

Mandatory Restitution: Complying with the Trafficking Victims Protection Act

William E. Nolan
Trial Attorney
Human Trafficking Prosecution Unit
Civil Rights Division

I. Introduction

“He had me do ten appointments a day and I was there for six months. I never saw any of that money[,] and when I finally escaped I left with nothing[—]I just needed to get away from him and back to my son.”¹

To the federal prosecutor who has just heard a jury render a guilty verdict in a hard-fought human trafficking prosecution, a restitution order may seem like a far-off concern and not nearly as urgent as preparing for a sentencing hearing, but to the trafficking victim, the money associated with a restitution order can be life-changing. Although no amount of money can erase the pain the trafficker has inflicted, that money can fund much-needed transportation, opening doors to employment, school, and childcare. It can help pay for housing, food, and tuition, or be the means by which a victim seeks counseling for trauma or addiction. Most victims, like the young woman quoted above, are destitute when they finally escape the grip of their trafficker. Some literally escape with just the clothes on their back. Restitution can be a catalyst to independence and a critical factor in a survivor’s efforts to avoid re-victimization. To the federal prosecutor who has just heard a jury render a guilty verdict, the upcoming restitution hearing is the government’s opportunity to change a victim’s life.

Skillfully advocating for restitution is a core component of the Department’s victim-centered approach to trafficking enforcement. Enacted in 2000, the Trafficking Victims Protection Act (TVPA) mandates restitution for victims of human trafficking.² Specifically, the TVPA requires a defendant convicted of a trafficking crime under Title 18, Chapter 77, to pay restitution to the victim.³ Chapter 77 includes, *inter alia*, crimes such as sex trafficking and forced labor.⁴

The most important aspect of the TVPA’s restitution component is that restitution is mandatory.⁵ Mandatory restitution for trafficking victims under 18 U.S.C. § 1593 is a powerful mechanism enabling federal prosecutors to restore to trafficking survivors the simple dignity of living free. This article

¹ Survivor’s Victim Impact Statement, *United States v. Hamidullah*, No. 6:16-cr-27 (M.D. Fla., filed Feb. 10, 2016).

² See 18 U.S.C. § 1593 (2012).

³ See *id.* § 1593(b).

⁴ See 18 U.S.C. §§ 1581–1597 (2012 & Supp. III 2015).

⁵ See 18 U.S.C. § 1593(a) (“the court *shall order* restitution for any offense under this chapter”) (emphasis added); *United States v. Culp*, 608 F. App’x 390, 392 (6th Cir. 2015) (“Courts must award restitution to victims of sex trafficking.”); *United States v. Robinson*, 508 F. App’x 867, 870 (11th Cir. 2013) (“based on the plain language of § 1593, an award of restitution was mandatory”); *In re Sealed Case*, 702 F.3d 59, 66 (D.C. Cir. 2012) (“Because the appellant pleaded guilty to 18 U.S.C. § 1591, the district court was required to impose restitution under 18 U.S.C. § 1593”).

discusses challenges that arise in interpreting and applying § 1593 and provides strategies for effectively enforcing the TVPA’s mandatory restitution statute as an essential means of pursuing justice on behalf of victims of human trafficking.

II. Calculating Restitution Under § 1593: Defining a Victim’s Losses

Section 1593(b) provides that “[t]he order of restitution . . . shall direct the defendant to pay the victim . . . the full amount of the victim’s losses” and defines those losses in § 1593(b)(3) as the sum of two distinct types of compensation—personal losses and the economic value of the victim’s services.⁶

The first part of the definition, which calculates the victim’s personal losses, is given the same meaning as the phrase “the full amount of the victim’s losses” as defined in 18 U.S.C. § 2259(b)(3).⁷ Section 2259(b)(3), which is the restitution statute applicable to victims of child sexual exploitation, defines “the full amount of the victim’s losses,” including “any costs incurred by the victim for [the following]”:

- (A) medical services relating to physical, psychiatric, or psychological care;
- (B) physical and occupational therapy or rehabilitation;
- (C) necessary transportation, temporary housing, and child care expenses;
- (D) lost income;
- (E) attorneys’ fees, as well as other costs incurred; and
- (F) any other losses suffered by the victim as a proximate result of the offense.⁸

In 1999, the Ninth Circuit Court of Appeals stated that § 2259(b)(3) is “phrased in generous terms, in order to compensate the victims of sexual abuse for the care required to address the long term effects of their abuse.”⁹ Because victims of human trafficking similarly suffer long-term effects associated with the abuse inflicted by their traffickers, Congress required the same restitution calculations mandated in cases involving the sexual exploitation of children to apply to victims of human trafficking.

