

# What is the Monetary Value of Slave Labor?: Restitution Based on a Traditional Fair Market Value Valuation Basis may not Fully Compensate Human Labor Trafficking Victims

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*“There’s another humanitarian crisis spreading, yet hidden from view. Each year, an estimated 800,000 to 900,000 human beings are bought, sold or forced across the world’s borders.*

*There’s a special evil in the abuse and exploitation of the most innocent and vulnerable. . . . Those who create these victims and profit from their suffering must be severely punished.”<sup>1</sup>*

President George W. Bush, 2003

## I. INTRODUCTION

Human trafficking is an abomination that decimates the lives of the trafficked, fracturing their families, and is an act exploiting their labor as a renewable resource. Post-conviction proceedings primarily focus on the disposition of sentence and rehabilitation of the convicted. Restitution for the victim is too often marginalized, relegating it to an afterthought. Prosecutors are often reluctant to vigorously pursue victim restitution, as they feel they have achieved their mandate of conviction, shifting their focus to the next defendant. While the victim is heartened their abuser was forced to answer to the criminal justice system, without an appropriately formulated monetary recovery for their damages, the victim may never truly be made whole and fully recover from the predatory crime. With a recent resurgence and focus on victims’ rights, proper calculation of restitution should also be examined. This article will do the following: (1) demonstrate the increased consciousness and heightened awareness of forced labor trafficking; (2) highlight the importance of an appropriately calculated restitution order for forced labor human trafficking; (3) demonstrate why a traditional “fair market value” calculation for the forced labor may not be the most beneficial method of valuation of forced labor victims; and (4) propose an alternative valuation benchmark the court should consider when fabricating an equitable restitution order for victims of forced labor.

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<sup>1</sup> President of the United States George W. Bush, United Nations General Assembly, New York, New York, Sept. 12, 2003.

## II. HEIGHTENED AWARENESS OF FORCED LABOR HUMAN TRAFFICKING IN THE UNITED STATES; EXISTING FEDERAL AND STATE HUMAN TRAFFICKING STATUTES

Human trafficking is a crime that is extremely broad in scope and has polluted entire sectors of our economy and yet embodies the same central characteristic: the unscrupulous exploitation of another person for profit. Trafficking is a highly dynamic and fluid phenomenon that reacts remarkably well to market demands, under-regulated economic sectors, and can easily adapt to exploit weaknesses in the prevailing laws.<sup>2</sup> Traditionally, law enforcement has employed a myopic view on trafficking, focusing on the sexual exploitation trade (i.e., prostitution);<sup>3</sup> however federal and state governments, influenced by advocacy groups, have begun to reconceptualize their understanding of human trafficking to include the subjugation of people into forced labor.

Forced labor has been generally defined as “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.”<sup>4</sup> In its June 2010 *Trafficking in Persons Report*, the United States Department of State reported that “[m]ore people are trafficked for forced labor than commercial sex”<sup>5</sup> and The International Labour Organization estimates that there are nine times the amount of trafficked victims subjugated into forced labor than the sex trade,<sup>6</sup> and the profits are in the billions.<sup>7</sup> Textile manufacturing shops, domestic labor providers, construction sites, and agricultural employment roles<sup>8</sup> are garnering new societal and regulatory scrutiny for their sources of labor. Although slavery and involuntary servitude have been outlawed for

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2. U.S. DEP’T OF STATE, *TRAFFICKING IN PERSONS REPORT* 341 (10th ed., 2010), <http://www.state.gov/documents/organization/142979.pdf> (last visited Jan. 31, 2011).

3. Kathleen Kim & Grace Chang, *Reconceptualizing Approaches to Human Trafficking: New Directions and Perspectives from the Field(s)*, 3 *STAN. J.C.R. & C.L.* 317, 318 (2007).

4. Convention Concerning Forced or Compulsory Labour, art. 2(1), June 28, 1930, 39 U.N.T.S. 55, 58; Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, art 3(a)-(d), June 17, 1999, S. Treaty Doc. No. 106-5, 1, 4.

5. *TRAFFICKING IN PERSONS REPORT*, *supra* note 2, at 4.

6. *Id.* at 7

7. HUMAN TRAFFICKING AWARENESS COALITION OF SARASOTA COUNTY, *Statistics and Information*, <http://htsrq.weebly.com/statistics-and-information.html> (last visited Jan. 22, 2011).

