

**BREAKING THE LAW: THE FAILURE TO AWARD MANDATORY  
CRIMINAL RESTITUTION TO VICTIMS IN SEX TRAFFICKING  
CASES**

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K.P. met Craig Gadley at a nightclub in Texas.<sup>1</sup> Gadley told her that she could make more working for him than she earned as a stripper.<sup>2</sup> They exchanged contact information; he took her shopping and gave her \$200.<sup>3</sup> She confessed to him that she was sixteen years old. He told her he didn't care how old she was: she now owed him money.<sup>4</sup>

Gadley began following K.P. and sending her threatening text messages.<sup>5</sup> When she asked him to stop, he told her to go to an address in Forest Hill, Texas.<sup>6</sup> She was "scared that if she did not comply, Gadley would retaliate against her."<sup>7</sup> In Forest Hill, K.P. met several girls who "were involved in commercial [sexual] activities for Gadley."<sup>8</sup> She later estimated to police that Gadley managed or trafficked twenty females in the sex industry, at least some of whom were minors like herself.<sup>9</sup>

Gadley drove K.P. to hotels and forced her to have sex with men for money (he kept all proceeds).<sup>10</sup> He made her get a tattoo across her chest to "signif[y] to others that [he] owned her," required her to call him "Daddy," and

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1. Criminal Complaint at 1, *United States v. Smith*, No. 4:11-cr-00203-Y (N.D. Tex. Sept. 29, 2011), ECF No. 1.

2. *Id.* at 2.

3. *Id.*

4. *Id.*

5. *Id.*

6. Criminal Complaint, *Smith*, *supra* note 1, at 2.

7. *Id.*

8. *Id.*

9. *Id.* at 1.

10. *Id.* at 2–3.

took nude photographs of her that he posted online to advertise the opportunity to rape her.<sup>11</sup> Together with his co-defendant, Joshua Smith, Gadley secured K.P.'s compliance by physically abusing her, threatening to kill her, and brandishing a gun.<sup>12</sup> On one occasion, Smith warned K.P. that if she didn't "act right," she would get "dealt with" by being dumped in a lake.<sup>13</sup>

In the subsequent months, multiple females who were arrested for prostitution in the area reported to police that Gadley and Smith had trafficked them.<sup>14</sup> One woman described Smith's practice of holding her against a wall until she passed out; several indicated that they feared they would be seriously harmed or killed if they stopped performing commercial sex acts and handing over the proceeds.<sup>15</sup> Federal authorities eventually arrested Gadley and Smith. The following December, a grand jury indicted the two men for sex trafficking of minors—like K.P.—and adults.<sup>16</sup> Both defendants pled guilty to sex trafficking and received sentences of fifteen years in federal prison.<sup>17</sup>

The sex trafficking offenses to which Gadley and Smith pled guilty are part of Title 18 of the United States Code, Chapter 77. A separate section of Chapter 77 requires federal courts to order "restitution for any [Chapter 77] offense . . . [to] the individual harmed as a result of [the] crime."<sup>18</sup> However, in violation of this law, the court ordered neither Gadley nor Smith to pay restitution.<sup>19</sup> The court offered a single sentence by way of explanation: "Restitution is not ordered because there is no victim other than society at large."<sup>20</sup>

The court's refusal to order restitution to K.P. violated federal law. Sadly, the failure to award restitution to victims of sex trafficking is typical in United States courts. A study of federal human trafficking cases brought over a four-year period shows that federal courts failed to order restitution in well over half of surveyed human trafficking prosecutions in which defendants had been

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11. Criminal Complaint, *Smith*, *supra* note 1, at 2.

12. *Id.*

13. *Id.*

14. *Id.* at 3–4.

15. *Id.* at 4.

16. Indictment at 6, *United States v. Gadley*, No. 4:11-cr-00203-Y (N.D. Tex. Dec. 14, 2011), ECF No. 16.

17. Judgment at 1–2, *Gadley*, No. 4:11-cr-00203-Y (N.D. Tex. June 4, 2013), ECF No. 74 (recording that Gadley pled guilty to sex trafficking of a minor under 18 U.S.C. § 1591(a)(1) and 18 U.S.C. § 1591(b)(2)); Judgment at 1–2, *Smith*, No. 4:11-cr-00203-Y (N.D. Tex. June 4, 2013), ECF No. 76 (recording that Smith pled guilty to sex trafficking by force, fraud, and coercion under 18 U.S.C. § 1591(a)(1) and 18 U.S.C. § 1591(b)(1)).

18. 18 U.S.C. § 1593 (2012).

19. Judgment, *Gadley*, *supra* note 17, at 3; Judgment, *Smith*, *supra* note 17, at 3.

20. Judgment, *Gadley*, *supra* note 17, at 3; Judgment, *Smith*, *supra* note 17, at 3.

adjudicated guilty.<sup>21</sup> Among cases surveyed that involved sex trafficking offenses, the fraction of cases without restitution orders rose to nearly two-thirds.<sup>22</sup> Finally, and most troublingly, the victims *least* likely to obtain restitution orders were children trafficked into the sex industry. Defendants who commit sex trafficking offenses against children—defendants like Gadley—only rarely face restitution orders in sentencing: in the data analyzed, courts ordered fewer than one in three such defendants to pay restitution to their victims.

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Nine months before the *Gadley* court declared human trafficking to be an essentially victimless crime, President Obama gave a public address on the topic of human trafficking.<sup>23</sup> His pronouncement that “our message today [to human trafficking victims] is . . . we see you. We hear you” was met with applause.<sup>24</sup> “We insist on your dignity,” he continued.<sup>25</sup> More than a decade earlier, Congress, too, had insisted—legally mandated, in fact—that courts make victims of human trafficking whole. It did this by including a mandatory restitution provision in the Trafficking Victims Protection Act (TVPA).<sup>26</sup> But in spite of Obama’s soaring rhetoric and in spite of Congress’s mandate, most human trafficking victims in the United States are betrayed by a system that, like the *Gadley* court, recognizes “no victim other than society at large.”<sup>27</sup>

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21. This study is based on case materials gathered by a team of pro bono attorneys at the law firm of WilmerHale. The team identified federal human trafficking prosecutions brought between 2009 and 2012 by searching government press releases, news media, legal research databases, and documents related to other prosecutions. In September 2014, WilmerHale and the Human Trafficking Pro Bono Legal Center jointly published an analysis of restitution requests and orders in these cases. ALEXANDRA F. LEVY, MARTINA E. VANDENBERG & LYRIC CHEN, WHEN “MANDATORY” DOES NOT MEAN MANDATORY: FAILURE TO OBTAIN CRIMINAL RESTITUTION IN FEDERAL PROSECUTION OF HUMAN TRAFFICKING CASES IN THE UNITED STATES 3, 4 (2014), <http://www.htprobono.org/wp-content/uploads/2014/09/HTProBono-Trafficking-Restitution-Report.pdf> [<http://perma.cc/MX3Y-623S>]. The analysis conducted in this article relies on a subset of the original dataset (independently conducted research on file with authors). For further discussion of quantitative methodology and data selection, see *infra* Section II.

22. The case analysis conducted for this article included only those cases in which a defendant pled guilty to a Chapter 77 trafficking crime or faced conviction for that crime.

23. President Barack Obama, Remarks by the President to the Clinton Global Initiative (Sept. 25, 2012), <http://www.whitehouse.gov/the-press-office/2012/09/25/remarks-president-clinton-global-initiative> [<http://perma.cc/U3YF-X34W>].

24. *Id.*

25. *Id.*

26. 18 U.S.C. § 1593 (2012).

27. Judgment at 3, *United States v. Gadley*, No. 4:11-cr-00203-Y (N.D. Tex. June 4, 2013), ECF No. 74; Judgment at 3, *United States v. Smith*, No. 4:11-cr-00203-Y (N.D. Tex. June 4, 2013), ECF No. 76.

Congress passed the TVPA, including the mandatory restitution provision, in 2000.<sup>28</sup> The congressional findings acknowledged that human trafficking not only affects society at large but also that specific victims bear tremendous costs.<sup>29</sup> In the TVPA restitution provision, 18 U.S.C. § 1593, Congress provided a formula to calculate those costs, setting forth the precise terms under which courts were to restore victims' dignity to endeavor to make their lives whole.<sup>30</sup>

Why do courts routinely withhold the restitution that Congress promised to victims when it passed 18 U.S.C. § 1593? Why did the court in *Gadley* tell K.P.—a child whose chest had been branded to identify her as a possession, whose sexual services had been stolen and sold—that she was not a victim?<sup>31</sup> Why, in an era in which trafficking victims are a cause célèbre, when dozens of advocacy organizations focus on their needs, do courts so consistently let them down?

This article tackles these questions by using quantitative methods to identify factors that make courts more likely to deny victims the restitution that they are owed. Section I provides an overview of the relevant law, including case examples. Section II describes the methodology used to gather and analyze data, and identifies limitations. Section III discusses findings. Section IV posits some implications, and Section V provides conclusions and recommendations for remedying this dire situation.

## I. THE LAW

Congress passed the Victims of Trafficking and Violence Protection Act (TVPA)<sup>32</sup> in 2000 and has reauthorized the law four times since.<sup>33</sup> In addition to increasing sentences for preexisting crimes,<sup>34</sup> the TVPA contained new

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28. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 1593, 114 Stat. 1464, 1488 (2000).

29. *Id.* § 102(b)(11) (“Trafficking exposes victims to serious health risks. Women and children trafficked in the sex industry are exposed to deadly diseases, including HIV and AIDS. Trafficking victims are sometimes worked or physically brutalized to death.”).

30. *See* 18 U.S.C. § 1593(b)(1)–(3).

31. Judgment, *Gadley*, *supra* note 17, at 3; Judgment, *Smith*, *supra* note 17, at 3.

32. Victims of Trafficking and Violence Protection Act of 2000 § 1593.

33. Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875 (2003); Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558 (2005); William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 112 Stat. 5044 (2008); Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, tit. XII, 127 Stat. 54 (2013).