As noted in subsection (F), the costs incurred by the victim must be proximately caused by the defendant’s conduct in committing the trafficking offense.¹⁰ “In other words, the defendant should not be required to pay restitution for harm he did not cause. This does not mean, however, that the defendant must be the sole cause of the harm.”¹¹

Notably, “costs incurred by the victim” are not limited to losses incurred during the offense conduct. That is, restitution also includes compensation for estimated costs of future medical and mental health needs as well.¹²

For example, in *In re Sealed Case*, the court awarded restitution based on calculations of the cost of future mental health services, which were presented in mental health assessment reports that a

⁶ See 18 U.S.C. § 1593(b); see also *United States v. Cortes-Castro*, 511 F. App’x 942, 947 (11th Cir. 2013); *In re Sealed Case*, 702 F.3d at 66.

⁷ See 18 U.S.C. § 1593(b)(3).

⁸ 18 U.S.C. § 2259(b)(3)(A)–(F) (2012).

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

¹⁰ See 18 U.S.C. § 2259(b)(3)(F).

¹¹ *In re Sealed Case*, 702 F.3d at 66 (citing *United States v. Monzel*, 641 F.3d 528, 538 (D.C. Cir 2011)).

¹² *United States v. Pearson*, 570 F.3d 480, 486 (2d Cir. 2009) (citing *United States v. Doe*, 488 F.3d 1154, 1159–60 (9th Cir. 2007); *United States v. Danser*, 270 F.3d 451, 455 (7th Cir. 2001); *United States v. Julian*, 242 F.2d 1245, 1247 (10th Cir. 2001)) (“Three of our sister circuits have considered this language and concluded that § 2259 authorizes compensation for future counseling expenses.”).

psychologist prepared for each of the victims in preparation for the restitution hearing. The psychologist interviewed the victims, reviewed their prior mental health history, and diagnosed each victim's mental health and substance abuse problems, including Post-Traumatic Stress Disorder. While some of the victims had pre-existing mental health and substance abuse problems, the psychologist "concluded there was 'little doubt' that the . . . [defendant] 'exacerbated' any preexisting mental health problems" and that each of the victims would require "significant mental health services, in different stages and to differing degrees, for the rest of her life."¹³ The psychologist calculated estimated lifetime costs of those mental services for each of the four victims, and the court cited these reports in awarding restitution for each victim in amounts ranging from \$570,000 to \$850,000.¹⁴

The second part of the "the full amount of the victim's losses" definition seeks to compensate the victim for the value of the services the defendant caused the victim to perform.¹⁵ Said another way, § 1593 seeks to restore to the trafficking survivor the stolen wages and profits realized by the trafficker during the commission of the trafficking offense. In this regard, the statute defines such losses to 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.)."¹⁶

In calculating "the gross income or value to the defendant of the victim's services or labor," courts have used various methods to estimate the value of the victim's work, including relying upon victims' accounts of the work they performed and prices charged for such work, as well as evidence gathered during the government's investigation regarding the work performed. In a sex trafficking case, the value of a victim's services to a defendant is calculated based upon a defendant's gross income from the commercial sex acts performed by the victim. This is sometimes referred to as the "unjust enrichment" calculation. For example, in *United States v. Lewis*, the court's restitution figures were based on the length of time the victims were engaged in commercial sex at the direction of the defendant, the average number of clients the defendant compelled the victims to service per night, and the average price charged per client.¹⁷

Courts do not require exacting precision to establish the amount of the losses but, rather, require only that the restitution calculation be based on some reasonable certainty. For example, the restitution figures in *Lewis* were not exact accountings of the work performed and the prices charged, but they were the court's best estimation based upon the evidence.¹⁸ One of the victims in *Lewis*, "S.H.," testified before the grand jury that prostitution clients paid her between \$300 and \$500 per day, which she turned over to the defendant. As part of his plea agreement, the defendant admitted that he prostituted S.H. for 914 days. In calculating the unjust enrichment of the defendant for purposes of restitution, the court multiplied \$400 (an average of the daily proceeds from the prostitution) by 914 to arrive at a total of \$365,000.¹⁹ For another victim, "T.S.," the court multiplied the number of days the defendant trafficked T.S. by the daily quota of \$500 that the defendant required T.S. to earn, as established by T.S.'s testimony.²⁰

Similarly, in *United States v. Webster*, the Ninth Circuit affirmed a restitution order that the trial court calculated by multiplying the number of weeks the victim was trafficked by the average number of

¹³ *In re Sealed Case*, 702 F.3d at 62.