8. *See generally* ANTHONY M. DESTEFANO, *THE WAR ON HUMAN TRAFFICKING: U.S. POLICY ASSESSED* (2008).

generations,<sup>9</sup> state and federal governments are modernizing their laws to specifically address and combat this newly developing pattern of predation.<sup>10</sup>

On October 28, 2000, Congress passed the Trafficking Victims Protection Act of 2000 (TVPA).

The TVPA enhanced three aspects of federal government activity to combat trafficking in person: it provided for a range of new protections and assistance for victims of trafficking in persons; it expanded the crimes and enhanced the penalties available to federal investigators and prosecutors pursuing traffickers; and it expanded United States activities internationally to prevent victims from being trafficked in the first place.<sup>11</sup>

In its Purpose and Findings, the TVPA stated, “[t]rafficking in person is not limited to the sex industry. This growing transnational crime also includes forced labor and involves significant violations of labor, public health, and human rights standards worldwide.”<sup>12</sup>

According to the State Department’s 2010 report, there are over twelve million adults and children in forced labor, bonded labor, and forced prostitution worldwide.<sup>13</sup> In 2009, with a newly honed focus, jurisdictions within the United States secured 335 successful forced labor prosecutions, with 49,105 identifiable victims.<sup>14</sup> The Human Trafficking Prosecution Unit, a specialized anti-trafficking unit of the Department of Justice’s Civil Rights Division, “in partnership with U.S. Attorneys’ Offices, charged 114 individuals, and obtained 47 convictions in 43 human trafficking prosecutions (21 labor trafficking and 22 sex trafficking).”<sup>15</sup> Out of the fifty states, forty-

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9. U.S. CONST. amend. XIII, § 1. (“Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”).

10. See generally Clawson J. Heather et al., *Law Enforcement Response to Human Trafficking and the Implications for Victims: Current Practices and Lessons Learned* (2006), <http://www.ncjrs.gov/pdffiles1/nij/grants/216547.pdf> (last visited Jan. 31, 2011).

11. U.S. DEP’T OF JUSTICE, REPORT TO CONGRESS FROM ATTORNEY GENERAL JOHN ASHCROFT ON U.S. GOVERNMENT EFFORTS TO COMBAT TRAFFICKING IN PERSONS IN FISCAL YEAR 2003, (May 1, 2004), <http://www.justice.gov/archive/ag/annualreports/tr2003/050104agreporttocongresstvprav10.pdf> (last visited Jan. 31, 2011).

12. 22 U.S.C. § 7101(b)(3) (2006).

13. TRAFFICKING IN PERSONS REPORT, *supra* note 2, at 6.

14. *Id.*

15. *Id.* at 339.

four<sup>16</sup> have enacted specific anti-human trafficking legislation, codifying varying definitions, and monetary and incarceration penalties.<sup>17</sup> There are five main economic sectors of the United States economy that are primarily affected: prostitution and sex services (46%), domestic services (27%), agricultural (10%), textile sweatshops and factories (5%), and the restaurant and hotel industries (4%).<sup>18</sup>

Victim advocacy groups have been instrumental in assisting and tracking victim demographics. The California-based victim advocacy group, Coalition to Abolish Slavery & Trafficking (CAST), has compiled the most comprehensive data profiles to date.<sup>19</sup> CAST's mission is to highlight, analyze, and eradicate trafficking in all of its forms.<sup>20</sup> From their 2008-2009 client profiles, they have built the following demographic breakdowns:

CAST's Trafficked Victims National Origins<sup>21</sup> as follows:

Nation	Percentage (%) of Clientele
Albania	1
America	2
Armenia	1
China	1
Ecuador	1
El Salvador	2
Ethiopia	3
Guatemala	19
Honduras	2
Indonesia	3
Kenya	2
Mexico	22
Mongolia	1
Morocco	1
Nicaragua	1
Nigeria	2
North Korea	1
Peru	1

16. *Model Provisions of Comprehensive State Legislation to Combat Human Trafficking*, POLARIS PROJECT, (2010), [http://www.polarisproject.org/storage/documents/policy\\_documents/state\\_policy/Final\\_Comprehensive\\_ModelLaw\\_\\_8\\_2010.pdf](http://www.polarisproject.org/storage/documents/policy_documents/state_policy/Final_Comprehensive_ModelLaw__8_2010.pdf) (last visited Jan. 31, 2011).

