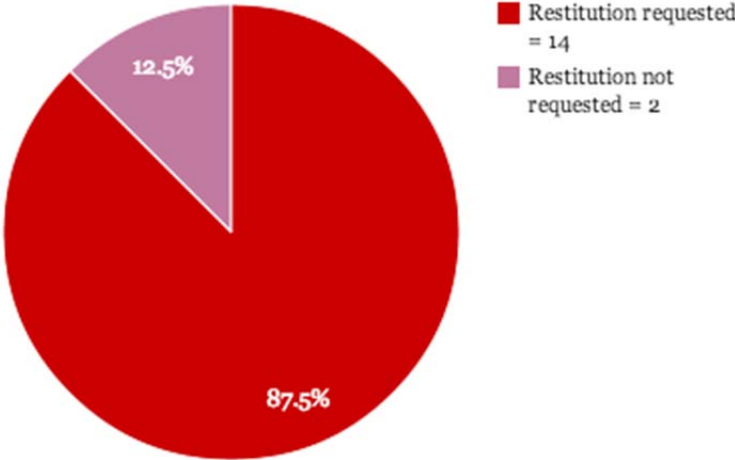
Table 3: Restitution Requests and Orders in Labor and Sex Trafficking Cases

	Restitution requested	Restitution not requested	Restitution ordered	Restitution not ordered
Labor Trafficking	14	2	15	1
Sex Trafficking	104	66	52	118

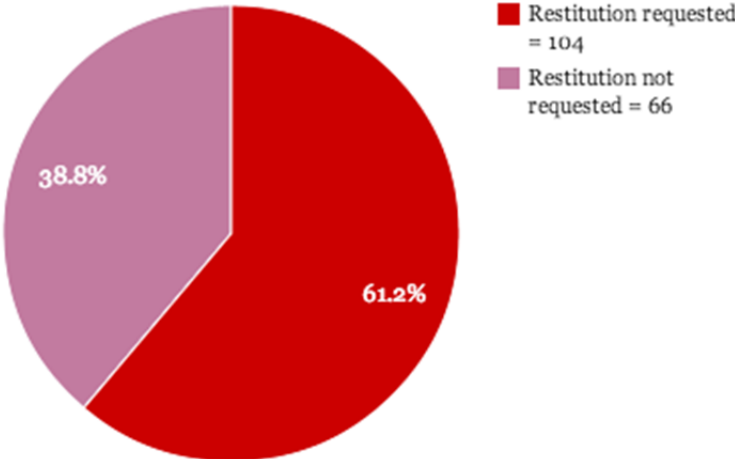
Restitution award amounts also varied by case type. The average award for labor trafficking cases was \$213,939.21.<sup>64</sup> In contrast, the average award for sex trafficking cases was less than a quarter of that: \$46,211.66.<sup>65</sup> Although this discrepancy in averages can be explained in part by the higher *incidence* of restitution awards in labor cases, awards were higher on average among labor trafficking cases in which restitution was awarded than they were among sex trafficking cases in which restitution was awarded. The average restitution award in labor trafficking cases in which restitution was awarded was \$228,201.82, while the average award in equivalent sex trafficking cases was \$151,076.58.<sup>66</sup>