¹⁴ *See id.*

¹⁵ 18 U.S.C. § 1593(b)(3) (2012).

¹⁶ *Id.*

¹⁷ *United States v. Lewis*, 791 F. Supp. 2d 81, 92–94 (D.C. Cir. 2011).

¹⁸ *See id.*; *see also United States v. Nash*, 558 F. App'x 741, 742 (9th Cir. 2014) ("The district court appropriately 'estimate[d], based upon facts in the record,' the victims' losses 'with some reasonable certainty.'" (quoting *United States v. Doe*, 488 F.3d 1154, 1160 (9th Cir. 2007))).

¹⁹ *Lewis*, 791 F. Supp. 2d at 92, 95 n.12.

²⁰ *Id.* at 92, 95 n.15.

clients per week and multiplying that product by the minimum amount charged per client.²¹ The court noted:

Any error in the district court’s figure is more than offset by the conservative estimate of the fee per date used to determine restitution. The court used \$150 per date in determining restitution, while most of the girls testified that they regularly made substantially more per date. Three of the women testified that they regularly made between \$400 and \$700 per date and sometimes thousands.²²

Notably, because the statute defines losses by the “gross income or value to the defendant,” the amount of proceeds generated should not be offset by expenses incurred by the defendant or proceeds shared with the victim.²³ Often in sex trafficking cases, the trafficker pays for the hotel rooms where the victims slept and showered, as well as for food, clothing, hair styling, manicures, and even “gifts” for the victims, all with the proceeds of the prostitution. None of those expenses, however, are deducted from the “unjust enrichment” restitution calculation because the statute is clear that this calculation calls for the “gross” income or value generated. In effect, the statute views the trafficker’s outlays for such expenses—including any “allowance” the victim is permitted to keep—as costs of maintaining the ongoing sex trafficking operation, reducing only the net profits and not the gross income or value.

As an alternative to the “unjust enrichment” method discussed above, the value of the victim’s losses may be calculated according to the minimum wage and overtime guarantees of the Fair Labor Standards Act (FLSA), effectively compensating the victim at minimum rates for the services the victim performed for the defendant’s gain.²⁴ In cases where the services are illegal—most commonly prostitution in sex trafficking cases—it is important to emphasize that this formula does not treat an illegal service as minimum wage employment, but it instead seeks to compensate the victim for the lost opportunity to pursue legitimate employment on the victim’s behalf. For this reason, the calculation under the FLSA guarantees is sometimes referred to as the “opportunity loss” calculation. In many sex trafficking cases, this amount is lower than the “unjust enrichment” calculation described above. Nevertheless, it can provide an important alternative means of proving the victim’s losses in cases where there is insufficient evidence to estimate, with reasonable certainty, the number of clients served or the price per client. This calculation is also useful in cases involving forced labor, where “opportunity loss” is often the most appropriate measure of the victim’s losses for restitution purposes. The U.S. Department of Labor’s Wage and Hour Division often plays an invaluable role in performing this calculation by reviewing the evidence, interviewing the victim, and computing lost wages in accordance with the FLSA.

The FLSA calculation is derived by multiplying the number of hours worked by the applicable minimum or prevailing wage rate in effect at the relevant time and place; one can then add overtime pay, if applicable, and subtract any money actually paid to the victim. The FLSA also provides for liquidated damages in an amount equal to double the amount of back wages owed, and the courts have upheld the application of this liquidated damages provision in labor trafficking cases.²⁵

For example, in *United States v. Sabhnani*, the defendants trafficked two victims in their home as domestic servants.²⁶ A jury convicted the defendants of peonage, forced labor, document servitude, and alien harboring. Among the many facts demonstrating the defendants’ crimes, the evidence at trial

²¹ [United States v. Webster](#), Nos. 08–30311 & 09–30182, 2011 WL 8478276, at *3 (9th Cir. Nov. 28, 2011).