17. Human Trafficking Awareness Partnerships – Frequently Asked Questions, <http://www.humantraffickingawareness.org/faqs-mainmenu-34.html> (last visited Jan. 24, 2011).

18. Kevin Bales et al., *Hidden Slaves: Forced Labor in the United States*, 23 BERKELEY J. INT'L L. 47, 48 (2005).

19. Key State – CAST LA, <http://www.castla.org/key-stats> (last visited Feb. 14, 2011).

20. History – CAST LA, <http://www.castla.org/history> (last visited Feb. 14, 2011).

21. Key State – CAST LA, *supra* note 19.

Philippines	17
Russia	1
South Korea	12
Miscellaneous	4

CAST's Clientele Forced Labor Economic Sector Breakdown<sup>22</sup> as follows:

Form of Forced Labor	Percentage (%) of Clientele
Commercial Exploitations of Children (CSEC)	3
Commercial Sex Trafficking	38
Forced Labor – domestic servitude	28
Forced Labor – hotel/hospitality	4
Forced Labor – Peddling	7
Forced Labor – Restaurant Work	1
Forced Labor – Sweatshop/Garment	3
Forced Labor – Child/Elderly Care	7
Forced Labor – Construction	1
Forced Labor – Other	6
Non-Commercial Sex Trafficking	1
Servile Marriage	1

Recent federal statistical analysis revealed that the largest concentrations of trafficked victims were located in California, Oklahoma, Texas, and New York.<sup>23</sup> A 2009 study found that

Eighty-two percent of foreign adult victims were labor trafficking victims, of which 58 percent were men and 42 percent were women; 15 percent were adult sex trafficking victims, all of whom were women; and three percent were victims of both forms. Fifty-six percent of foreign child victims were labor trafficking victims, of which half were boys and half were girls; 38 percent were sex trafficking victims, of which 16 percent were boys; and six percent were victims of both forms.<sup>24</sup>

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22. *Id.*

23. U.S. DEP'T OF JUSTICE, *supra* note 11, at 9 n.1 (“In Fiscal Year 2002, the Office of Refugee Resettlement issued letters to benefit offices in fourteen states, of which the largest concentrations were to Texas ([thirty-one] percent), Florida (nineteen percent), and California (fourteen percent). Note that these concentrations reflect where victims were living after victimization and do not necessarily reflect where they were victimized.”).

24. TRAFFICKING IN PERSONS REPORT, *supra* note 2, at 341.

With the state's extensive border, major shipping ports, and powerful economy, California is an enticing and fertile terminal for traffickers to sell their slaves.<sup>25</sup> Understanding its role as a major market destination for traffickers,<sup>26</sup> the State of California has aggressively updated their criminal and civil codes to confront trafficking within its borders. The California Legislature has amended three important sections of their code to help fight trafficking and to give victims legal protections to ensure comprehensive penal redress. In 2005, the legislature added California Penal Code sections 236.1<sup>27</sup> and 1202.4(q). Penal Code section 236.1 was the first state statute

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25. CALIFORNIA ATTORNEY GENERAL'S OFFICE CRIME AND VIOLENCE PREVENTION CENTER, HUMAN TRAFFICKING IN CALIFORNIA: FINAL REPORT OF THE CALIFORNIA ALLIANCE TO COMBAT TRAFFICKING AND SLAVERY TASK FORCE 15 (2007), [http://www.ag.ca.gov/publications/Human\\_Trafficking\\_Final\\_Report.pdf](http://www.ag.ca.gov/publications/Human_Trafficking_Final_Report.pdf).

26. DAVID TULLER, FREEDOM DENIED: FORCED LABOR IN CALIFORNIA 6, (Laurel Fletcher and Eric Stover eds., 2005), <http://www.law.berkeley.edu/HRCweb/pdfs/freedomdenied.pdf>.

27. CAL. PENAL CODE § 236.1 (West 2010). Section 236.1 states the following:

(a) Any person who deprives or violates the personal liberty of another with the intent to effect or maintain a felony violation of Section 266, 266h, 266i, 267, 311.4, or 518, or to obtain forced labor or services, is guilty of human trafficking.