Graph 5: Restitution Requests

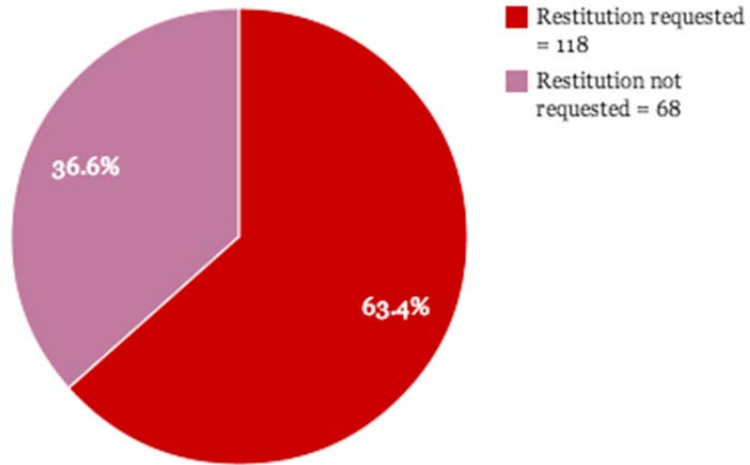
Labor Trafficking Cases



Sex Trafficking Cases

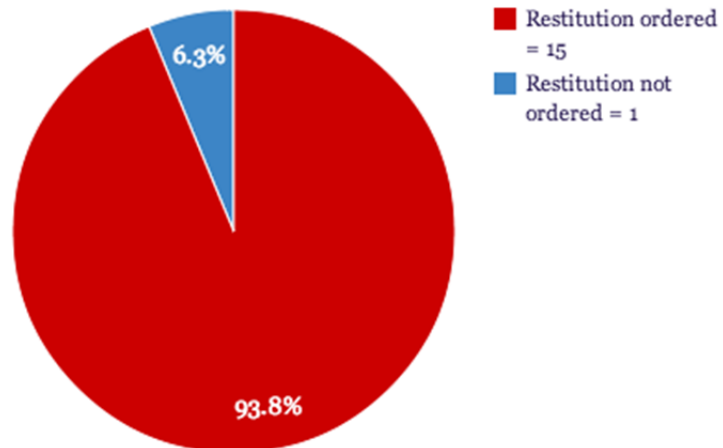


## Labor and Sex Trafficking Cases Combined

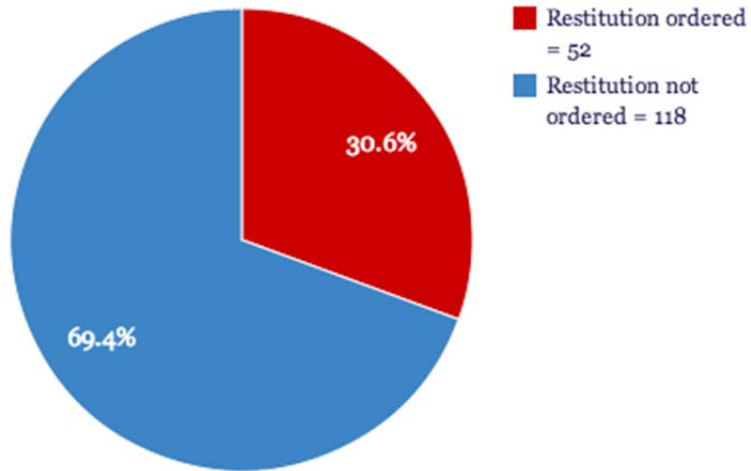


## Graph 6: Restitution Orders

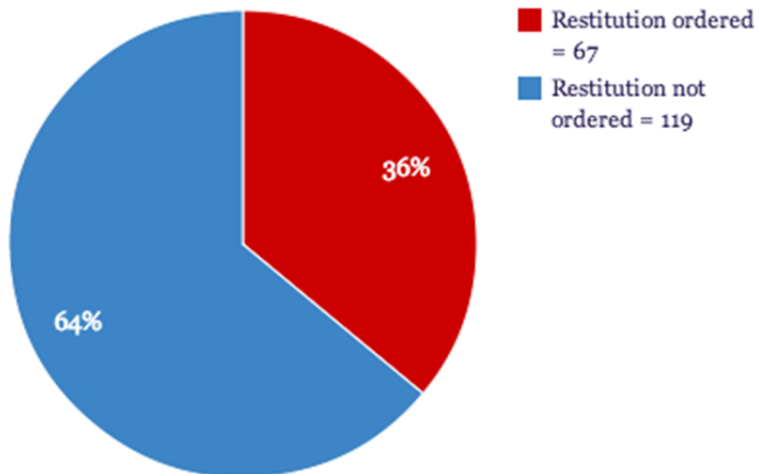
### Labor Trafficking Cases



## Sex Trafficking Cases

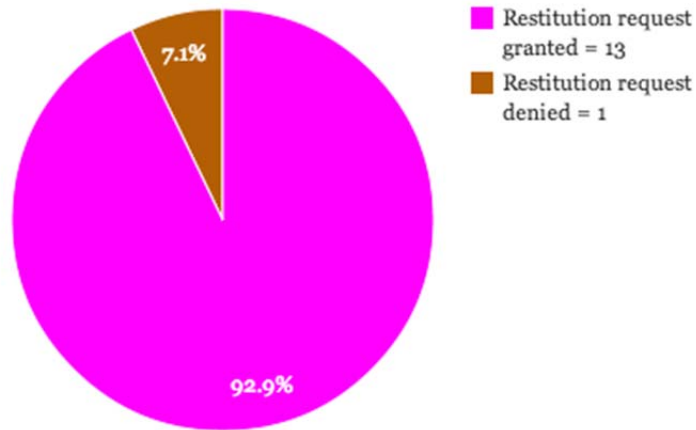


## Labor and Sex Trafficking Cases Combined

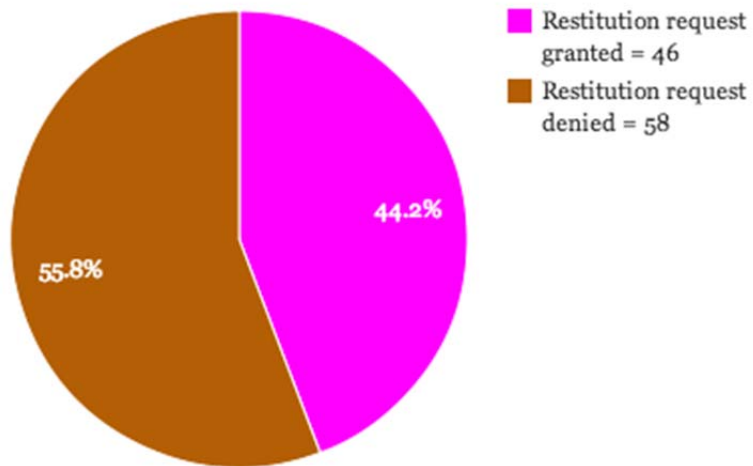


Graph 7: Proportion of Successful Restitution Requests

Labor Trafficking Cases

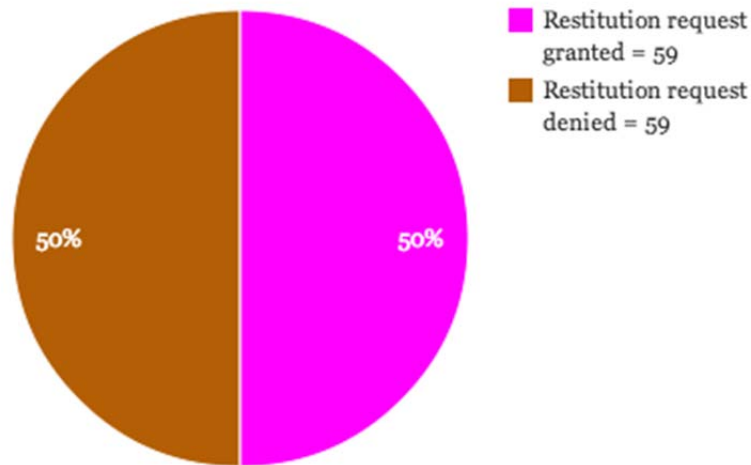


Sex Trafficking Cases





## Labor and Sex Trafficking Cases Combined



The pie charts above demonstrate that failure to award restitution orders is more predominant in sex trafficking cases. Despite the mandatory language of the TVPA (“shall order restitution”), restitution is requested less often in sex trafficking cases than in labor trafficking cases. Restitution requests are also less likely to succeed in sex trafficking cases than in labor trafficking cases. A careful examination of sentencing transcripts indicates that the low rate of restitution orders may stem from misconceptions and confusion over how restitution should be calculated in cases involving forced prostitution or the commercial sexual exploitation of children. Prosecutors’ efforts to obtain restitution may falter when confronted by the argument that victims performed services that are illegal and should not be compensated. Not only do defense counsel routinely advance this argument, but courts may be unaware of case law to the contrary. Transcripts of sentencing and restitution hearings show that both federal prosecutors and courts are not always clear about when, and on what grounds, restitution is owed to sex trafficking victims.

### IV. CALCULATING RESTITUTION

Under the mandatory restitution provision of the TVPA, trafficking victims are entitled to two kinds of damages: compensation for their personal losses, and compensation for the economic value of their services.<sup>67</sup> First, they may recover the “full amount of [their] losses,” as defined under 18 U.S.C. § 2259(b)(3).