34. *See* 22 U.S.C. § 7109 (2012); Victims of Trafficking and Violence Protection Act of 2000 § 112(a).

provisions prohibiting forced labor,<sup>35</sup> trafficking with respect to forced labor,<sup>36</sup> and sex trafficking.<sup>37</sup>

Noting that “[e]xisting laws often fail to protect victims of trafficking,” and “adequate services and facilities do not exist to meet victims’ needs,”<sup>38</sup> Congress also added a mandatory restitution provision, which required that:

[I]n addition to any other civil or criminal penalties authorized by law, the court shall order restitution for any offense under this chapter. . . . direct[ing] the defendant to pay the victim (through the appropriate court mechanism) the full amount of the victim’s losses . . . . As used in this section, the term “victim” means the individual harmed as a result of a crime under this chapter . . . .<sup>39</sup>

Congress then specified how restitution should be calculated:

As used in this subsection, the term “full amount of the victim’s losses” has the same meaning as provided in section 2259(b)(3) and shall in addition include 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 (29 U.S.C. 201 et seq.).<sup>40</sup>

Trafficking victims are thus entitled to recover two kinds of damages in federal criminal cases: compensation for their personal losses and compensation for the economic value of their services.<sup>41</sup>

35. 18 U.S.C. § 1589 (2012). 18 U.S.C. § 1589 prohibits obtaining labor or services:

(1) by means of force, physical restraint, or threats of physical restraint to that person or another person; (2) by means of serious harm or threats of serious harm to that person or another person; (3) by means of the abuse or threatened abuse of law or legal process; or (4) by means of any scheme, plan, or pattern intended to cause the person to believe that, if that person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint . . . .

*Id.*

36. 18 U.S.C. § 1590.

37. *Id.* § 1591. Sex trafficking refers to (1) inducing an adult to perform a commercial sex act through force, fraud, or coercion, and (2) inducing a person under eighteen to perform a commercial sex act through any means. Though sex trafficking of a minor does not require proof of force, fraud, or coercion, the presence of these factors may increase penalties. *Id.*

38. Victims of Trafficking and Violence Protection Act of 2000 § 102(17)–(18). The 2000 TVPA marked a renewed focus on victims’ needs and empowerment, a commitment further echoed when the federal civil action provision was added in 2003. *See* 18 U.S.C. § 1595 (showing a civil action provision was added in 2003).

39. 18 U.S.C. § 1593.

40. *Id.*

41. Trafficking victims are also entitled to recover far more extensive damages, including punitive damages, in federal civil cases. *See* 18 U.S.C. § 1595 (listing civil damages). Civil remedies are beyond the scope of this article but for more information, *see Civil Litigation on Behalf of Victims of Human Trafficking*, SOUTHERN POVERTY L. CTR. (Nov. 30, 2008),

### A. *Personal Losses*

To quantify victims' personal losses, Congress looked to 18 U.S.C. § 2259(b)(3), the mandatory restitution provision of the chapter of the United States Code addressing the sexual exploitation and other abuse of children.<sup>42</sup> The enumerated costs include those incurred for medical services (including psychological care); physical rehabilitation; transportation, housing, and childcare; lost income; attorneys' fees and "any other losses suffered . . . as a proximate result of the offense."<sup>43</sup> In order to calculate awards under 18 U.S.C. § 2259, the burden is on the government to show the amount of the victims' losses with "reasonable certainty."<sup>44</sup>

Receipts and other records often suffice for losses already suffered; on the other hand, quantifying *anticipated future* losses poses significant difficulty and may require the input of experts. In *United States v. Lewis*, for example, the court awarded significant restitution for anticipated losses based on a report, filed by the victims' court-appointed guardian ad litem (GAL), which incorporated an expert report.<sup>45</sup> The expert interviewed the victims and reviewed their individual foster care files.<sup>46</sup> The GAL also obtained input and guidance from "all four victims . . . as well as with other 'collaterals' including attorneys, other guardians ad litem, probation officers, social workers, therapists, foster parents, and birth mothers."<sup>47</sup>

In contrast, in *United States v. Jennings*, the court affirmatively denied restitution when the calculation of future losses was based upon "speculation, [not] facts."<sup>48</sup> The government had relied on the testimony of a child psychologist who estimated—based on his experience with other victims of sexual abuse—that each victim in this case would require \$176,530 of treatment.<sup>49</sup> Though the court found the psychologist to be "credible, well-meaning, and accomplished," the court was unwilling to grant restitution

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<http://www.splcenter.org/20081201/civil-litigation-behalf-victims-human-trafficking> [<http://perma.cc/W6CQ-WU5G>]. A new, updated edition of the manual is forthcoming.

42. 18 U.S.C. § 2259 (2012).

43. *Id.*

44. *See* *United States v. Doe*, 488 F.3d 1154, 1160 (9th Cir. 2007) (holding 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").

45. *United States v. Lewis*, 791 F. Supp. 2d 81, 81 (D.D.C. 2011). For further discussion of the restitution award in *Lewis*, *see infra* Section III.

46. *Lewis*, 791 F. Supp. 2d at 81.

47. *Id.*

48. Restitution Order at 4, *United States v. Jennings*, No. 4:09-cr-00050 (W.D. Mo. Oct. 14, 2010), ECF No. 64. This case was entered into the dataset after the publication of the September 2014 restitution report. The Human Trafficking Pro Bono Legal Center is in the process of constructing a searchable database of all criminal cases brought under Chapter 77, which will be made available in the winter of 2015 at [www.htprobono.org](http://www.htprobono.org) [<http://perma.cc/7LA8-GEVK>].

49. Restitution Order, *Jennings*, *supra* note 48, at 2.

without “an individualized assessment of each victim’s circumstances and needs.”<sup>50</sup> An estimate based on nothing more than stipulated facts in the plea agreement and videotaped interviews with two of the five victims did not meet the burden of “reasonable certainty.”<sup>51</sup>

*B. Value of the Victim’s Labor or Services*

The TVPA’s mandatory restitution provision also requires that courts award trafficking victims restitution for the value of the work or services their traffickers forced them to perform. This can be measured in two ways: (1) under the minimum wage and overtime provisions of the Fair Labor Standards Act (FLSA), or (2) based on the value of their services to the defendants. Victims are entitled to the greater of the two amounts. Unlike the value of the victims’ losses under 18 U.S.C. § 2259, the government need not prove these amounts with precision; an estimate is sufficient.<sup>52</sup>

Quantifying a victim’s entitlement under the FLSA is usually straightforward and requires only an account of the hours the victim worked.<sup>53</sup> Prosecutors commonly offer back wage calculations based on testimony of Department of Labor Wage and Hour Division experts entered into evidence for purposes of calculating this kind of restitution.<sup>54</sup>

If the defendant earned more from the victim’s labor or services than what the victim would have made at minimum wage, however, the defendant must pay the victim this higher amount. Determining the victim’s entitlement calls for a calculation and comparison of what the victim would have earned under minimum wage and what the defendant actually earned by forcing her to work. In the context of forced commercial sex, the victim’s earnings invariably exceed minimum wage, so this—and not the minimum wage—is the proper measure of restitution. A third method of calculation, which applies only if the underlying work was legal, is to apply the prevailing wage rate.<sup>55</sup>

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50. *Id.* at 3.

51. *Id.* at 2, 4. *See also* United States v. Doe, 488 F.3d 1154, 1160 (9th Cir. 2007).

52. *E.g.*, Lewis, 791 F. Supp. 2d at 81, 90-93 (determining restitution figures based on length of time victims worked for the defendant multiplied by daily quotas imposed by the trafficker).

53. Under the Fair Labor Standards Act, 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. § 516.2 (2012).

54. The Fair Labor Standards Act also includes liquidated damages for unpaid wages. *See, e.g.*, United States v. Sabhnani, 599 F.3d 215, 255, 260 (2d Cir. 2010) (upholding the lower court’s decision that liquidated damages should also be included in the restitution calculation for the amount owed to trafficking victims).

55. The prevailing wage rate is the typical market wage in a given location for a given occupation. *Prevailing Wages*, U.S. DEP’T OF LAB. EMP. & TRAINING ADMIN., <http://www.foreignlaborcert.doleta.gov/pwscreens.cfm> [<http://perma.cc/VFM9-275H>] (last visited Aug. 22, 2015). For a catalogue of prevailing wages, *see Federal Labor Certification Data Center Online*

## II. STUDY OVERVIEW

### A. *Methodology*

Researchers began by indexing federal human trafficking prosecutions brought between 2009 and 2012.<sup>56</sup> The initial search yielded 306 cases in which at least one Chapter 77 count was brought against at least one defendant.<sup>57</sup> Because the central goal of the original study was to isolate factors that would determine whether restitution would be awarded, researchers eliminated cases that remained open<sup>58</sup> (i.e. where restitution had neither been awarded nor denied); cases that ended in dismissal or acquittal (i.e. restitution was not warranted); sting operations (i.e. cases in which there were no victims); and cases with few or no accessible documents.<sup>59</sup> The researchers then coded the remaining 186 cases for restitution request (presence and type), outcome (plea or conviction), amount of restitution, jurisdiction, and crime of plea or conviction.<sup>60</sup>

The analysis conducted for this article used a subset of those data to examine several related questions. Whereas the initial analysis only considered the presence of restitution orders, the research analysis for this article also probed the *method of calculation* used in restitution orders. Therefore, cases that were not adjudicated under Chapter 77 of Title 18—in other words, cases that may have called for restitution but did not mandate restitution as set forth in 18 U.S.C. § 1593—were excluded from this analysis.<sup>61</sup> That eliminated fifty-five cases: cases that had restitution, but restitution awarded under an alternative statute.

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*Wage Library*, <http://www.flcdatacenter.com> [<http://perma.cc/NN8N-L2BD>] (last visited Aug. 22, 2015).

56. This article relies on a subset of the data gathered for WilmerHale and the Human Trafficking Pro Bono Legal Center's 2014 report. Because this article examines different questions, the authors applied narrower selection criteria and therefore excluded some cases discussed in the original report. LEVY, VANDENBERG & CHEN, *supra* note 21, at 3.