²² *Id.*

²³ 18 U.S.C. § 1593(b)(3) (2012); *see also Lewis*, 791 F. Supp. 2d at 93 n.14 (acknowledging testimony that the victim kept some money she earned but declining to subtract it from restitution amount because “restitution must be awarded in the amount of the defendant’s gross, rather than net, proceeds”).

²⁴ *See generally* 29 U.S.C. §§ 206–207 (2012 & Supp. III 2015).

²⁵ *See* 29 U.S.C. § 216 (2012).

²⁶ [United States v. Sabhnani](#), 599 F.3d 215, 215 (2d Cir. 2010).

showed that the victims “performed household work between 4:00 AM and late at night seven days a week.”²⁷ The victims testified that they were sleep deprived and sometimes worked between twenty-two and twenty-four hours a day.²⁸ The victims testified that they “didn’t dare” leave their employ due to the threats of serious harm made by the defendants.²⁹ In awarding restitution, the district court first calculated the “net back pay” pursuant to FLSA, specifically 29 U.S.C. § 216(b), and then doubled that figure as liquidated damages to arrive at a restitution award nearing \$1 million.³⁰ The defendants argued that the liquidated damages provision of the FLSA did not apply to restitution awards under 18 U.S.C. § 1593.³¹ The court, however, disagreed, relying on three “significant” points regarding the statutory language of § 1593.³²

First, the court explained that § 1593’s reference to the FLSA “does not limit the ‘minimum wage and overtime guarantees’ that determine the ‘value’ of the victim’s labor solely to §§ 206 and 207, the specific provisions of FLSA setting out the definitions of minimum wage and overtime and when they apply.”³³ According to the court, this implied that the other provisions of the FLSA are relevant in calculating restitution.³⁴ Second, the court noted that the liquidated damages provision of the FLSA is “triggered automatically by a violation of §§ 206 or 207” and requires that employers who commit those violations “shall be liable” for liquidated damages.³⁵ Third, the court noted that the liquidated damages provision of the FLSA is “exclusively tied to violations of the minimum wage and overtime rules in §§ 206 and 207.”³⁶ Accordingly, the court concluded that the liquidated damages provision of the FLSA is proper to apply when calculating the value of the victim’s labor for restitution under § 1593.

III. Challenges in Securing Restitution Orders

The United States bears the burden of proving the proper amount of restitution by a preponderance of the evidence,³⁷ so it is critically important during the investigation, at trial, and in plea agreements to develop evidence that can support a reasonably certain estimation of the amount of the victim’s loss. However, eliciting this evidence can be challenging, particularly when trauma symptoms or substance abuse issues complicate victims’ ability to recount chronology or when traffickers keep victims unaware of how much customers are charged. Case law suggests that it is inappropriate for a defendant to object to the sufficiency of the government’s evidence where the defendant has failed to keep records regarding the hours worked by the victim.³⁸

In establishing proof for the restitution calculation, the government may rely on the evidence presented at trial,³⁹ presented to the grand jury,⁴⁰ or obtained during the government’s investigation. There is no requirement that the victim testify at a restitution hearing.⁴¹ When calculating restitution, a

²⁷ *Id.* at 258.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 224, 259.

³¹ *Id.* at 258.

³² *Id.* at 259.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* (citing 29 U.S.C. § 216(b) (2012)).

³⁶ *Id.* at 259.

³⁷ 18 U.S.C. § 3664(e) (2012).

³⁸ See *Gurung v. Malhotra*, 851 F. Supp. 2d 583, 589 (S.D.N.Y. 2012); see also *United States v. Fu Sheng Kuo*, 620 F.3d 1158, 1167 (9th Cir. 2010).

³⁹ See *United States v. Baston*, 818 F.3d 651, 665 (11th Cir. 2016).

⁴⁰ See *In re Sealed Case*, 702 F.3d 59, 67 (D.C. Cir. 2012).