<sup>68</sup> These losses include costs incurred for medical services (including psychological care); physical rehabilitation; transportation, housing, and child care; lost income; attorneys’ fees; and “any other losses suffered . . . as a proximate result of the offence.”<sup>69</sup> These losses must be proved by a preponderance of the evidence “with some reasonable certainty.”<sup>70</sup>

Courts require a clear accounting of expenses incurred to be included in a request for restitution under this category. In *United States v. Flanders*, for example, the government submitted itemized costs incurred by victims ranging from gas bills for transportation to sexual assault recovery therapy sessions.<sup>71</sup> The court ordered restitution for the full amount requested.<sup>72</sup> As the *United States v. Lewis* case demonstrates, these restitution awards may take a forward-looking approach to costs, especially in the case of child victims.<sup>73</sup>

In addition to these “out-of-pocket” losses, trafficking victims are entitled to recover the value of the services they were forced (or, in the case of victims of child sex trafficking, induced) to perform.<sup>74</sup> Under the mandatory restitution provision of the TVPA, this value can be measured in two ways: under the provisions of the Fair Labor Standards Act, or according to the value to the defendant of the victim’s services.<sup>75</sup> Victims are entitled to whichever is greater.<sup>76</sup> If the defendant forced the victim to perform lawful work – that is, labor that could be bought and sold lawfully – the defendant must pay the victim at least what he or she would have earned in minimum and overtime wage under the FLSA. After the *Sabhnani* Second Circuit decision, defendants must also arguably pay liquidated damages under the Fair Labor Standards Act.<sup>77</sup> This calculation is relatively straightforward, and is generally based on an accounting of the victim’s hours worked.<sup>78</sup> Back wage calculations based on the Department of Labor Wage and Hour Division expert testimony are commonly offered into evidence for purposes of calculating this category of restitution.<sup>79</sup>