(b) Except as provided in subdivision (c), a violation of this section is punishable by imprisonment in the state prison for three, four, or five years.

(c) A violation of this section where the victim of the trafficking was under 18 years of age at the time of the commission of the offense is punishable by imprisonment in the state prison for four, six, or eight years.

(d) (1) For purposes of this section, unlawful deprivation or violation of the personal liberty of another includes substantial and sustained restriction of another's liberty accomplished through fraud, deceit, coercion, violence, duress, menace, or threat of unlawful injury to the victim or to another person, under circumstances where the person receiving or apprehending the threat reasonably believes that it is likely that the person making the threat would carry it out. (2) Duress includes knowingly destroying, concealing, removing, confiscating, or possessing any actual or purported passport or immigration document of the victim.

(e) For purposes of this section, "forced labor or services" means labor or services that are performed or provided by a person and are obtained or maintained through force, fraud, or coercion, or equivalent conduct that would reasonably overbear the will of the person.

(f) The Legislature finds that the definition of human trafficking in this section is equivalent to the federal definition of a severe form of trafficking found in Section 7102(8) of Title 22 of the United States Code.

(g) (1) In addition to the penalty specified in subdivision (c), any person who commits human trafficking involving a commercial sex act where the victim of the human trafficking was under 18 years of age at the time of the commission of the offense shall be punished by a fine of not more than one hundred thousand dollars (\$100,000). (2) As used in this subdivi-

to specifically make human trafficking not only a federal crime, but also a state crime.<sup>28</sup>

Reconceptualizing human trafficking requires a critical analysis of not only the criminal *actus reus*, but also the injury sustained by the victim. To complement the newly codified crime, California legislators revised the restitution calculations available to trafficked victims, adding Penal Code section 1202.4(q). This new section directs trial courts to calculate human trafficking restitution orders in the light most beneficial to the victim, maximizing their recovery.<sup>29</sup> This new law reflects a nuanced understanding that trafficking manifests itself in many different facets and so, too, should their restitution orders.

Labor has long been understood as personal property;<sup>30</sup> without an insightful calculation, the true worth of the individual is offended. Human trafficking for forced labor is not only the theft of one's time and energy, but is also a fundamental attack on another's human spirit and freedom. California has a rich history of valuing stolen labor.<sup>31</sup> Forced and stolen

vision, "commercial sex act" means any sexual conduct on account of which anything of value is given or received by any person.

(h) Every fine imposed and collected pursuant to this section shall be deposited in the Victim-Witness Assistance Fund to be available for appropriation to fund services for victims of human trafficking. At least 50 percent of the fines collected and deposited pursuant to this section shall be granted to community-based organizations that serve victims of human trafficking.

28. CALIFORNIA ATTORNEY GENERAL'S OFFICE, *supra* note 25, at 3.

29. *Id.*

30. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 305-06 (Peter Laslett ed., Cambridge U. Press 1988) (1960) ("[E]very Man has a *Property* in his own *Person*. This no Body has any Right to but himself. The *Labour* of his Body, and the *Work* of his Hands, we may say, are properly his. Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his *Labour* with, and joyned to it something that is his own, and thereby makes it his *Property* . . . For this *Labour* being the unquestionable Property of the Labourer, no Man but he can have a right to what that is once joyned to . . . and as good left in common for others.").

31. CAL. PENAL CODE § 484 (West 2010). Section 484 (a) states the following:

Every person who shall feloniously steal . . . by any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property . . . or obtains the labor or service of another, is guilty of theft. In determining the value of the property obtained, for the purposes of this section, the reasonable and fair market value shall be the test, and in determining the value of services received the contract price shall be the test. If there be no contract price, the reasonable and going wage for the service rendered shall govern. For the purposes of this section, any false or fraudulent representation or pretense made shall be treated as continuing, so as to cover any money, property or service received as a result thereof, and the complaint, information or indictment may charge that the crime was committed on any date during the particu-

labor share similar injurious monetary characteristics; however, the method of extraction of the labor is different, and the remedial calculation should reflect this.