⁴¹ See *United States v. Sabhnani*, 599 F.3d 215, 258–59 (2d Cir. 2010).

court may rely on any evidence “bearing ‘sufficient indicia of reliability to support its probable accuracy.’”⁴² “District courts have broad discretion in choosing the procedures to employ at a restitution hearing, ‘so long as the defendant is given an adequate opportunity to present his position as to matters in dispute.’”⁴³

Because the government is not required to present sworn testimony at a restitution hearing, and may rely on summary reports, law enforcement testimony, and other evidence that would be inadmissible at trial, prosecutors should aim to develop the necessary evidence for a restitution calculation from the earliest stages of the investigation. While much of the evidence relevant to calculating the value of the victim’s labor or services likely will be obtained through the investigative process because such evidence relates closely to the trafficking crime itself, the restitution analysis can benefit from additional specifics on dates, hours, prices, and volume of customers served to aid in calculating the monetary value of the labor or services performed. The victim’s account of dates and times can be corroborated by hotel receipts, travel reservations, text messages, or internet advertisements. Similarly, prices, average numbers of clients, and quotas can often be corroborated, at least circumstantially, by text messages between the trafficker and victim. The victim’s statements as memorialized in law enforcement reports or grand jury transcripts, along with corroborating evidence, can form the basis for the restitution calculation and be attached to restitution motions and presented to the court at restitution hearings to meet the government’s burden of proving the victim’s losses. Because some courts are unfamiliar with the mandatory nature of the TVPA restitution provision and with methods of calculating the victim’s losses under § 1593, filing a written restitution motion that cites relevant authorities and attaches relevant evidence can significantly enhance the likelihood of securing a restitution order that properly accounts for the full scope of the victim’s losses.

A common defense in opposing restitution awards under § 1593 is that, because the victim’s services were illegal (usually argued in sex trafficking cases regarding prostitution), it would be an affront to justice for the court to “reward” the victim for engaging in illegal conduct. Federal courts without exception have rejected this argument. It is simply not relevant that the defendant’s unjust enrichment was derived from illegal means. In *United States v. Mammedov*, the court explained that such an argument lacks merit for two reasons: it ignores that the “defendant caused . . . [the] illegal conduct through force, fraud or coercion, or the inducement of a minor”; and restitution under the statute is mandatory, with no exception based on whether the services are legal or illegal.⁴⁴ “Thus, the express terms of 18 U.S.C. § 1593 require that the victims in this case, i.e., 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.”⁴⁵ Similarly, in *Fu Sheng Kuo*, the court explained that “the Trafficking Act mandates restitution that includes a defendant’s ill-gotten gains.”⁴⁶ And in *United States v. Cortes-Castro*, when the defendant argued that such a restitution calculation would reward the victim for her illegal activities, the court called that argument “preposterous” because the victims were “forced to prostitute.”⁴⁷

In some cases, the loss calculations result in small restitution awards that seem inappropriately low compared to the serious trauma the victim endured and the substantial prison sentence resulting from the mandatory minimum and the sentencing guidelines. For example, in a sex trafficking case, if a defendant forced a woman to engage in prostitution with two clients prior to the victim’s escape or recovery, and in each instance the defendant received \$100 from the prostitution proceeds, then the unjust enrichment calculation is only \$200 and the “opportunity loss” calculation based on the FLSA could be

⁴² *United States v. Singletary*, 649 F.3d 1212, 1217 n.21 (11th Cir. 2011) (quoting *United States v. Bernardine*, 73 F.3d 1078, 1080–81 (11th Cir. 1996)); see also *Baston*, 818 F.3d at 665 (quoting *Bernadine*, 73 F.3d 1080–81).

⁴³ *Baston*, 818 F.3d at 665 (quoting *United States v. Maurer*, 226 F.3d 150, 151 (2d Cir. 2000)).

⁴⁴ *United States v. Mammedov*, 304 F. App’x 922, 922 (2d Cir. 2008).

⁴⁵ *Id.* at 927.

⁴⁶ *United States v. Fu Sheng Kuo*, 620 F.3d 1158, 1164 (9th Cir. 2010).

⁴⁷ *United States v. Cortes-Castro*, 511 F. App’x 942, 947 (11th Cir. 2013).

even less. In contrast to the \$200, the defendant will face a fifteen-year mandatory minimum sentence, and the victim may suffer a lifetime of trauma for having been forced to engage in prostitution, regardless of the number of commercial sex encounters. In these instances, prosecutors may be concerned that the court will not be receptive to a motion to recover a small amount of restitution or that the small dollar amount may appear to trivialize the severity of the victimization. However, because restitution is mandatory, prosecutors must file the motion even if the dollar amount is extremely low. They should present arguments, as necessary, to establish that the amount is a statutory measure of the defendant's unjust enrichment or the victim's lost opportunity, and emphasize that the amount does not purport to make the victim whole for the degrading and dehumanizing experience of being compelled to prostitute. Finally, while the calculation of the value of the victim's services may produce a small dollar amount, when they are added to other losses listed in § 2259(b)(3), particularly future mental health care expenses, the final amount may be more proportionate to the defendant's sentence and may more accurately reflect the survivor's victimization.