57. *Id.*

58. As of February 1, 2014. LEVY, VANDENBERG & CHEN, *supra* note 21, at 3 n.33. The conviction in one case was reversed on appeal after the end date of the study. Because it is a forced labor case, it is not germane to the central analysis here. *United States v. Toviave*, 761 F.3d 623 (6th Cir. 2014).

59. For further discussion of selection criteria related to document availability, *see infra* note 65.

60. LEVY, VANDENBERG & CHEN, *supra* note 21, at 3–4.

61. Mandatory restitution may also be ordered under separate statutes, such as 18 U.S.C. § 3663A (2012). Restitution under 18 U.S.C. § 1593 is far better for trafficking victims, as this restitution is awarded tax-free. In 2012, the United States Treasury issued a determination that restitution under 18 U.S.C. § 1593 would not be subject to federal income taxes. *Restitution Payments Under the Trafficking Victims Protection Act of 2000*, IRS (2012), <http://www.irs.gov/pub/irs-drop/n-12-12.pdf> [<http://perma.cc/Y2HK-WD8F>].

Of the 131 remaining cases, all but eight included charges related to sex trafficking.<sup>62</sup> A preliminary analysis of the eight human trafficking prosecutions involving only allegations of labor trafficking revealed that the problem at issue—the absence of a restitution order—did not arise in these cases.<sup>63</sup> For this reason, the authors decided to focus on the 123 cases that included sex trafficking charges. The authors coded these cases for the presence/absence of a restitution order, presence/absence of a restitution request, method of calculation in restitution order (if applicable), and presence/absence of child victims. The authors then analyzed correlations between various case characteristics and the incidence of restitution orders.<sup>64</sup> These findings are discussed in Section III.

### B. Limitations

While the data show strong correlations between the unlawful failure to award restitution and certain case characteristics, these numbers do not—and indeed cannot—demonstrate causation. Some theories for why these attributes might arise contemporaneously are offered in Section V, but they are based on observable trends alone. Given the complexity of the issues at play, practitioners are likely in a better position to analyze and identify the causes for the findings identified in this study. This study uses quantitative tools to reveal trends. Qualitative analysis of the cases should provide additional nuance to this analysis.

The authors collected data for this research from publicly obtainable documents.<sup>65</sup> Due to the inherently sensitive nature of sex trafficking prosecutions, access to relevant filings is often highly restricted. Courts seal sensitive documents on the dockets. Dozens of cases with no (or very few) available documents were, by practical necessity, omitted from the dataset. The information gleaned about the remaining cases was often very limited. This

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62. One case, *United States v. Shabazz*, did not include charges under 18 U.S.C. § 1591 but instead brought sex trafficking charges under 18 U.S.C. § 1589. *United States v. Shabazz*, No. 2:12-cr-00033 (W.D. Wash. Feb. 15, 2012). A previous case that was dismissed against the same defendant included essentially the same charges but was brought under 18 U.S.C. § 1591. *United States v. Shabazz*, No. 3:11-cr-05246 (W.D. Wash. May 12, 2011).

63. Seven out of the eight cases that included only labor charges yielded restitution orders; the exception is *United States v. Aguilar-Lopez*, in which victims were forced to sell illegal DVDs. Criminal Complaint at 3, *United States v. Aguilar-Lopez*, No. 4:10-cr-00805 (S.D. Tex. Aug. 31, 2010), ECF No. 1. One theory for why restitution orders are so much more common in forced labor prosecutions than in sex trafficking prosecutions is that the underlying work in labor cases is usually legal, while the underlying work in sex trafficking cases is not. Of course, this at most explains the problem; it does not excuse it. Restitution is mandatory regardless of the nature of the underlying work. For further discussion of the impact of the legality of the underlying work, see *infra* Section IV.

64. See *infra* Section III.

65. All documents were downloaded from PACER or Westlaw.

does not mean that inferences are impossible or untrustworthy, but rather that they must be made cautiously and with an awareness that the source materials do not, on their own, tell a complete story.

The scarcity of documents made it particularly challenging to identify the *absence* of restitution requests. Most known requests appear in one of three documents.<sup>66</sup> In order to conclude that a restitution request did not exist, these documents had to *lack* the request; the absence of the documents themselves obviously did not support the same inference. Therefore, cases without an available plea agreement, sentencing memorandum, transcript of sentencing proceedings, or separate request were excluded.

It is possible that cases coded as “no request” in fact contained requests or other references in sealed or otherwise unavailable documents. Some references to presentence reports (PSRs),<sup>67</sup> for example, suggest that they sometimes contain detailed discussions of restitution.<sup>68</sup> However, PSRs are never available for public viewing.<sup>69</sup> And, in any event, if some hidden requests exist—that is to say, even if some cases were miscategorized as “no request”—it is reasonable to assume that the percentage of cases with hidden requests is the same across victim types. Therefore, it is still possible to draw meaningful conclusions by *comparing* request rates between different types of cases.<sup>70</sup>

Finally, the analysis for this article looked at restitution orders *by case* not *by victim*.<sup>71</sup> The victims listed in the indictments are often different from those included in restitution orders (if the order lists the recipients at all, which it may not); victims may appear in one indictment but not another; criminal complaints that refer to dozens of victims may result in restitution orders listing only one. It is usually impossible to know whether *each victim* received the restitution she was owed. As a result, the statistics in this study present a

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66. In forty-seven of the 123 surveyed cases, the request appeared in a plea agreement; in twenty cases, the request appeared in a sentencing memo; in ten cases, the request appeared in a dedicated restitution request. *See infra* notes 79–81.

67. PSRs are a part of sentencing procedures. Among other things, these reports are required to include discussions of potential sentences and, “when the law provides for restitution, information sufficient for a restitution order.” FED. R. CRIM. P. 32(d)(2)(D).

68. *See, e.g.*, Government’s Restitution Memorandum at 1–2, *United States v. Nash*, No. 2:12-cr-00023 (W.D. Wash. Mar. 12, 2013), ECF No. 95 (discussing the amounts of restitution “provided in Paragraphs 167, 168, and 169 of the Presentence Report as to victims K.S., A.S., and S.Z. These amounts are \$30,000.00 to K.S.; \$350.00 to A.S., and \$650 to S.Z.”).

69. PSRs “shall be part of the record but shall be sealed and opened only on order of the court.” MODEL SENTENCING ACT § 4 (NAT’L COUNCIL ON CRIME AND DELINQUENCY 1963).

70. Of course, the size of the ratio diminishes as the rate of hidden requests goes up. If all cases that appear to have no requests in fact have hidden requests, for example, then the rates for child and adult victims are the same. While there is no reason to believe that hidden requests are prevalent, the possibility that they exist should be acknowledged.

71. *See infra* Section III.

“best case” scenario: the authors coded only those cases in which *no* victims received restitution orders as failures. A theoretical case in which one victim received restitution but nineteen victims did not, would be counted as a success.

III. FINDINGS

Total Cases	Total Sex Trafficking Cases	Sex Trafficking Cases Involving Only Adults	Sex Trafficking Cases Involving Children
131	123	14	109

A. *Courts were significantly less likely to order restitution in cases that included at least one minor victim than in cases that involved only adult victims; in the rare instances in which courts did order restitution in cases involving minors, the awards were significantly smaller than awards in cases without child victims.*

In the data reviewed, 109 of the 123 sex trafficking cases included at least one minor victim.<sup>72</sup> Sex trafficking of children does not require the use of force, fraud, or coercion. Mere inducement to perform commercial sex acts suffices if the individual is under eighteen.<sup>73</sup> The victim’s alleged consent is therefore not a defense.

Despite the fact that the overwhelming majority of successful federal sex trafficking prosecutions are against traffickers of children, defendants who traffic children appear to be far *less* likely to be ordered to pay restitution than those who traffic only adults. Approximately one in three cases in this dataset that included minor victims resulted in a restitution order;<sup>74</sup> in contrast, nearly

72. This analysis included cases in which the defendant victimized both children and adults. Because case documents may refer to different victims, it is unclear in some cases whether victims included adults as well as children. In contrast, the cases involving only adults definitively do not include children. Twelve cases appear to involve both minor and adult victims; but, because of the high chance of misclassification, they were included with the child cases. In a surfeit of caution, trial analyses were performed excluding the twelve questionable cases; whether they were included did not affect results in a statistically significant way.

73. However, proving force, fraud, or coercion of minor victims can increase penalties. Compare 18 U.S.C. § 1591(b)(1) (2012) (calling for a minimum sentence of fifteen years), with *id.* § 1591(b)(2) (calling for a sentence of ten years). Higher penalties also apply if the victim is under the age of fourteen. *Id.* § 1591(b)(1).

74. Thirty-six cases out of 109 total cases involving minors. See *supra* note 21 (referring to independently conducted research on file with authors).

three-quarters of the cases that involved only adult sex trafficking victims in the dataset included a restitution award.<sup>75</sup>

Not only were cases involving children *less* likely to result in restitution awards, but the restitution amount ordered was on average much smaller.<sup>76</sup> The presence of a child victim reduced the size of a restitution award by two-thirds (among cases in which restitution was ordered at all).<sup>77</sup> In sum, sex trafficking cases involving child victims were less than half as likely to result in restitution orders as sex trafficking cases without child victims. And the restitution orders, when they existed at all, were usually around one-third the size.

*B. Prosecutors were significantly less likely to request restitution in cases that included at least one minor victim.*

	No Known Request	Requested in Plea	Requested in Sentencing Memorandum	Requested in Dedicated Memorandum	Affirmatively Not Requested
Adult Victims Only	1	5	4	4	0
Child Victims	33	42	16	6	8

A victim’s chances of obtaining a restitution order under 18 U.S.C. § 1593 improved drastically when the prosecutor requested it.<sup>78</sup> Restitution requests most commonly appeared in one of three documents: in a plea agreement,<sup>79</sup> in a general sentencing memorandum,<sup>80</sup> or in a memorandum dedicated to the

75. Ten cases out of fourteen total cases including only adult victims. *See supra* note 21 (referring to independently conducted research on file with authors).