The California Legislature codified a series of four calculations courts could apply. The code's fourth option provides courts with an extraordinary ability to select or create *any* method of calculation that they deem proper under the factual circumstances.<sup>32</sup> The directive, coupled with the authority, supplies the atmosphere for the court to create a meaningful order—one which best benefits the victim and one that uniquely addresses the type and kind of trafficking that was employed.

Approaching the crime of trafficking holistically, the legislature also included Civil Code section 52.5,<sup>33</sup> giving victims a specific and unique

lar period in question. The hiring of any additional employee or employees without advising each of them of every labor claim due and unpaid and every judgment that the employer has been unable to meet shall be prima facie evidence of intent to defraud.

*Id.*

32. CAL. PENAL CODE § 1202.4(q) (West 2010).
33. CAL. CIV. CODE § 52.5 (West 2010). Section 52.5 states the following:
- (a) A victim of human trafficking, as defined in *Section 236.1 of the Penal Code*, may bring a civil action for actual damages, compensatory damages, punitive damages, injunctive relief, any combination of those, or any other appropriate relief. A prevailing plaintiff may also be awarded attorney's fees and costs.
- (b) In addition to the remedies specified herein, in any action under subdivision (a), the plaintiff may be awarded up to three times his or her actual damages or ten thousand dollars (\$10,000), whichever is greater. In addition, punitive damages may also be awarded upon proof of the defendant's malice, oppression, fraud, or duress in committing the act of human trafficking.
- (c) An action brought pursuant to this section shall be commenced within five years of the date on which the trafficking victim was freed from the trafficking situation, or if the victim was a minor when the act of human trafficking against the victim occurred, within eight years after the date the plaintiff attains the age of majority.
- (d) If a person entitled to sue is under a disability at the time the cause of action accrues, so that it is impossible or impracticable for him or her to bring an action, then the time of the disability is not part of the time limited for the commencement of the action. Disability will toll the running of the statute of limitation for this action. (1) Disability includes being a minor, insanity, imprisonment, or other incapacity or incompetence. (2) The statute of limitations shall not run against an incompetent or minor plaintiff simply because a guardian ad litem has been appointed. A guardian ad litem's failure to bring a plaintiff's action within the applicable limitation period will not prejudice the plaintiff's right to do so after his or her disability ceases. (3) A defendant is estopped to assert a defense of the statute of limitations when the expiration of the statute is due to conduct by the defendant inducing the plaintiff to delay the

civil remedy. This statute not only clearly enumerates and authorizes all forms of traditionally recoverable damages (actual damages, compensatory damages, punitive damages, injunctive relief, any combination of these, or any other appropriate relief), but it also provides for the recovery of attorney's fees, costs, and treble damages<sup>34</sup> or ten thousand dollars, whichever is greater.<sup>35</sup>

While Civil Code section 52.5 may appear to be a monetarily superior method of recovery compared to the Criminal Restitution Code, for the reasons below, I assert that Penal Code section 1204.2(q) may prove to be the most efficient conduit for setting the proper value of victims' lost labor.

In September of 2010, California achieved its first major conviction for forced labor trafficking. Mabelle de la Rosa Dann was sentenced to five years in prison and ordered to pay \$123,740.34 in restitution for forced labor and associated crimes.<sup>36</sup> In a subsequent civil action the predatory relationship was revealed.

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filing of the action, or due to threats made by the defendant causing duress upon the plaintiff. (4) The suspension of the statute of limitations due to disability, lack of knowledge, or estoppel applies to all other related claims arising out of the trafficking situation. (5) The running of the statute of limitations is postponed during the pendency of any criminal proceedings against the victim.

(e) The running of the statute of limitations may be suspended where a person entitled to sue could not have reasonably discovered the cause of action due to circumstances resulting from the trafficking situation, such as psychological trauma, cultural and linguistic isolation, and the inability to access services.

(f) A prevailing plaintiff may also be awarded reasonable attorney's fees and litigation costs including, but not limited to, expert witness fees and expenses as part of the costs.

(g) Any restitution paid by the defendant to the victim shall be credited against any judgment, award, or settlement obtained pursuant to this section. Any judgment, award, or settlement obtained pursuant to an action under this section shall be subject to the provisions of *Section 13963 of the Government Code*.