Additionally, when a victim becomes uncommunicative after the conviction, it is still necessary to seek restitution, to the extent possible, based on the evidence in the record because the court is nevertheless mandated to order restitution. In such cases, it may be that the record does not contain enough information to calculate losses under § 2259(b)(3) or an "unjust enrichment" estimate, but in most cases there is enough evidence to at least put forth an "opportunity loss" estimate. While it may be difficult to deliver any recovered funds to a victim who has ceased contact with the government, the court is still required to order mandatory restitution, and the government must make reasonable efforts to contact the victim and provide the restitution recovered.

Finally, because the restitution order is mandatory, a defendant's inability to pay is irrelevant. The defendant's ability to pay, however, is relevant to the court's duty to order a payment schedule. In *Mammedov*, the district court did not provide a payment schedule for the mandatory restitution it ordered against the defendant. The Second Circuit understood this lack of a payment schedule to mean the district court implicitly ordered the restitution to be paid immediately, although the record established that the defendant was unable to pay.⁴⁸ The Second Circuit found that requiring the defendant to immediately pay restitution when nothing in the record suggested the defendant had the ability to do so was an abuse of discretion.⁴⁹ The court vacated the restitution order and remanded the case to the district court for a new hearing.⁵⁰

IV. Discretionary Restitution for Non-trafficking Offenses Such as 18 U.S.C. § 2421

Often, trafficking charges under Chapter 77, such as those involving § 1589 (forced labor) and § 1591 (sex trafficking), are brought alongside other charges that fall outside of Chapter 77. For instance, the Mann Act charges involving interstate transportation for purposes of prostitution under 18 U.S.C. § 2421 frequently accompany sex trafficking charges under § 1591.⁵¹ And sometimes, either as the result of plea negotiations or acquittal, the defendant is not convicted of the Chapter 77 offense. Restitution in those instances cannot (unless specifically set forth in the plea agreement) be calculated in accordance with § 1593.

⁴⁸ *Mammedov*, 304 F. App'x at 927 (citing 18 U.S.C. § 3572(d)(1) (2012)) ("A person sentenced to pay . . . restitution[] shall make such payment immediately, unless, in the interest of justice, the court provides for payment on a date certain or in installments.").

⁴⁹ *Id.* at 928 (citing *United States v. Mortimer*, 52 F.3d 429, 436 (2d Cir. 1995)).

⁵⁰ *Id.*

⁵¹ *Mann Act*, 18 U.S.C. §2421 (Supp. III 2015).

Restitution for a conviction under 18 U.S.C. § 2421, for example, is governed by 18 U.S.C. § 3663.⁵² Unlike § 1593, restitution is not mandatory under this provision.⁵³ Moreover, when calculating “the amount of loss sustained by the victim,” the unjust enrichment calculation does not apply.

In *Fu Sheng Kuo*, the defendants fraudulently induced women from China to come to the United States in order to engage in prostitution.⁵⁴ The defendants falsely told the women that they would be employed as cashiers and that the defendants would handle all of the logistics for the travel and legal immigration.⁵⁵ When the women arrived in the American Samoa, they were taken to a three-story building that housed a brothel.⁵⁶ The building was locked at all times, and wire and plywood covered the windows and balcony areas to prevent the women from leaving.⁵⁷ The defendants entered into guilty pleas for violating 18 U.S.C. § 241, conspiracy to violate civil rights.⁵⁸ Following sentencing, the district court ordered the defendants to pay restitution. The court, however, calculated restitution using the “unjust enrichment” calculation under § 1593.⁵⁹ The Ninth Circuit reversed, explaining that the defendants were not convicted of a crime under Chapter 77 but, rather, were convicted under § 241. It therefore held that, because the defendants were not convicted of a Chapter 77 crime, “the restitution provisions of the Trafficking Act simply do not apply. Instead, the restitution provisions of § 3663 apply. And the calculation methods under § 3663 do not include a defendant’s ill-gotten gains.”⁶⁰