76. The average excludes the amount ordered in *United States v. Lewis*. The award in *Lewis* is approximately six standard deviations above the mean. LEVY, VANDENBERG & CHEN, *supra* note 21, at n.65.

77. While it is theoretically possible that, based on the requirements in the statute, smaller restitution awards are warranted in cases involving children, a closer look at how restitution is actually calculated suggests that is not the case. *See infra* Section III(C)(3).

78. LEVY, VANDENBERG & CHEN, *supra* note 21, at 5. As discussed above, that report included cases that pled out under non-Chapter 77 statutes. This analysis omits those cases so the results may vary slightly.

79. Forty-seven out of 123. *See supra* note 21 (referring to independently conducted research on file with authors).

80. Twenty out of 123. *See supra* note 21 (referring to independently conducted research on file with authors).

restitution request.<sup>81</sup> On occasion, these requests arose elsewhere in writing or, very rarely, were brought up verbally in sentencing proceedings.<sup>82</sup>

Requests made in dedicated memoranda were considerably more successful than requests made in other contexts. Plea agreements were the least effective vehicle for a request, with a success rate of approximately one in four.<sup>83</sup> In contrast, *every* surveyed case in which a prosecutor filed a separate request resulted in a restitution order.<sup>84</sup>

The data showed that prosecutors were far less likely to request restitution in sex trafficking cases involving children than in cases involving only adults. In thirty-three out of 109 prosecutions involving children, there was no known restitution request.<sup>85</sup> In eight cases, restitution was explicitly *ruled out*—that is to say, the prosecutor affirmatively stated that the government did not wish to seek restitution.<sup>86</sup> For example, in *United States v. Johnson*, the government withdrew its request for restitution because one of the victims “received mental health services paid for by the state and not by her or her family. Therefore,

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81. Ten out of 123. *See supra* note 21 (referring to independently conducted research on file with authors).

82. Three cases in the dataset for this article include restitution requests made elsewhere in writing: in a “Notice of Maximum Penalties,” in an agreed memo, and in an unavailable request by pretrial services that was mentioned in the sentencing memo. In one case, restitution came up in a sentencing proceeding. Amended Notice of Maximum Penalty, Elements of Offense, Personalization of Elements, and Factual Basis at 2, *United States v. Aiken*, No. 3:10-cr-00209 (M.D. Fla. Nov. 17, 2010), ECF No. 38; Defendant’s Memorandum Regarding Agreed Recommendation of Restitution Amount, *United States v. Brackett*, No. 3:11-cr-02031 (W.D. Tex. July 27, 2012), ECF No. 178; Amended Memorandum Opinion as to Timothy Davis Analyzing the Sentencing Factors, *United States v. Davis*, No. 1:11-cr-00289 (N.D. Ohio Apr. 11, 2012), ECF No. 28. For further discussion of establishing the absence of restitution requests and the possibility of hidden requests, *see supra* note 70.

83. Thirteen out of forty-seven. *See supra* note 21 (referring to independently conducted research on file with authors).

84. Ten out of ten. *See supra* note 21 (referring to independently conducted research on file with authors).

85. *See supra* note 21 (referring to independently conducted research on file with authors).

86. Memorandum as to Deanijiniqe Cail, Christian Demitris Dotson, Veranique Wallace re Restitution Hearing at 1, *United States v. Cail*, No. 2:10-cr-00350 (E.D. Cal. Dec. 20, 2011), ECF No. 70; Transcript of Sentencing at 27, *United States v. Collins*, No. 1:10-cr-20089 (S.D. Fla. Jan. 24, 2011), ECF No. 121; Judgment and Commitment at 5, *United States v. Hubbard*, No. 3:12-cr-00243 (D. Or. Mar. 5, 2013), ECF No. 37; Letter to the Hon. Roslynn R. Mausekopf from the Government Addressing Supplemental Sentencing Issues at 2, *United States v. Johnson*, No. 1:10-cr-00807 (E.D. N.Y. May 3, 2012), ECF No. 39; Sentencing Memorandum at 2, *United States v. Sanders*, No. 3:11-cr-00385 (D. Or. May 15, 2013), ECF No. 83; Sentencing Memorandum at 4 n.2, *United States v. Uscanga-Reyes* (Interpreter), No. 2:11-cr-00053 (M.D. Ala. Mar. 23, 2012), ECF No. 51; Order Accepting Plea Petition/Agreement at 1, *United States v. West*, No. 3:09-cr-00242 (M.D. Tenn. May 20, 2010), ECF No. 154; Plea Agreement at 5, *United States v. Handy*, No. 4:09-cr-00052 (E.D. Ark. Oct. 23, 2009), ECF No. 51.

there is no restitution applicable to Jane Doe 2 or her family.”<sup>87</sup> In contrast, prosecutors requested restitution in thirteen out of fourteen cases involving only adults.<sup>88</sup>

Moreover, prosecutors bringing cases that involved child victims were less likely to file separate restitution requests, defaulting instead to the much less effective forum of the plea agreement.<sup>89</sup>

Though the prosecutor’s request significantly improved the chances that restitution would be awarded, it did not guarantee it. Only thirty-three out of sixty-eight requests in cases involving children were successful, while ten out of thirteen requests in cases involving only adults resulted in restitution orders.<sup>90</sup>

C. *When victims did get restitution orders, the orders were usually not calculated according to the specifications laid out in 18 U.S.C. § 1593.*

	No Restitution	Restitution Calculated as Set Forth Under 18 U.S.C. § 1593	Restitution Calculated Under 18 U.S.C. § 2259 Only	Restitution Calculated With Reference to Earnings Only	Calculation Unknown
Adult Victims Only	4	2	1	3	4
Child Victims	73	1	5	16	14

The TVPA’s mandatory restitution provision, 18 U.S.C. § 1593, requires that a victim receive two kinds of compensation: compensation for losses as described in 18 U.S.C. § 2259, and compensation for the value of her labor or services.<sup>91</sup> The method of calculation is unknown in eighteen out of forty-six

87. Letter to the Hon. Roslynn R. Mauskopf from the Government Addressing Supplemental Sentencing Issues, *Johnson*, *supra* note 86, at 2.

88. *See supra* note 21 (referring to independently conducted research on file with authors).

89. The success rate of separate requests (100%) is identical for adults and children, so it is unlikely that the success rate is so high *because* it is infrequently used in cases involving children. *See supra* note 21 (referring to independently conducted research on file with authors).

90. *See supra* note 21 (referring to independently conducted research on file with authors).

91. 18 U.S.C. § 1593 (2012).

surveyed cases with restitution awards.<sup>92</sup> In six cases, the restitution request was based *exclusively* on 18 U.S.C. § 2259, meaning the value of the victim's labor or services was ignored. In nineteen cases, it was based *exclusively* on the value of the victim's labor or services, meaning the losses suffered under 18 U.S.C. § 2259 were ignored.<sup>93</sup> There are three known cases in which restitution was calculated properly under the law. Only one of those is a case with child victims.<sup>94</sup>

1. Cases calculated only with reference to 18 U.S.C. § 2259

A total of six cases—one involving only adults, and five involving children—are known to include restitution orders calculated *only* with reference to 18 U.S.C. § 2259.<sup>95</sup> 18 U.S.C. § 2259(a) mandates that restitution be awarded to victims of certain kinds of sexual exploitation or other child abuse.<sup>96</sup> It makes intuitive sense to include losses suffered by victims of sexual exploitation in a broader assessment of losses suffered by human trafficking victims: after all, human trafficking usually involves significant sexual exploitation.

However, Congress made clear that 18 U.S.C. § 2259 only covers a portion of the losses suffered by trafficking victims. Indeed, Congress mandated that restitution awards also include the value of the victim's labor or services to the defendant.<sup>97</sup> Multiple cases simply ignore this second requirement, limiting the victim's award to the out-of-pocket costs enumerated in 18 U.S.C. § 2259. In *United States v. Kweme*, for example, while the court awarded \$286 in restitution "for expenses related to medical care," it allowed the defendant to retain all proceeds earned by trafficking the victim.<sup>98</sup> This choice was not due to an unclear record or other evidentiary problems: the victim specifically indicated that she had commercial sex with "about eight different men on about ten separate occasions,"<sup>99</sup> that most of these transactions yielded \$250, that one man paid \$100, and that the defendant gave her half of the earnings.<sup>100</sup>

92. See *supra* note 21 (referring to independently conducted research on file with authors).

93. See *supra* note 21 (referring to independently conducted research on file with authors).

94. Memorandum Opinion at 2, 22, *United States v. Lewis*, No. 1:09-cr-00213 (D.D.C. June 13, 2011), ECF No. 48.

95. The rate at which courts make this particular calculation error is slightly higher in cases involving children than in those involving only adults (fourteen percent versus ten percent). See *supra* note 21 (referring to independently conducted research on file with authors).

96. See 18 U.S.C. § 2259 (2008).

97. 18 U.S.C. § 1593 (2012).

98. Restitution Judgment at 1, *United States v. Kweme*, No. 1:11-cr-00345 (E.D. Va. Dec. 12, 2011), ECF No. 32.

99. Affidavit by USA as to Cooper Kweme Complaint at 5, *Kweme*, No. 1:11-cr-00345 (E.D. Va. June 9, 2011), ECF No. 3.

100. *Id.*

Even if the court elected to subtract what the defendant had paid to the victim, she was still entitled to \$1175.<sup>101</sup>

2. Cases calculated only with reference to the value of the victim's labor or services

A total of nineteen cases—three involving only adults, and sixteen involving children—are known to include restitution orders calculated *only* with reference to the value of the victim's services to the defendant.<sup>102</sup> Victims' personal losses were ignored.