(h) Any civil action filed under this section shall be stayed during the pendency of any criminal action arising out of the same occurrence in which the claimant is the victim. As used in this section, a "criminal action" includes investigation and prosecution, and is pending until a final adjudication in the trial court, or dismissal.

34. See BLACK'S LAW DICTIONARY 449 (9th ed. 2009) (defining treble damages as "[d]amages that, by statute, are three times the amount of actual damages that the fact finder determines is owed – also termed *triple damages*.").

35. CAL. CIV. CODE § 52.5 (West 2010).

36. Press Release, U.S. DEP'T OF JUSTICE, Walnut Creek Woman Sentenced to Five Years Imprisonment For Forced Labor of Domestic Servant (Apr. 15, 2010), available at [http://www.justice.gov/usao/can/press/2010/2010\\_04\\_15\\_dann.sentenced.press.html](http://www.justice.gov/usao/can/press/2010/2010_04_15_dann.sentenced.press.html).

“Peña Canal worked for Dann for fifteen hours a day, seven days a week, caring for Dann’s three young children and cooking and cleaning for the household.”<sup>37</sup> Peña Canal was promised \$600 per month plus free room and board in exchange for working five days per week during regular business hours.<sup>38</sup> Dann had no intention of ever paying Peña Canal for her work, and her promises of reasonable work accommodations were false.<sup>39</sup> Peña Canal moved to the United States in 2006, living with Dann, her three children, and the children’s grandmother in her Walnut Creek, California apartment.<sup>40</sup> She was immediately put to work as a full-time nanny, maid, and cook for the children.<sup>41</sup> Peña Canal’s typical workday began at 6:00 a.m. when she cooked breakfast for the family, and ended around 9:00 p.m. when she finished washing the dishes for the meals she had cooked.<sup>42</sup> “Rather than pay Peña Canal, Dann told her that she owed Dann money and needed to continue to work for free to pay off this debt.”<sup>43</sup> At one point, Dann told Peña Canal that she accumulated debt and owed Dann over \$13,000.<sup>44</sup> Dann controlled every aspect of Peña Canal’s life, holding her visa, passport, and Peruvian identification card.<sup>45</sup> Whenever Dann left the apartment, she took Peña Canal’s passport with her.<sup>46</sup>

In order to set restitution, Peña Canal’s labor value was based upon the Federal Government’s valuation,<sup>47</sup> derived from the Foreign Labor Certification Program.<sup>48</sup> Based on the evidence submitted, Peña Canal worked for one year, nine months, and one day (641 days total), at a rate of fifteen-hour days without break, constituting 9,615 forced labor hours.<sup>49</sup> The Federal District Court awarded Peña Canal \$123,740.43.<sup>50</sup> At a straight hourly wage, the court valued her work at \$12.87 an hour. While the valuation may appear to be a reasonable hourly wage, this calculation fails to account for

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37. Canal v. Dann, No. 09-03366, slip op. at 1 (N.D. Cal. Sept. 2, 2010).

38. *Id.* at 2.

39. *Id.*

40. *Id.*

41. *Id.* at 2-3.

42. *Canal*, No. 09-03366, slip op. at 2-3.

43. *Id.* at 3.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Canal*, No. 09-03366, slip op. at 4.

48. Foreign Labor Certification—Frequently Asked Questions and Answers, <http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm>. Employers can seek a PWD “prevailing wage determination” by submitting ETA Form 9141. The ETA Form 9141 is available at [http://www.foreignlaborcert.doleta.gov/pdf/ETA\\_Form\\_9142.pdf](http://www.foreignlaborcert.doleta.gov/pdf/ETA_Form_9142.pdf). The court based the restitution value on the Department of Labor’s response.

49. *See Canal*, No. 09-03366, slip op. at 1.