If the victim performed labor typically valued at a rate higher than the minimum wage, the same calculations should instead incorporate the *prevailing wage rate* rather than the minimum wage, as this reflects the value of the victim’s services on an open market.<sup>80</sup> In *United States v. Ding*, for example, the defendants forced the victim to work as their live-in domestic servant for approximately one year. The government used prevailing wage calculations to successfully argue that the victim’s work entitled her to a wage higher than the minimum.<sup>81</sup>

In the sex trafficking context, traffickers must surrender in restitution to victims all amounts that they earned through the victims’ services in the sex industry. Estimates of earnings need not be mathematically precise. Indeed, as illustrated in the *United States v. Lewis* case, courts will accept calculations based on daily quotas imposed by traffickers multiplied by the number of days the trafficker held the victim.<sup>82</sup>

## V. CONCLUSION

Despite the fact that restitution is mandatory under the statute, the question of whether it should be awarded – both on the facts of a particular case and as a policy matter – is nonetheless frequently debated in restitution hearings. While many prosecutors successfully advocate for restitution, others are not clear on the law when called upon to defend restitution, particularly in sex trafficking cases.<sup>83</sup> As indicated above, nearly half simply do not request restitution at all.

In sex trafficking cases, the apparent disconnect between the illegality of the underlying activity and the legal requirement that victims receive compensation provides ample fodder for defense attorneys to object to restitution. In sentencing proceedings, defense attorneys routinely argue that sex trafficking victims do not deserve restitution. One defense attorney unsuccessfully objected to restitution because:

“it would be a windfall for the girls’ illegal conduct. You are paying them to be prostitutes. The government is paying or ordered they be paid for their prostitution activities. . . so we are rewarding them in essence for their illegal conduct.”<sup>84</sup>

Another defense attorney argued that the victim-witnesses were:

“women who come here illegally, commit illegal acts in our country, and now they are trying to get paid. They want the Court to order restitution for their having committed illegal acts. Basically, they are asking this Court to reward them for prostitution. That is not the intent or the spirit of the statute . . . . These are opportunists. These women are taking advantage of the situation that they are in to use this circumstance to try to gain some sort of residency here even though they were here illegally and trying to make over a million dollars off of, you know, committing illegal activities . . . .”<sup>85</sup>

Prosecutors successfully defended restitution requests in both cases.

Some federal courts have refused to accept that ill-gotten gains are, indeed, the correct measure of damages. In *United States v. Rojas*, the court awarded no damages to adult sex trafficking victims, stating that “[the defendant] could force her, but . . . [he wouldn’t] owe restitution . . . because . . . she’s furnishing the facility [providing the commercial sex act], which is still illegal.”<sup>86</sup> Other courts have simply expressed surprise at the notion that the ill-gotten gains could be the measure of damages. For example, in *United States v. Lopez-Perez*, the judge “wonder[ed] how that would be an appropriate measure of loss, the money that was made from engaging in an illegal activity.”<sup>87</sup>

These statements speak to a larger uncertainty—on the part of prosecutors and courts alike—about whether sex trafficking victims truly deserve to be compensated, and if so, how. But in passing 18 U.S.C. § 1593, Congress *mandated* restitution and created an unambiguous, clearly-defined restitution formula for trafficking victims. Numerous Circuit Courts of Appeals have heeded Congress’s dictate. The Eleventh Circuit Court of Appeals declared the idea that restitution rewards victims for their illegal acts to be “preposterous.”<sup>88</sup> The Ninth Circuit ruled that the TVPA “mandates restitution that includes a defendant’s ill-gotten gains.”<sup>89</sup> The Second Circuit held that the “[e]xpress terms of [the TVPA] require that the [sex trafficking victims] in this case receive restitution, notwithstanding that their earnings came from illegal conduct.”<sup>90</sup>

More than a decade after the law’s passage, courts still stumble when implementing the TVPA’s restitution provision. Inexplicably, prosecutors handling trafficking cases continue to pass up opportunities to seek restitution for victims. Although federal prosecutors have made significant strides to prosecute traffickers,<sup>91</sup> more attention must be given to protecting victims and making them whole. It is time to heed the TVPA and make mandatory restitution mandatory.

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<sup>1</sup> Pub. L. No. 106-386, §§ 101-113 (2000).

<sup>2</sup> 18 U.S.C. § 1593 (a) (emphasis added).

<sup>3</sup> No. 2:07-CR-000429 (E.D.N.Y. 2007).

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<sup>4</sup> Memorandum of Decision and Order, *United States v. Sabhnani*, No. 2:07-CR-000429 (E.D.N.Y. July 19, 2008). Mrs. Sabhnani received a sentence of 132 months; Mr. Sabhnani received a sentence of 40 months. *Id.*

<sup>5</sup> Notice of Appeal Regarding Judgment by Mahender Murlidhar Sabhnani, *United States v. Sabhnani*, No. 2:07-CR-000429, (E.D.N.Y. July 3, 2008), ECF No. 435; Notice of Appeal Regarding Judgment by Varsha Mahender Sabhnani, (E.D.N.Y. July 3, 2008), ECF No. 488.