In *United States v. Robinson*, the court awarded the victim \$14,400 in restitution based on the prosecutor's calculation that under the defendant's watch she was raped by six men per day, six days per week, for eight weeks, for which the defendant was paid between fifty dollars and \$250 per sex act.<sup>103</sup> Though the extent of this victim's past and future out-of-pocket expenses under 18 U.S.C. § 2259 cannot be calculated based on the available information alone, it is reasonable to assume that she suffered *some* harm that would give rise to out-of-pocket costs permitted under the statute. Unfortunately, these costs are not included in the order, as the prosecutor failed to request these costs.<sup>104</sup> The same can be inferred in the eighteen other cases in which the court failed to award losses under 18 U.S.C. § 2259.<sup>105</sup>

In *United States v. Campbell*, a jury convicted the defendant of crimes including labor trafficking, sex trafficking, extortion, and harboring illegal aliens. The court sentenced him to life in prison.<sup>106</sup> The court ordered the defendant to pay a total of \$124,529.14 in restitution to his four adult victims whom he had forced to work in his massage parlor, and, in some cases, in

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101. The law is not clear on whether the court may subtract proceeds the defendant allowed the victim to keep. *See, e.g.*, Government's Motion for Order of Restitution at 3, *United States v. Curtis*, No. 0:11-cr-60065 (S.D. Fla. Feb. 6, 2012), ECF No. 119 (cutting the victim's award because she kept half of the proceeds). *But see* Memorandum Opinion at 30–34, *United States v. Lewis*, No. 1:09-cr-00213 (D.D.C. June 13, 2011), ECF No. 48 (awarding the gross amount, not the net amount).

102. Again, the rate at which courts make this particular calculation error is slightly higher in cases involving children than in those involving only adults (forty-four percent versus thirty percent). *See supra* note 21 (referring to independently conducted research on file with authors).

103. Government's Sentencing Memorandum at 7–8, *United States v. Robinson*, No. 1:10-cr-00129 (N.D. Ga. Nov. 30, 2011), ECF No. 115.

104. In some instances, trafficking victims do not wish to cooperate with prosecutors in providing these out-of-pocket expense calculations. Additionally, calculation of future out-of-pocket costs may require evidence from an expert witness. Nevertheless, as Restitution Order, *Lewis*, No. 1:09-cr-00213 (D.D.C. June 13, 2011), ECF No. 47 illustrates, these costs can be significant and, particularly in cases with children, should be included in the restitution order.

105. *See supra* note 21 (referring to independently conducted research on file with authors).

106. Judgment at 2–3, *United States v. Campbell*, No. 1:10-cr-00026 (N.D. Ill. Nov. 26, 2012), ECF No. 257.

forced prostitution. The court found that he had forced his victims to provide services through “a disciplined progression of romance, isolation, intimidation, coercion, abuse, and degradation.”<sup>107</sup> At the prosecutor’s request, the court calculated restitution owed to three of the victims by looking at how much they would have earned as massage therapists had they been paid minimum wage as required under the FLSA; to the fourth victim, the court awarded the \$40,500 that the defendant had extorted from her.<sup>108</sup> Notably missing from these calculations was any mention of proceeds from forced prostitution.<sup>109</sup> Additionally, despite extensively expounding on the victims’ “[unimaginable] grief and despair,” “[pulsing] fear,” “[shattered] dreams,” and “cruelly crushed” faith in humanity, the prosecutor failed to request—and the court did not order—restitution for any of the victims’ future out-of-pocket expenses that would be incurred to recover from this trauma.<sup>110</sup>

Additional errors were widespread. In multiple cases in which the victim received only the value of her labor or services to the defendant (i.e. where her personal out-of-pocket losses were omitted), the court used the wrong method of calculation, further reducing the already truncated award.<sup>111</sup> Under 18 U.S.C. § 1593, the victim is entitled to the *greater* of the value of her labor under the FLSA, or the benefit conferred on the defendant by her labor or services. The court must therefore conduct a comparison between those amounts.<sup>112</sup> The amount of money earned from forced prostitution invariably exceeds what would be earned for the same amount of time spent working under minimum wage, so using the FLSA to calculate restitution for forced prostitution leads to insufficient awards.

Nevertheless, in *United States v. Tramble*, the prosecutor requested that the victims be compensated according to the value of their sexual services under the FLSA.<sup>113</sup> The prosecutor opined—without support or citation—that the purpose of 18 U.S.C. § 1593(b)(3) was to compensate the victims—but “*not* for the odious, dehumanizing acts which they were forced to perform, for

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107. Government’s Response to the PSR and Sentencing Memorandum at 3, *Campbell*, No. 1:10-cr-00026 (N.D. Ill. Nov. 5, 2012), ECF No. 253.

108. *Id.* at 29.

109. *Campbell* was only convicted of sex trafficking one victim, but the sentencing memorandum indicates that at least one other was also raped for money. *Id.* at 9–10.

110. *Id.* at 12. As in *Lewis*, these expenses might have covered future medical expenses, future counseling expenses, and future expenses for prescription drugs relating to mental health. While only victims in a civil case can recover money damages to cover emotional harm, the out-of-pocket expense calculations for future costs can be extensive. 18 U.S.C. § 2259 (2008).

111. *See supra* note 21 (referring to independently conducted research on file with authors).

112. *See, e.g.*, Memorandum for Restitution Hearing at 5–6, *United States v. Nash*, No. 2:12-cr-00023 (W.D. Wash. Mar. 12, 2013), ECF No. 95.

113. Sentencing Memorandum at 8, *United States v. Tramble*, No. 2:11-cr-00250 (W.D. Wash. Mar. 12, 2012), ECF No. 32.

which no monetary sum could ever properly compensate them—but rather for having been denied any opportunity to pursue a livelihood for themselves while they were under Tramble’s control.”<sup>114</sup> The government then proceeded to calculate “the approximate value of [the victim’s forgone] labor opportunity” using Washington’s state minimum wage of \$7.93.<sup>115</sup>

The court initially accepted these calculations, and then amended the judgment (without explanation) to significantly diminish the victims’ already insufficient awards.<sup>116</sup>

### 3. Cases calculated correctly

A total of three sex trafficking cases—two involving only adults, and one involving children—resulted in restitution orders calculated in accordance with the law. In *United States v. Lewis*, the defendant trafficked four children into the sex industry.<sup>117</sup> He eventually pled guilty to multiple counts of sex trafficking and was sentenced to twenty years in prison.<sup>118</sup> The court ordered him to pay \$1,215,000, \$1,151,300, \$845,165, and \$680,590 to the four victims, respectively.<sup>119</sup>

In accordance with 18 U.S.C. § 1593, the restitution award included both the victims’ losses under 18 U.S.C. § 2259 and the value of their services to the defendant.<sup>120</sup> To properly assess the victims’ losses under 18 U.S.C. § 2259, the court appointed a GAL who filed a restitution report reflecting information gathered from meetings with all victims, attorneys, other GALs, probation officers, social workers, therapists, foster parents, and birth mothers.<sup>121</sup> The GAL also hired a licensed psychologist as an expert, who evaluated the victims and diagnosed them with conditions, including PTSD, sexual abuse, and bipolar disorder.<sup>122</sup>

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114. *Id.* at 9 (emphasis in original).

115. *Id.* The Fair Labor Standards Act guarantees federal minimum wage, which rose from \$5.15 to \$5.85 in May 2007. 29 U.S.C. § 206(a)(1)(A) (2007). It is worth noting that the request does acknowledge that Congress mandated that victims receive the *greater* of the calculated values—leaving open the question of why the prosecutor requested the lesser. Sentencing Memorandum, *Tramble*, *supra* note 113, at 9. To make matters even more confusing, the prosecutor declared the defendant’s “ill-gotten profits” to be “beyond the market value of [the victims’] labor.” *Id.* at 10.

116. Amended Judgment at 1, 5, *Tramble*, No. 2:11-cr-00250 (W.D. Wash. June 29, 2012), ECF No. 38.

117. Memorandum Opinion at 2, *United States v. Lewis*, No. 1:09-cr-00213 (D.D.C. June 13, 2011), ECF No. 48.

118. Judgment at 1–2, *Lewis*, No. 1:09-cr-00213 (D.D.C. Nov. 17, 2010), ECF No. 30.

119. Restitution Order at 1, *Lewis*, No. 1:09-cr-00213 (D.D.C. June 13, 2011), ECF No. 47.

120. *See id.*

121. Memorandum Opinion, *Lewis*, *supra* note 94, at 13.

122. *Id.* at 13–14.

The psychologist recommended intensive therapy as well as psychiatric treatment and tutoring.<sup>123</sup> The prosecutor used this evaluation as the basis for the claim that the victims would require \$849,000, \$573,800, \$839,700, and \$679,800, respectively, to recover their future losses under 18 U.S.C. § 2259.<sup>124</sup> Based on this evidence, the court found that “the trauma personally inflicted on each victim by defendant [was] clear and undeniable . . . [and] defendant personally caused each of the child victims severe physical, emotional, and mental harm.”<sup>125</sup> The court awarded the full amounts requested.<sup>126</sup>

The court also awarded damages for the value of the victims’ services to the defendant. For one victim—S.H., who the defendant found sleeping at a bus stop after she had run away from home—the court multiplied the average daily amount she testified she earned (\$400) by the number of days the defendant trafficked her (914).<sup>127</sup> The court awarded another victim the amount she charged per “date” (between eighty dollars and \$100) multiplied by the number of “dates” she had (between three and six per day).<sup>128</sup> The court did not require “mathematical precision” for purposes of assessing the value of the victims’ services to the defendant but merely a “reasonably certain estimate of [the victims’] losses.”<sup>129</sup>

The amount of restitution ordered by the court in *United States v. Lewis* is an extreme anomaly.<sup>130</sup> The result is also an anomaly insofar as it is the *only* case in which a court is known to have followed the law when it calculated restitution in a child sex trafficking case. Statistically, a child sex trafficking victim *whose trafficker is apprehended and adjudicated guilty* has a less than one percent chance of obtaining a properly calculated restitution order under 18 U.S.C. § 1593 to which she is legally entitled.<sup>131</sup>

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123. *Id.* at 18–19.