The government argued that, “[a]lthough Section 1593 does not mandate restitution for violations of 18 U.S.C. [§] 241,” because the facts were similar to trafficking offenses (i.e., forced prostitution), “it was reasonable . . . to look to Section 1593 for guidance” on formulating a fair restitution order.⁶¹ The court disagreed and explained that restitution under § 3663 is limited to the “victim’s actual losses.”⁶² The court concluded that the government “may seek only the penalties authorized by law for violations of that crime.”⁶³ While the court ruled that the “unjust enrichment” calculation was erroneous, the court implied that it would be appropriate to apply the “opportunity loss” calculation as a means to determine “lost wages for legitimate employment” of adult victims transported interstate for purposes of prostitution in violation of § 2421.⁶⁴

V. Restitution as Part of the Plea Agreement

As noted above, when entering into a plea agreement, it is certainly acceptable for the government and a defendant to agree to a stipulated amount of restitution or to agree that restitution will be calculated in accordance with § 1593, even in cases where the defendant is not pleading guilty to a Chapter 77 trafficking offense. An agreement to apply § 1593 is beneficial to the victim, both because loss calculations can be broader under § 1593’s “unjust enrichment” measure than under § 3663 and because restitution awarded pursuant to § 1593 is not a taxable award under IRS Notice 2012-12.⁶⁵ As *Fu*

⁵² 18 U.S.C. § 3663 (2012).

⁵³ *See id.*

⁵⁴ *United States v. Fu Sheng Kuo*, 620 F.3d 1158, 1160 (9th Cir. 2010).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 1161.

⁵⁹ *Id.* at 1164.

⁶⁰ *Id.* at 1164–65.

⁶¹ *Id.* at 1165.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 1165–66.

⁶⁵ I.R.S. Notice 2012-12, 2012-6 I.R.B. 365 (Feb. 6, 2012).

Sheng Kuo illustrates, however, the plea agreement must expressly stipulate that restitution will be calculated pursuant to § 1593; otherwise, applying § 1593 to calculate restitution for non-trafficking offenses would constitute reversible error.⁶⁶ The exact amount of restitution does not need to be agreed upon in the plea agreement, but note that if the agreement does not specify the exact amount, the defendant does not waive the right to appeal the restitution ordered at a later date by the court.⁶⁷

VI. Conclusion

As noted above, restitution awards can provide life-changing resources for a trafficking survivor. Restitution serves to restore a victim's losses, as measured either by the ill-gotten gains the defendant derives from exploiting the victim's services (stolen wages) or by the lost opportunity for the victim to obtain legitimate work. Moreover, disgorging the criminal proceeds serves as a deterrent to the defendant's conduct in misappropriating the victim's services for the defendant's own profit. The mandatory nature of the TVPA's restitution provision highlights the significance of restitution, both as a means of stabilizing and empowering the victim and as a means of deterring the trafficking conduct. Advocating effectively for restitution is, therefore, a critical component of the Department's victim-centered approach to combating human trafficking. Effective enforcement of the TVPA's mandatory restitution provisions frequently requires federal prosecutors to investigate evidence related to the victim's losses from the earliest stages of the investigation, and requires them to file briefs setting forth the applicable calculations and to present evidence of the victim's losses at contested hearings. Federal prosecutors encountering restitution-related issues are encouraged to contact the Civil Rights Division's Human Trafficking Prosecution Unit for assistance in pursuing restitution orders.

ABOUT THE AUTHOR

□ **William E. Nolan** serves as a Trial Attorney for the U.S. Department of Justice's Human Trafficking Prosecution Unit (HTPU) within the Civil Rights Division's Criminal Section. Mr. Nolan has prosecuted sex trafficking and forced labor cases in districts across the country and has conducted training on human trafficking for law enforcement, prosecutors, and government officials nationwide and internationally. Additionally, Mr. Nolan has been an expert consultant for the United Nations Office on Drugs and Crime (UNODC) Human Trafficking and Migrant Smuggling Section. He joined the Civil Rights Division in 2007. Prior to his work with the Department of Justice, Mr. Nolan was an Assistant Public Defender in the State of Maryland.

⁶⁶ *United States v. Fu Sheng Kuo*, 620 F.3d 1158, 1164 (9th Cir. 2010).

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