<sup>6</sup> *United States v. Sabhnani*, 599 F.3d 215, 224 (2d Cir. 2010).

<sup>7</sup> *Id.*, 599 F.3d at 255. A trafficking victim held in forced labor is entitled to recover at least minimum wage for the work performed. 18 U.S.C. § 1593. With some exceptions, the FLSA requires that employees be paid a minimum wage of \$7.25 per hour, and overtime pay of 150% the regular wage. See 26 U.S.C § 206. Live-in domestic workers are exempted from the time-and-a-half wage rate, although they must be paid for every hour worked. See *id.*

<sup>8</sup> Judgment, *United States v. Sabhnani*, No. 2:07-CR-000429, Docket No. 656 (E.D.N.Y. August 9, 2010).

<sup>9</sup> No. 8:11-CR-00316 (D. Md. 2011).

<sup>10</sup> Indictment, *United States v. Edwards*, No. 8:11-CR-00316 (D. Md. June 6, 2011). A superseding indictment issued in January 2012. Superseding Indictment, *United States v. Edwards*, No. 8:11-CR-00316, Docket No. 44 (D. Md. Jan. 30, 2012).

<sup>11</sup> Plea Agreement as to Gloria Edwards, *United States v. Edwards*, No. 8:11-CR-00316 (D. Md. May 29, 2012); Plea Agreement as to Alfred Edwards, *United States v. Edwards*, No. 8:11-CR-00316 (D. Md. May 29, 2012).

<sup>12</sup> Sentencing Hearing as to Gloria Edwards and Alfred Edwards, *United States v. Edwards*, No. 8:11-CR-00316 (D. Md. Apr. 23-24, 2013).

<sup>13</sup> Government's Supplemental Sentencing Memorandum, *United States v. Edwards*, No. 8:11-CR-00316 (D. Md. Dec. 3, 2012); Government's Proposed Supplemental Sentencing Memorandum, *United States v. Edwards*, No. 8:11-CR-00316 (D. Md. May 2, 2013).

<sup>14</sup> Fair Labor Standards Act, 29 U.S.C. § 216(b). "Any employer who violates the provisions ... shall be liable to the employee or employees affected in the amount of their unpaid minimum wages ... and in an additional equal amount as liquidated damages." *Id.*

<sup>15</sup> Government's Supplemental Sentencing Memorandum, *supra* note 13, at \*1-\*2.

<sup>16</sup> The FLSA defines the term "employ" to include the words "suffer or permit to work." See Government's Proposed Supplemental Sentencing Memorandum, *supra* note 13, at \*6.

<sup>17</sup> See Transcript of Sentencing Proceedings at \*120, *United States v. Edwards*, No. 8:11-CR-00316 (D. Md. May 7, 2013). The trial court judge did not adopt the government's theory on back wages entirely, backing out up to two hours each day and calculating the restitution for 50 rather than 52 weeks of work each year.

<sup>18</sup> Judgment in a Criminal Case at \*5, *United States v. Gloria Tafalla Edwards*, No. 8:11-CR-000316 (D. Md. 2011); Judgment in a Criminal Case at \*5, *United States v. Alfred Edwards*, No. 8:11-CR-000316 (D. Md. 2011).

<sup>19</sup> Plea Agreement as to Gloria Edwards, *supra* note 11, at \*5; Plea Agreement as to Alfred Edwards, *supra* note 11, at \*5.

<sup>20</sup> Government's Supplemental Sentencing Memorandum, *supra* note 13, at \*2.

<sup>21</sup> IRS Notice 2012-12, at 2, available at <http://www.irs.gov/pub/irs-drop/n-12-12.pdf>.

<sup>22</sup> Judgment in a Criminal Case, *supra* note 19, at \*5.

<sup>23</sup> 18 U.S.C. § 1593 (a) (emphasis added).

<sup>24</sup> See *United States v. Lewis*, No. 1:09-CR-00213 (D.D.C. 2009), *infra*.

<sup>25</sup> See *infra*.

<sup>26</sup> Indictment at 1, *United States v. Lewis*, No. 1:09-CR-00213 (D.D.C. May 15, 2009).

<sup>27</sup> Letter Confirming Plea Agreement at 1, *United States v. Lewis*, 09-CR-00213 (D.D.C. Dec. 11, 2009).