124. *Id.* at 30–31, 33–34.

125. *Id.* at 28–29.

126. Memorandum Opinion, *Lewis*, *supra* note 94, at 29.

127. *Id.* at 4, 30.

128. *Id.* at 33 n.16.

129. *Id.* at 30. Notably, the *Lewis* court did not subtract money that the defendant handed over to victims, stating instead that “restitution must be awarded in the amount of the defendant’s gross, rather than net, proceeds.” *Id.* at 32 n.14. Other courts have opted to award net proceeds. Government’s Motion for Order of Restitution, *United States v. Curtis*, No. 0:11-cr-60065 (S.D. Fla. Mar. 31, 2011), ECF No. 119.

130. See LEVY, VANDENBERG & CHEN, *supra* note 21, at 9 n.65.

131. See *supra* note 21 (referring to independently conducted research on file with authors). Obtaining the court-ordered restitution, of course, does not guarantee that a victim will actually receive the funds the court has ordered. And while each United States Attorney’s Office has a Financial Litigation Unit tasked with collecting restitution, defendants frequently fail to pay the orders in full. Because data on payment of these orders is not public, it is not possible to provide a precise estimate on the amounts paid to victims in restitution. The authors recommend a

Fortunately, however, the solution is entirely in the hands of courts and prosecutors—and pro bono attorneys for trafficking victims.

#### IV. EXCUSES, POSSIBLE EXPLANATIONS, AND IMPLICATIONS

When confronted with data indicating that sex trafficking victims rarely receive restitution orders, federal authorities frequently cite a number of factors. In a response to the Human Trafficking Pro Bono Legal Center-WilmerHale restitution report, one federal prosecutor told *The National Law Journal* that victims do not request restitution, and, “if the victim doesn’t ask for money, the court doesn’t order it.”<sup>132</sup> Other commentators have stated that the defendants in sex trafficking cases do not have sufficient funds to pay restitution orders.<sup>133</sup> And still others have blamed the victims themselves, arguing that they do not cooperate and often disappear.<sup>134</sup>

The TVPA says nothing that would require victims to request the restitution themselves. Indeed, there is no reason to assume victim-witnesses know about the mandatory restitution statute—much less have the ability to insist on its implementation. And while it is true that some sex trafficking victim-witnesses do not cooperate, that lack of cooperation would likely only preclude precise calculation of restitution under the 18 U.S.C. § 2259 prong. The value of the victim’s labor to the defendant can frequently be calculated using other means, such as bank records.<sup>135</sup> In *United States v. Williams*, a trafficker recruited vulnerable single mothers, forcing them into prostitution.<sup>136</sup> He required that each woman earn a daily quota and wire the money to him.<sup>137</sup> Although the wire records certainly documented the value to the defendant of the victims’ services, the court failed to order criminal restitution.<sup>138</sup> Similarly, in *United States v. Robinson*, the record reflected that a fourteen-year-old

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Government Accountability Office study to assess the percentage of restitution actually paid in human trafficking cases. A similar study was undertaken in 2005 to examine collections in white-collar fraud cases. U.S. GOV’T ACCOUNTABILITY OFFICE, CRIMINAL DEBT: COURT-ORDERED RESTITUTION AMOUNTS FAR EXCEED LIKELY COLLECTIONS FOR THE CRIME VICTIMS IN SELECTED FINANCIAL FRAUD CASES (Jan. 2005), <http://www.gao.gov/new.items/d0580.pdf> [<http://perma.cc/LMV5-MS9N>].

132. Katelyn Polantz, *Human Trafficking Cases Rarely Result in Restitution, Study Says*, NAT’L L.J., Oct. 6, 2014, at 11. A case exemplifying this is *United States v. Uscanga-Reyes* in which the government simply stated: “Restitution is required in this case. However, the victim has made no requests for restitution.” Sentencing Memorandum at 4, *United States v. Uscanga-Reyes*, No. 2:11-cr-00053 (M.D. Ala. Mar. 23, 2012), ECF 51.

133. Polantz, *supra* note 132.

134. *Id.*

135. *See supra* Section I on Personal Losses (discussing means of calculating victims’ labor).

136. Factual Resume at 5, *United States v. Williams*, No. 3:09-cr-00145 (N.D. Tex. Mar. 16, 2011), ECF No. 181.

137. *Id.*

138. Judgment at 6, *Williams*, No. 3:09-cr-00145 (N.D. Tex. Apr. 5, 2012), ECF No. 292.

runaway from a foster home, who was induced to commit commercial sex acts at a truck stop, earned \$7000 for her trafficker in just ten days—nevertheless, the court did not order restitution.<sup>139</sup> And in *United States v. Gandia*, the record reflected that the defendants had given the victims green stones to track the fraction paid of their \$3900 debt to the traffickers through forced prostitution.<sup>140</sup> A simple tally of these stones might have yielded an appropriate restitution estimate. Instead, no restitution was ordered.

The second common explanation for the failure to order restitution—that the defendants have no assets—is easily rebutted with a careful review of the indictments. In some cases, the government has already seized the traffickers’ assets at the time of indictment. In *United States v. McMillian*, for example, the defendant was convicted under 18 U.S.C. § 1591 for trafficking multiple adults and minors, and sentenced to 360 months in prison.<sup>141</sup> The indictment contained a list of items to be forfeited to the government, including a “Custom Pendant (State of WI) with Gold Chain and Diamonds” (valued at \$22,100), a “Yellow Gold Diamond 3-D Custom Piece” (valued at \$26,140), and a “Custom Diamond Breitling Men’s Watch” (valued at \$15,900).<sup>142</sup>

In a separate motion for forfeiture, the government went so far as to calculate the value of the proceeds of sex trafficking—but not for purposes of calculating restitution, as required under the law.<sup>143</sup> Instead, the government provided the affidavit in order to determine whether the defendant’s watch should be forfeited to the government as a substitute asset.<sup>144</sup> Restitution was not ordered in the case.<sup>145</sup>

Finally, in *United States v. Patrick*, an extremely violent child sex trafficking case, the government officially noticed that it planned to require forfeiture of “\$10,960 in United States currency,” along with “a gold 1992 Chevrolet conversion van inscribed with the words ‘Ho Hauler’ on the front

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139. Transcript of Sentencing Proceedings at 20, 27, 33–34, *United States v. Robinson*, No. 3:10-cr-00463 (N.D. Ohio Mar. 5, 2013), ECF No. 84.

140. Complaint at 7, 9, *United States v. Gandia*, No. 1:11-cr-00034 (M.D. N.C. Jan. 4, 2011), ECF No. 1. Because none of the defendants pled to crimes under Chapter 77, the case was not included in the dataset analyzed here.

141. Judgment at 1–2, *United States v. McMillian*, No. 2:11-cr-00193 (E.D. Wis. Nov. 7, 2013), ECF No. 109.

142. Indictment at 4–5, *McMillian*, No. 2:11-cr-00193 (E.D. Wis. Sept. 7, 2011), ECF No. 6.

143. Affidavit of FBI Special Agent Leah Nemetz in Support of United States’ Motion for Entry of Preliminary Order of Forfeiture Imposing Money Judgment and Forfeiting Men’s Breitling Watch as a Substitute Asset at 3–5, *McMillian*, No. 2:11-cr-00193 (E.D. Wis. Oct. 28, 2013), ECF No. 102.

144. *Id.*

145. Judgment, *McMillian*, *supra* note 141, at 5.

panel.”<sup>146</sup> The defendant pled guilty to 18 U.S.C. § 1591 and was sentenced to 265 months in prison, but the court failed to order restitution.<sup>147</sup>

Common excuses offered to explain prosecutors’ and courts’ lack of adherence to the mandatory restitution statute fall flat. However, several alternate theories may provide insight into this systemic failure.

#### A. *Victims’ Access to Competent Legal Representation*

In most sex trafficking cases, it is impossible to tell from the docket whether victims have attorneys—and therefore impossible to compare restitution rates of represented and unrepresented victims. However, because victims who are undergoing immigration proceedings often have attorneys appointed to them, it is possible to use foreigner-status as a proxy for the presence of an attorney. It indeed appears that this independent variable has a significant impact on the likelihood that a case will result in a restitution order.

Nearly half of adult sex trafficking cases involve foreign victims.<sup>148</sup> Because of these victims’ precarious immigration statuses (most are undocumented), anti-trafficking non-governmental organizations often provide immigration representation. This means that non-citizen adult sex trafficking victims are more likely to have legal counsel. It is therefore perhaps no coincidence that every adult sex trafficking case involving foreign victims includes a restitution order. The fact that more adult victims are foreign—and therefore more likely to be represented—may go a long way towards explaining why more adult victims get restitution.

In contrast, children in sex trafficking cases rarely have legal representation.<sup>149</sup> Courts have the power to appoint GALs<sup>150</sup> but rarely do so. In theory, these attorneys can be instrumental in obtaining restitution for a child victim of sex trafficking. Two cases in particular—*United States v. Lewis* and *United States v. Jackson*—illustrate the importance of ensuring that GALs are both well-trained and well-versed in trafficking law.

*United States v. Lewis* remains the gold standard for GAL performance in a criminal sex trafficking case. In *Lewis*, the court appointed a GAL pursuant to 18 U.S.C. § 3509(h)(1), which provides that “a court may appoint, and provide reasonable compensation and payment of expenses for, a guardian ad litem for

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146. Information as to Sean D. Patrick at 9, *United States v. Patrick*, No. 2:11-cr-00238 (E.D. Wis. Oct. 26, 2011), ECF No. 1.

147. Judgment at 1–2, 5, *Patrick*, No. 2:11-cr-00238 (E.D. Wis. Apr. 23, 2013), ECF No. 54.

148. Six out of fourteen cases involve non-United States citizens, non-legal permanent resident victims. *See supra* note 21 (referring to independently conducted research on file with authors).