50. *See id.* at 8.

any overtime wage adjustment. When adjusted for overtime, the rate drops to approximately \$9.95 an hour.<sup>51</sup>

### III. THE NECESSITY FOR AN AUTHORITATIVE RESTITUTION IMPLEMENTATION SCHEME FOR VICTIMS OF FORCED LABOR HUMAN TRAFFICKING

A key component in a criminal disposition is the penal redress and interdiction. Victim restitution is required by the California Constitution,<sup>52</sup> Penal Code,<sup>53</sup> and case law. A sentence will be considered invalid if the court fails to specifically address a victim's restitution.<sup>54</sup>

In its 2010 report, the United States State Department posed the question, "[w]hat makes a good trafficking in person's law?"<sup>55</sup> Their answer—"explicit provisions ensuring identified victims have access to legal redress to obtain financial compensation for the trafficking crimes committed against them."<sup>56</sup>

A fundamental tenet of restitution is that it should be "broadly and liberally construed" so a victim may be made as monetarily whole as possible.<sup>57</sup> Restitution orders can be imposed for all crimes, including crimes containing pure economic losses,<sup>58</sup> and the date for measuring the loss is

51. This number was calculated by totaling the weekly hours worked (forty hours valued at one base unit each and sixty-five overtime hours valued at one and a half base units each (equaling 137.5), times four and one-third (the average weeks in a month (equaling 595.79)), times the twenty-one months worked (equaling 12,511.54), plus the one remaining day (valued at eight base hours at one unit each plus seven overtime hours valued at one and a half base units each (equaling a grand total of 12,530.04 base unit hours).

52. CAL. CONST. art. 1, § 28(b)(13) (West 2010). Section 28(b)(13) states the following:

(A) It is the unequivocal intention of the People of the State of California that all persons who suffer losses as a result of criminal activity shall have the right to seek and secure restitution from the persons convicted of the crimes for losses they suffer.

(B) Restitution shall be ordered from the convicted wrongdoer in every case, regardless of the sentence or disposition imposed, in which a crime victim suffers a loss. . . .

*Id.*

53. CAL. PENAL CODE § 1202.4(q) (West 2010).

54. *People v. Rowland*, 60 Cal. Rptr. 2d 351, 355 (Cal. Ct. App. 1997).

55. TRAFFICKING IN PERSONS REPORT, *supra* note 2, at 13 (emphasis added).

56. *Id.*

57. *In Re Johnny M.*, 123 Cal. Rptr. 2d 316 (Cal. Ct. App. 2002); *People v. Mearns*, 118 Cal. Rptr. 2d 511 (Cal. Ct. App. 2002); *see People v. Dalvito*, 65 Cal. Rptr. 2d 679 (Cal. Ct. App. 1997).

58. *People v. Broussard*, 856 P.2d 1134 (Cal. 1993); *People v. Valdez*, 30 Cal. Rptr. 2d 4 (Cal. Ct. App. 1994).

generally the date of conversion.<sup>59</sup> The desired effect of any order is to sufficiently and *fully* reimburse the victim for every determined economic loss incurred as a result of the defendant's criminal conduct.<sup>60</sup> The court is given a wide berth when finding the boundaries of the economic harm sustained by the victim. Restitution may even exceed the actual loss caused by the defendant, provided the order is not arbitrarily or capriciously calculated.<sup>61</sup> If a reviewing court finds a factual and rational basis for the amount of restitution ordered, a challenge for abuse of discretion will not survive.<sup>62</sup> These guidelines provide ample room for a well-informed court to aggressively evaluate damages and formulate restitution.

The timing of the order is crucial and should not be disregarded. The issue of restitution is customarily—and most appropriately—addressed at the time of sentencing. This provides the reviewing court an opportunity to take into account the totality of the circumstances of the underlying offense when setting its decree.<sup>63</sup> It also provides an adversarial setting for an accurate computation, in which any effort by the defendant to dispute restitution may illustrate lack of remorse for the crime or true capitulation. Constructing restitution during sentencing is also advantageous because the sentencing court continues to possess jurisdiction over the defendant, leaving the court with the power to compel the defendant to complete California Restitution Form CR-115.<sup>64</sup> This form demands complete and full disclosure of the defendant's assets and liabilities.<sup>65</sup> Providing false information on the form is a misdemeanor and could constitute perjury.<sup>66</sup> In addition, when

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59. RESTATEMENT (FIRST) OF RESTITUTION § 151 (1937) (defining the measure of recovery when benefits are acquired by consciously tortuous conduct as the value at the date of acquisition, but a different date may be used to avoid injustice).

60. CAL. PENAL CODE § 1202.4(f)(3) (West 2010) (emphasis added).

61. *People v. Carbajal*, 899 P.2d 67, 70 (Cal. 1995).