<sup>28</sup> Memorandum Opinion at \*1, *United States v. Lewis*, No. 1: 09-CR-00213 (D.D.C. June 13, 2011). This amounted to \$1,215,000, \$1,151,300, \$845,165, and \$680,590 to four child victims, respectively. See also FBI Press Release, "Pimp Sentenced to 20-Year Prison Term for Trafficking Four Juveniles Into the District of Columbia for Prostitution," November 1, 2010, available at <http://www.fbi.gov/washingtondc/press-releases/2010/wfo110110a.htm>.

<sup>29</sup> Memorandum Opinion, *United States v. Lewis*, at 30.

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<sup>30</sup> Federal trafficking crimes are codified in Chapter 77 of Title XVIII of the U.S. Code. The cases analyzed include federal trafficking criminal indictments filed between January 1, 2009 to December 31, 2012 that were identified by the WilmerHale pro bono team.

<sup>31</sup> As described in the methodology section below, these are cases in which the defendant pled guilty or the court or jury reached a guilty verdict. All decimals are rounded to the nearest whole number. The defendant's conviction in *U.S. v. Toviave*, 11-cr-20259 (E.D.Mich.), was reversed by the Sixth Circuit as this report went to press in September 2014. The restitution amount in that case was \$134,646.60.

<sup>32</sup> The data reviewed here reflect all Chapter 77 cases identified during this four-year period. The federal government does not maintain a list of all trafficking cases brought in the United States. The WilmerHale pro bono team identified these cases by searching press releases issued by the Department of Justice and U.S. Attorneys' Offices, searching federal criminal dockets on PACER, and running general internet queries to identify indictments filed in the United States. In order to make the tracking of restitution orders less labor-intensive in the future, the authors recommend that the federal government maintain (and release publicly) a list of federal trafficking cases filed annually.

<sup>33</sup> As of February 1, 2014.

<sup>34</sup> Data were considered insufficient where none of the following documents was available: a plea agreement, a sentencing memorandum, a transcript of sentencing proceedings, a restitution request, or any other document in which a restitution request might ordinarily appear.

<sup>35</sup> In most cases, evidence of the request was available in the document itself, though a reference to a written request was counted as a written request.

<sup>36</sup> This includes cases in which requests appeared in both plea agreements and sentencing memoranda.

<sup>37</sup> This includes requests contained in a U.S. Notice of Maximum penalties, in another memo, in a pre-sentence report, and in a request by pretrial services.

<sup>38</sup> 18 U.S.C. § 1593(a). The provision covers 18 U.S.C. §§ 1581-1592, 1593A-1597.

<sup>39</sup> These cases all ended in a guilty verdict or a guilty plea.

<sup>40</sup> Even in cases with *convictions* under Chapter 77 of Title 18, only 52% of sentences included a restitution order for the victims.

<sup>41</sup> Some of these cases also included other defendants who were convicted. This represents a rate of plea agreements of more than 87%.

<sup>42</sup> Such as conspiracy, distribution of child pornography, or harboring aliens.

<sup>43</sup> Such as possession of a firearm or money laundering.

<sup>44</sup> For example, alien harboring and perjury statutes do not include mandatory restitution provisions, as those crimes do not have direct victims. Certain federal child pornography statutes, on the other hand, do mandate restitution.

<sup>45</sup> 3:12-CR-00089 (N.D. Cal. 2012).

<sup>46</sup> Government's Sentencing Memorandum at \*1, *United States v. Penzato*, 3:12-CR-00089 (N.D. Cal. 2012).

<sup>47</sup> *See id.* at \*2 ("As originally filed and described in the Indictment and affidavit supporting the Complaint, this case concerned the conditions of C.D.S.'s employment while working for the Penzatos. Those allegations are not part of the current charge, or of the plea agreement before the Court. The agreed restitution amount, however, is based on the government's calculation of pay that the Penzatos owed C.D.S. for time spent working for them in 2009."). *Id.*

<sup>48</sup> *See, e.g., United States v. Fu Sheng Kuo*, 620 F.3d 1158, 1164 (9th Cir. 2010) (holding that the district court erred in calculating restitution under 18 U.S.C. § 1593 when the defendant was convicted of violating 18 U.S.C. § 241, even though defendants' crimes were similar to those addressed under 18 U.S.C. § 1593).

<sup>49</sup> *See, e.g.,* Government's Supplemental Sentencing Memorandum at \*2, *United States v. Edwards*, *supra* note 13 ("the parties agreed that restitution shall be determined under 18 U.S.C. § 1593.").

<sup>50</sup> *See United States v. Nash*, No. 13-30081, 2014 WL 768453 at \*1 (9th Cir. Feb. 27, 2014), *United States v. Tsosie*, 639, F.3d 1213, 1218 (9th Cir. 2011).

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<sup>51</sup> For an example of a court exercising such discretion in the case of a conviction, *see, e.g., United States v. Calimlim*, No. 04-CR-248, 2007 WL 527481 at \*1 (E.D. Wis. Feb. 14, 2007).