149. *See* KATHERINE K. WALTS ET AL., LEGAL SERVICES ASSESSMENT FOR TRAFFICKED CHILDREN 17, 19 (Aug. 2013), [http://www.luc.edu/media/lucedu/chrc/LegalServicesAssess\\_TraffickedChildren\\_2013\\_CHRC\\_Final.pdf](http://www.luc.edu/media/lucedu/chrc/LegalServicesAssess_TraffickedChildren_2013_CHRC_Final.pdf) [<http://perma.cc/C9VE-6WHR>].

150. 18 U.S.C. § 3509(h)(1) (2012).

a child who was a victim of . . . a crime involving abuse or exploitation to protect the best interests of the child.”<sup>151</sup> Noting the GAL’s significant contribution to the victims’ interests,<sup>152</sup> the *Lewis* court also expressed frustration:

When the Court appointed the GAL in this action, it anticipated being able to provide her with “reasonable compensation” pursuant to 18 U.S.C. § 3509(h)(1). The Court was subsequently informed, however, that despite the fact that Congress amended § 3509(h)(1) on July 27, 2006 to expressly authorize the courts to compensate guardians ad litem in cases of child sexual abuse, *see* Adam Walsh Child Protection and Safety Act of 2006, P.L. 109–248, Title V, § 507 (2006), there was no source of dedicated funding to pay for such an appointment. When the Court informed the GAL of this unexpected development, she graciously volunteered to continue to represent the minor victims in this case in a pro bono capacity, and the Court is grateful for her service. The Court feels compelled to reiterate its frustration regarding its inability to provide compensation to individuals charged with the extremely important task of representing the interests of victims of child sexual exploitation and to express its hope that Congress will provide the courts with the necessary funding to implement this important statutory provision.<sup>153</sup>

The GAL in *United States v. Lewis* succeeded in obtaining the largest known restitution award in any sex trafficking case involving children.<sup>154</sup> Moreover, it is one of the few cases in which the court properly calculated the restitution in accordance with 18 U.S.C. § 1593. Sadly, the GAL in *United States v. Jackson* failed to request restitution for the value to the defendant of the victim’s services.<sup>155</sup> Furthermore, while he did bring evidence of costs incurred for the victim’s care, he specifically stated that he was “bringing [these costs] to the attention of the court as indication of the consequences of Defendant’s conduct, and not to request a restitution order with respect to these amounts.”<sup>156</sup> The significant amount of restitution ordered in the *Jackson* case was divided among the Oregon Department of Justice Crime Victims’ Services Division, the Washington State Crime Victims’ Compensation Program, and the victim, to be disbursed by the attorney.<sup>157</sup>

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151. *Id.*

152. *See* Memorandum Opinion at 12–13, *United States v. Lewis*, No. 1:09-cr-00213 (D.D.C. June 13, 2011), ECF No. 48.

153. *Id.* at 35, 36 n.18.

154. *See id.* at 36.

155. *See* Sentencing Memorandum filed by A.K., *United States v. Jackson*, No. 3:09-cr-00170 (D. Or. June 2, 2011), ECF No. 288.

156. *Id.* at 9–10.

157. Second Amended Judgment in a Criminal Case at 5, *Jackson*, No. 3:09-cr-00170 (D. Or. July 1, 2011), ECF No. 301.

While the use of GALs (including pro bono attorneys) should become standard practice in child sex trafficking cases, attorneys working in this role must receive training to understand the full array of crime victims' rights, including the right to mandatory restitution for trafficking victims under 18 U.S.C. § 1593.<sup>158</sup>

### B. *Legality of Underlying Work*

Failure to award restitution is widespread among sex trafficking prosecutions. In contrast, failure to award restitution is rare among labor trafficking cases, and completely non-existent among labor trafficking cases *in which the underlying labor was legal*.<sup>159</sup> This pattern suggests that one explanation for courts' failures to award restitution in sex trafficking cases might be ongoing insecurity about whether restitution should be awarded to victims who were forced to perform work that, had they performed it voluntarily, would have constituted criminal activity. Comments made in sentencing proceedings lend credence to this theory.<sup>160</sup>

It is beyond question that restitution is mandatory no matter what the nature of the underlying work. In *United States v. Mammedov*, the Second Circuit confirmed the plain meaning of the statute's text, stating that "the express terms of 18 U.S.C. § 1593 require that . . . persons who engaged in commercial sex acts within the meaning of 18 U.S.C. § 1591, receive restitution, notwithstanding that their earnings came from illegal conduct."<sup>161</sup>

158. 28 U.S.C. § 1593 (2012).

The *Attorney General Guidelines for Victim and Witness Assistance 2000* state that the primary goal of every Justice Department law enforcement officer, investigator, prosecutor, victim/witness professional and staff member shall be to reduce the trauma to child victims and child witnesses caused by the criminal justice system. To that end, Justice Department personnel are required to provide child victims with referrals for services, and should provide child witnesses with services referrals.

U.S. ATTORNEYS' MANUAL SECTION § 9-75.610 (U.S. DEP'T OF JUSTICE 2000), <http://www.justice.gov/usam/usam-9-75000-obscenity-sexual-exploitation-sexual-abuse-and-related-offenses#9-75.500> [<http://perma.cc/SK83-DGQP>].

159. See Government's Response to the PSR and Sentencing Memorandum at 29, *United States v. Campbell*, No. 1:10-cr-00026 (N.D. Ill. Nov. 5, 2012), ECF No. 253. It is also worth noting the one case that included both forced labor and sex trafficking charges calculated the restitution based exclusively on the forced labor. See *supra* Section III(C)(2) (discussing *United States v. Campbell*).

160. For example, in *United States v. Lopez-Perez*, the judge wondered aloud how restitution "would be an appropriate measure of loss, the money that was made from engaging in an illegal activity." Transcript of Proceedings at 25, *United States v. Lopez-Perez*, No. 1:11-cr-00199 (E.D. N.Y. Nov. 21, 2013), ECF No. 63. Likewise, in *United States v. Rojas*, the court opined that the defendant couldn't "owe restitution . . . because . . . she's furnishing the facility [providing the commercial sex act], which is still illegal." Sentencing Transcript at 32, *United States v. Rojas*, No. 4:11-cr-00116 (S.D. Tex. Apr. 9, 2012), ECF No. 255.

161. *United States v. Mammedov*, 304 F. App'x 922, 927 (2d Cir. 2008).

Nevertheless, courts continue to express surprise and even deny restitution because “the money . . . was made from engaging in an illegal activity.”<sup>162</sup> In *United States v. Rojas*, the court objected to restitution on grounds that the victim (albeit unwillingly) was “furnishing the facility, which is still illegal.”<sup>163</sup> This recurring unwillingness to enforce the law as written suggests that simple education of prosecutors and judges may improve restitution awards in sex trafficking cases.

### C. Victims’ Cooperation

Restitution under 18 U.S.C. § 1593 is mandatory—regardless of the legality of the underlying work, and regardless, also, of the victim’s interest in receiving an order.<sup>164</sup> In *United States v. Cail*, the prosecutors cancelled the restitution request when they could not reach the victim and were therefore “unable to determine whether she [was] entitled to restitution.”<sup>165</sup> (She was.) Likewise, in *United States v. Collins*, the prosecutor stated that “there is going to be no restitution in this case” because attempts made “to reach out to the victim and the victim’s mother . . . have been unsuccessful.”<sup>166</sup> In contrast, the United States Attorney’s Office in the Western District of Washington consistently demonstrates awareness that 18 U.S.C. § 1593 mandates restitution. In a presentation at a conference in Washington, D.C. in 2014, Assistant United States Attorney Kate Crisham reported that even in cases in her jurisdiction where the victims elected not to receive the restitution, the prosecutors still pursued an order.<sup>167</sup> The victim has the option to surrender the assets to a state victims fund if she does not wish to keep them.<sup>168</sup> This approach reflects a fundamental fact about the law: restitution payments are mandatory; the victim’s acceptance of the funds is not.

### D. Who Prosecutes Matters: The Department of Justice Civil Rights Division

The Department of Justice (DOJ) has split prosecution of sex and labor trafficking cases between two divisions. The Civil Rights Division (CRD) Criminal Section oversees prosecution of all adult sex trafficking cases and all

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162. Transcript of Proceedings, *Lopez-Perez*, *supra* note 160, at 25.

163. Appeal Transcript at 32, *Rojas*, No. 4:11-cr-00116 (S.D. Tex. June 26, 2012), ECF No. 324.

164. 28 U.S.C. § 1593 (2012).

165. Memorandum at 1, *United States v. Cail*, No. 2:10-cr-00350 (E.D. Cal. Dec. 20, 2011), ECF No. 70.

166. Transcript of Sentencing at 27, *United States v. Collins*, No. 1:10-cr-20089 (S.D. Fla. Jan. 24, 2011), ECF No. 121.

167. Kate Crisham, Assistant U.S. Attorney, W.D. Wash., Presentation on Criminal Restitution in Human Trafficking Cases (2014) (on file with authors).

168. *Id.*

forced labor trafficking cases in the United States.<sup>169</sup> Child sex trafficking cases, in contrast, are handled by the Child Exploitation and Obscenity Section (CEOS) of the Department of Justice's Criminal Division.

In 2007, the CRD established a specialized sub-department within the Criminal Section, the Human Trafficking Prosecution Unit (HTPU), to oversee labor trafficking and adult sex trafficking cases.<sup>170</sup> The HTPU reviews and coordinates these prosecutions nationwide. The DOJ official website for the CRD states, "Human trafficking crimes, like other civil rights crimes, require notification to the Criminal Section pursuant to §§ 8-3.120 and 8-3.140 of the U.S. Attorneys' Manual."<sup>171</sup> In-depth analysis of data for adult sex trafficking and labor trafficking cases over the relevant four-year period demonstrates that the CRD has a stellar record for obtaining restitution orders for trafficking victims. Indeed, in thirteen of the fourteen adult sex trafficking cases prosecuted, prosecutors requested restitution.<sup>172</sup> And in all of the forced labor cases included in the dataset analyzed for this article, prosecutors requested—and courts awarded—mandatory restitution. The CRD's Human Trafficking Prosecution Unit has actively and consistently pressed for mandatory restitution under the proper statute. At the time of the release of the Human Trafficking Pro Bono Legal Center-WilmerHale restitution report, the CRD issued a formal response to the report's findings:

'Securing restitution for trafficking victims is an essential part of DOJ's victim-centered approach to trafficking investigations and prosecutions,' [the Civil Rights Division of the Justice Department] said. The department has worked to strengthen enforcement and train federal prosecutors in restitution . . . [And] '[w]e look forward to continuing to secure significant restitution orders, and to work with victims' pro bono counsel to seek justice for victims of human trafficking' . . . .<sup>173</sup>

Unfortunately, analysis of data on child sex trafficking cases does not echo this successful record or commitment to restitution for victims. United States Attorneys' Offices across the country bring child sex trafficking cases independently. The Child Exploitation and Obscenity Section (CEOS) does not vet all child sex trafficking cases brought by the United States Attorneys' Offices, but CEOS attorneys do participate in some prosecutions. Unfortunately, many of these cases, even cases with CEOS prosecutor

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169. See *Human Trafficking Prosecution Unit: Overview*, U.S. DEP'T OF JUST., <http://www.justice.gov/crt/about/crm/htpu.php> [<http://perma.cc/MSY5-MBM4>] (last visited Aug. 11, 2015).

170. *Id.*

171. *Id.*

172. See *supra* note 21 (referring to independently conducted research on file with authors).

173. Polantz, *supra* note 132.

involvement, do not include restitution requests for the victims.<sup>174</sup> In addition, a review of the U.S. Attorneys' Manual reveals that the manual has apparently never been updated to include mandatory restitution for child victims of sex trafficking under 18 U.S.C. § 1593.<sup>175</sup> This oversight might explain the failure to enforce the mandatory restitution statute on behalf of child victims across the country.<sup>176</sup>

#### V. A TROUBLING TREND

As awareness of restitution grows, so do the ranks of those who seek to collect. While restitution is designed to make *victims* whole, there is the danger that non-governmental organizations (NGOs) or state victim services agencies, desperate for funding, will view restitution orders as a mechanism for reimbursement for outlays made on behalf of trafficking victims in their care. This outcome should be avoided. NGOs obtain funding from state and federal sources; accepting defendants' funds in the form of restitution has the effect of stealing from the trafficking victims these organizations purportedly wish to help. Some NGOs understand this dynamic. In *United States v. Jackson*, for example, an NGO called Children of the Night provided resources for the victim in the time between her escape and when she turned eighteen.<sup>177</sup> In his memorandum on the victim's behalf, the GAL indicated that Children of the Night did not seek restitution for reimbursement of those costs.<sup>178</sup> However, in *United States v. Flores-Benitez*, the court ordered that \$1152.18 of a \$4101.18

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174. Three examples of child sex trafficking cases in which attorneys from CEOS participated in the prosecution but did not request restitution for the victims are: *United States v. Mabon*, No. 2:11-cr-20121 (W.D. Tenn. May 12, 2011) (no restitution requested); *United States v. Matlock*, No. 2:12-cr-20213 (W.D. Tenn. Aug. 29, 2012) (no restitution requested); *United States v. Bell*, No. 5:12-cr-00057 (C.D. Cal. Aug. 1, 2012) (no restitution requested).

175. See U.S. ATTORNEYS' MANUAL § 9-75.000 (U.S. DEP'T OF JUSTICE 2000), <http://www.justice.gov/usam/usam-9-75000-obscenity-sexual-exploitation-sexual-abuse-and-related-offenses#9-75.500> [<http://perma.cc/SK83-DGQP>]. Many of the relevant sections in the U.S. Attorneys' Manual appear to have been last updated in 2000. *Id.*

176. U.S. ATTORNEYS' MANUAL § 9-75.610. The U.S. Attorneys' Manual does state that children are to receive referrals for services:

The *Attorney General Guidelines for Victim and Witness Assistance 2000* state that the primary goal of every Justice Department law enforcement officer, investigator, prosecutor, victim/witness professional and staff member shall be to reduce the trauma to child victims and child witnesses caused by the criminal justice system. To that end, Justice Department personnel are required to provide child victims with referrals for services, and should provide child witnesses with services referrals.

*Id.*

177. Sentencing Memorandum filed by A.K. at 9, *United States v. Jackson*, No. 3:09-cr-00170 (D. Or. June 2, 2011), ECF No. 288.

178. *Id.* at 8 (explaining, however, that the organization did not seek restitution because it feared that doing so would disrupt their fundraising efforts).

restitution order be paid to the Women’s Crisis Center in Northern Kentucky to reimburse the NGO for services provided to the victim.<sup>179</sup> Similarly, state victim support mechanisms often seek reimbursement through restitution orders. In *United States v. Greene*, the court restitution diverted restitution to the State of Alaska Violent Crimes Compensation Board to reimburse them for the amount expended for the victim.<sup>180</sup> In *United States v. Dorrough*, the court awarded restitution to reimburse the California Victim Compensation fund for the victim’s counseling appointments.<sup>181</sup> Diverting restitution to third parties strips trafficking victims of their right to recover. It is just one more way—among many—in which victims are deprived of their rights. Congress intended restitution for victims, not for NGOs or the state.<sup>182</sup>

## VI. CONCLUSIONS AND BEST PRACTICES

Child sex trafficking victims struggle to recover from the abuse they have suffered. Given the national spotlight focused on these children, it is perhaps ironic that this is the group *least* likely to see their restitution rights vindicated in the federal courts. Moreover, child sex trafficking victims are also the least likely to pursue civil damages claims against their traffickers under 18 U.S.C. § 1595.<sup>183</sup>

What is to be done? The United States has a restitution law that is an international model on paper. But the law is an illusion for the sex trafficking

179. Agreed Order for Restitution at 2, *United States v. Flores-Benitez*, No. 5:12-cr-00019 (E.D. Ky. Sept. 27, 2012), ECF No. 97.

180. Sentencing Memorandum at 7, *United States v. Greene*, No. 3:09-cr-00053 (D. Alaska Apr. 6, 2012), ECF No. 903 (“With respect to restitution, the State of Alaska Violent Crimes Compensation Board expended \$9,584.00 for the benefit of Juvenile C, according to an email received from that office. Defendant Greene should be required to pay restitution to that agency in that amount.”).

181. Sentencing Transcript at 17, 29, *United States v. Dorrough*, No. 3:09-cr-01250 (S.D. Cal. Oct. 29, 2010), ECF No. 178.

182. Scott Jones, *Forfeiture and Restitution in the Federal Criminal System: The Conflict of Victims’ Rights and Government Interests*, 6 AM. U. CRIM. L. BRIEF, Spring 2011, at 26, 27. If restitution is to be ordered to state and federal victims’ compensation agencies or NGOs, restitution should then be paid to victims first. Restitution orders to service providers and the state would not be problematic if defendants had unlimited assets. But given the problem of low recovery rates under restitution orders, it seems most appropriate for victims to be compensated first, before third parties.

183. *Trafficking Case Database*, HUM. TRAFFICKING PRO BONO LEGAL CTR. (on file with authors). Of the 147 cases filed under 18 USC § 1595 as of August 18, 2015, only ten of those cases were sex trafficking cases. *Id.* The remaining 139 federal civil trafficking cases involved forced labor or involuntary servitude. *Id.* Of the ten sex trafficking cases filed, only two related to the sex trafficking of children. *Id.* This data is drawn from a database created and maintained by the Human Trafficking Pro Bono Legal Center. The organization tracks all federal civil trafficking cases filed in the United States. Access to the database is password-protected. The database is available pro bono to attorneys handling trafficking victims’ cases.

victims who—at great personal risk—cooperate with prosecutors to hold traffickers accountable. There are seven immediate steps that could be taken to remedy the chasm between the law as it should be and the law as currently enforced.

- First, train federal prosecutors to seek restitution under the proper statute, using the formula that Congress mandated in 18 U.S.C. § 1593. Data indicate that the restitution request is the single biggest factor in determining whether the victim will get restitution.
- Second, train federal judges to order restitution under the proper statute, relying on the appropriate calculations. In numerous cases, judges refused to enter restitution orders calculated under 18 U.S.C. § 1593, even where the prosecutors had provided a detailed motion with the calculations to support the request under 18 U.S.C. § 1593. Federal judges need to be trained to enter these mandatory restitution orders, and to raise the issue of restitution with prosecutors who fail to do so on their own. Ultimately, the statute puts responsibility on courts to order restitution.
- Third, appoint pro bono counsel for all trafficking victims, including child sex trafficking victims. If GALs are to be used, they too must be trained in order to avoid errors in calculation of restitution. The victims' rights attorney model has been used successfully in child pornography cases; unfortunately, sex trafficking victims have not benefited from this system (indeed, have suffered, since most prosecutors doing child pornography cases are only aware of restitution under 18 U.S.C. § 2259). Pro bono counsel can do more than just assist prosecutors in identifying the proper amount of restitution to request (and to gather the receipts or other evidence to support the order); they can also help create trusts in which restitution funds obtained for children can be deposited and protected.
- Fourth, amend the U.S. Attorneys' Manual to reflect 18 U.S.C. § 1593 and the proper measure of mandatory restitution.
- Fifth, train probation officers to include restitution under 18 U.S.C. § 1593 in their PSRs. Where possible, probation officers should interview trafficking victim-witnesses to assess restitution amounts. Reliance on the defendants' testimonies alone should not suffice to draft the PSRs.
- Sixth, implement the provisions on restitution and forfeiture codified in the recently passed Justice for Victims of Trafficking Act.<sup>184</sup> The law requires that forfeited assets be used to pay restitution orders for victims.

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184. Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22, § 105(a)(1), 129 Stat. 227, 236 (2015).

The United States Treasury should not seize assets that belong to the trafficking victims forced to toil to earn these profits. Money seized from defendants should first go to their victims.

- Finally, develop financial literacy programs for trafficking survivors. With proper planning, trafficking survivors can use restitution funds to rebuild their lives, just as Congress intended.