<sup>52</sup> Of the 151 sex trafficking cases that included plea deals, 105 included pleas to Chapter 77 violations, and 27 to Mann Act violations. Of the 11 labor trafficking cases that included plea deals, 4 pled to Chapter 77 violations, 3 to labor violations, and 2 to harboring aliens.

<sup>53</sup> In a number of jurisdictions, trafficking prosecutions indicted between January 1, 2009 and December 31, 2012, did not lead to any restitution orders as of the close-date of this research of February 1, 2014. These jurisdictions are the Middle District of Alabama, the Northern District of Alabama, the Eastern District of Arkansas, the Central District of California, the District of Delaware, the District of Idaho, the Northern District of Indiana, the Southern District of Iowa, the District of Kansas, the Western District of Kentucky, the Eastern District of Louisiana, the District of Minnesota, the District of Nevada, the Southern District of New York, the Western District of New York, the Middle District of North Carolina, the Northern District of Ohio, the District of South Carolina, the District of South Dakota, the Western District of Tennessee, the Southern District of Texas, the District of Utah, and the Eastern District of Wisconsin.

<sup>54</sup> *United States v. Clark et al.*, 9:12-CR-80036 (S.D. Fla. 2013); *United States v. Williams*, 0:12-CR-60116 (S.D. Fla. 2013); *United States v. Curtis*, 0:11-CR-60065 (S.D. Fla. 2012); *United States v. Flanders et al.*, 1:11-CR-20557 (S.D. Fla. 2012); *United States v. Desir et al.*, 0:12-CR-60312 (S.D. Fla. 2012); *United States v. Gonzalez*, 0:10-CR-60263 (S.D. Fla. 2011); *United States v. Baldonado et al.*, No. 9:10-CR-80057 (S.D. Fla. 2010) (forced labor case); *United States v. Robinson et al.*, 0:10-CR-60088 (S.D. Fla. 2010); *United States v. Velasquez et al.*, 1:11-CR-20005 (S.D. Fla. 2010).

<sup>55</sup> *United States v. Anderson*, 1:12-CR-00148 (N.D. Ga. 2013); *United States v. Mustafa et al.*, 1:11-CR-00234 (N.D. Ga. 2012); *United States v. Chappell*, 1:10-CR-00531 (N.D. Ga. 2012); *United States v. Bello*, 1:10-CR-00397 (N.D. Ga. 2011) (forced labor case).

<sup>56</sup> *United States v. Velasquez*, No. 1:11-CR-20005 (S.D. Fla. 2011).

<sup>57</sup> *See, e.g.,* Plea Agreement at \*1, *United States v. Velasquez* (Israel Cortes-Morales), No. 1:11-CR-20005 (S.D. Fla. Aug. 4, 2011); Affidavit in Support of Criminal Complaint at \*2-\*9, *United States v. Velasquez*, No. 1:11-CR-20005 (S.D. Fla. Dec. 21, 2010).

<sup>58</sup> Amended Judgment at \*6, *United States v. Velasquez* (Israel Cortes-Morales), No. 1:11-CR-20005 (S.D. Fla. Feb. 6, 2012).

<sup>59</sup> *United States v. Terechina*, No. 2:10-CR-00088 (S.D. Ohio 2011).

<sup>60</sup> Amended Judgment at \*5, *United States v. Terechina*, No. 2:10-CR-00088 (S.D. Ohio Feb. 14, 2011); Factual Statement at \*1-\*4, *United States v. Terechina*, No. 2:10-CR-00088 (S.D. Ohio Apr. 14, 2010).

<sup>61</sup> Amended Judgment at \*5, *United States v. Terechina*, *supra* note 60. Maria Terechina, a Russian national, pled guilty to 18 U.S.C. § 371, conspiracy to defraud the United States. She admitted that she had failed to pay approximately \$185,000 to the IRS.

<sup>62</sup> This includes the one case in which there were both sex trafficking and labor trafficking charges. The restitution requested in that case was for the forced labor conduct only.

<sup>63</sup> The statistical discrepancy in these percentages stems from the fact that in several cases, courts rejected restitution requests. In other cases, courts ordered restitution that had not been requested by prosecutors.

<sup>64</sup> As above, this includes the one case for both sex trafficking and labor trafficking. The restitution award was calculated based on the labor trafficking alone.

<sup>65</sup> This includes restitution in *United States v. Lewis*, which, at \$3,892,055, lies over 7 standard deviations beyond the mean nonzero restitution award. Excluding *Lewis*, the average award in sex trafficking cases is \$23,455.19.

<sup>66</sup> The average award in sex trafficking cases in which restitution was granted, excluding *United States v. Lewis*, is \$77,724.06. It is also worth noting that labor cases typically include more victims. All calculations are per case, not per victim.

<sup>67</sup> 18 U.S.C. § 1593.

<sup>68</sup> 18 U.S.C. § 1593 (b)(3).

<sup>69</sup> 18 U.S.C. § 2259.



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<sup>70</sup> See 18 U.S.C. § 3664(e); see, e.g., *United States v. Doe*, 488 F.3d 1154, 1160 (9th Cir. 2007) (concluding that an award will be upheld “if the district court is able to estimate, based upon facts in the record, the amount of the victim’s loss with some reasonable certainty.”).

<sup>71</sup> United States’ Memorandum in Support of Restitution Order at \*1-\*6, *United States v. Flanders*, No. 1:11-CR-20557 (S.D. Fla. Apr. 20, 2012).

<sup>72</sup> Amended Judgment at \*6, *United States v. Flanders*, No. 1:11-CR-20557 (S.D. Fla. May 25, 2012).

<sup>73</sup> See Order at \*1, *United States v. Lewis*, *supra* note 28.

<sup>74</sup> 18 U.S.C. § 1593 (b)(3).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *United States v. Sabhnani*, 599 F.3d 215, 259-60 (2d Cir. 2010).

<sup>78</sup> Under the FLSA, the burden is on the defendant to keep records of the employee’s time; if such records are incomplete or missing, the victim’s record of hours may determine the amount owed. 29 C.F.R. Part 516.

<sup>79</sup> See, e.g., Government’s Supplemental Sentencing Memorandum, *United States v. Edwards*, *supra* note 13; Government’s Proposed Supplemental Sentencing Memorandum, *United States v. Edwards*, *supra* note 13.

<sup>80</sup> Prevailing wage data is available at [www.flcdatcenter.com](http://www.flcdatcenter.com).

<sup>81</sup> United States’ Consolidated Sentencing Memorandum at \*7-\*10, *United States v. Ding*, 4:09-CR-00573 (N.D. Cal. Nov. 12, 2010). The government’s calculations estimated that back wages were due in the amount of \$86,844.75. *Id.* at Attachment 3. However, prosecutors only requested \$80,000. *Id.* at 7-10. They received \$83,866.61. Judgment, *United States v. Ding*, 4:09-CR-00573 (N.D. Cal. Nov. 19, 2010).

<sup>82</sup> Similarly, the restitution amount ordered by the district court in *United States v. Mammedov* was based upon estimates of the number of days worked by the victims, the number of clients seen each day, and the price charged for each client. 304 Fed. App’x 922 (2d Cir. 2008).

<sup>83</sup> See, e.g., Transcript of Sentencing Proceedings at \*28, *United States v. Lopez-Perez*, 1:11-CR-00199 (E.D.N.Y. 2013) (a prosecutor assessing the question of whether earnings from sex trafficking should determine restitution to be “an interesting legal issue that [the prosecutor] would be happy to research.”).

<sup>84</sup> Sentencing Hearing at \*11, *United States v. Mustafa*, No. 1:11-CR-00234 (N.D. Ga. Sept. 19, 2012).

<sup>85</sup> Sentencing Proceedings at \*25, \*36, *United States v. Velasquez*, 1:11-CR-20005 (S.D. Fl. Nov. 21, 2011).

<sup>86</sup> See, e.g., Sentencing Transcript at \*32, *United States v. Rojas*, 4:11-CR-00116 (S.D. Tex. 2012).

<sup>87</sup> Sentencing Transcript at 25, *United States v. Lopez-Perez*, 1:11-CR-00199 (E.D.N.Y. 2013). The case ultimately ended in a restitution order for \$1,222,165.00. The court issued the order on March 28, 2014, after the close-date of this research. Because it is outside the date cut-off, the order is not included in this report’s statistical calculations.

<sup>88</sup> *United States v. Cortes-Castro*, 511 Fed. App’x 942, 947 (11th Cir. 2013).

<sup>89</sup> *United States v. Fu Sheng Kuo*, 620 F.3d 1158, 1167 (9th Cir. 2010).

<sup>90</sup> The authors thank Kate Crisham, Assistant U.S. Attorney for the Western District of Washington, who compiled all of these decisions for a presentation at the Freedom Network conference in April 2014.

<sup>91</sup> The work of the Department of Justice’s Human Trafficking Prosecution Unit (HTPU) exemplifies the commitment to combating human trafficking. The HTPU has developed training programs for federal prosecutors across the country on prosecution of traffickers and the mandatory restitution provisions of the TVPA.

The Human Trafficking Pro Bono Legal Center empowers trafficked women, men, and children to seek justice. HT Pro Bono leads national efforts to hold human traffickers accountable for their crimes and to raise awareness of victims' rights. By linking trafficking victims with highly-skilled pro bono attorneys, HT Pro Bono works to obtain criminal convictions, criminal restitution, and civil judgments against traffickers. With pro bono legal assistance, trafficking survivors can rebuild their lives. HT Pro Bono, which is funded entirely by private donations and grants, thanks the GE Foundation and Oak Foundation for their generous support.

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