62. *Id.* See also *Broussard*, 856 P.2d at 1134; *Valdez*, 30 Cal. Rptr. 2d at 4.

63. CAL. PENAL CODE § 1202.4(d) (West 2010). Section 1202.4(d) states the following:

To set a misdemeanor or felony fine above the minimum, the court shall consider any relevant factors including, but not limited to (1) number of victims, (2) seriousness and gravity of the offense, (3) circumstances of its commission, (4) economic gain derived by the defendant as a result of the crime, (5) extent to which any other person suffered losses, (6) Pecuniary losses to the victim or his/her dependents, (7) Psychological harm to the victim or his/her dependents, (8) Defendant's inability to pay, and (9) Defendant's future earning capacity.

*Id.*

64. California Restitution Form CR-115, *available at* <http://www.courtinfo.ca.gov/forms/documents/cr115.pdf> (last visited Jan. 31, 2011).

65. *Id.* See also CAL. PENAL CODE § 1202.4(f)(5)-(11) (West 2010) (requiring that the defendant file a statement of assets with the clerk no later than the defendant's sentencing date, unless otherwise directed by the court).

66. *Id.*

imposing the statutorily mandated restitution fines, there is no requirement for a separate hearing.<sup>67</sup>

Once restitution has been set, the defendant's due process rights are truncated. If an amount is to be challenged by the defendant, then he/she bears the burden of establishing the amount as erroneous.<sup>68</sup> This is a shift from the state's burden to prove criminal culpability beyond a reasonable doubt and restitution by a "preponderance of the evidence."<sup>69</sup> In addition to the defendant shouldering the burden of proof in refuting the stated amount of restitution, the challenger's due process rights do not provide for the ability to cross-examine the victim or persons who provided services to the victim as a result of the crime.<sup>70</sup> Once a restitution order has been entered, it is extremely difficult to overturn or reduce. Even the defendant's inability to afford restitution fails to constitute "compelling and extraordinary" grounds to vacate an order.<sup>71</sup>

Criminal restitution provides the additional benefit of constitutionally-granted creditor protections for victims. Under the California State Constitution, "[a]ll monetary payments, monies, and property collected from any person who has been ordered to make restitution shall be first applied to pay the amounts ordered as restitution to the victim."<sup>72</sup> This prevents a business defendant's creditors from receiving asset priority in a post-judgment bankruptcy proceeding. Conversely, a civil judgment may be subject to a lower abatement order, which could potentially leave the trafficked victim a judgment debtor.

While a defendant convicted under the Federal TVPA *may* be subject to restitution,<sup>73</sup> many states have taken the affirmative act of making restitution a mandatory component of the disposition process.<sup>74</sup> While the option of restitution and allowable methods of calculation vary, California has codified the most forward thinking and flexible statute, mandating direct restitution and/or statutory penalties.<sup>75</sup> Understanding that human traffick-

67. CAL. PENAL CODE § 1202.4(d) (West 2010).

68. *See* *People v. Thygesen*, 81 Cal. Rptr. 2d 886, 889 (Cal. Ct. App. 1999); *People v. Foster*, 18 Cal. Rptr. 2d 1, 5 (Cal. Ct. App. 1993).

69. *People v. Gemelli*, 74 Cal. Rptr. 3d 901, 904 (2008).

70. *See* *People v. Arbuckle*, 150 Cal. Rptr. 778, 781 (1978); *People v. Cain*, 97 Cal. Rptr. 2d 836, 838 (Cal. Ct. App. 2000); *People v. Birmingham*, 265 Cal. Rptr. 780, 783 (Cal. Ct. App. 1990).

71. CAL. PENAL CODE § 1202.4(f)-(g) (West 2010).

72. CAL. CONST. art. 1, § 28(b)(13)(C) (West 2010).

73. 18 U.S.C. § 1593 (West 2010).

74. *See* CAL. PENAL CODE § 1202.4 (West 2010); N.J. STAT. ANN § 2C:13-8 (West 2005) ("[G]reater of the gross income or value of the victim's labor or services.").

75. Direct restitution constitutes money given directly to the victim in compensation for damages incurred as a result of the crime. Statutory restitution constitutes money specifically enumerated by statute, impounded by the court and then distributed to state programs,

ing is complex and intricate, and that a “one-size-fits-all” restitution calculation could potentially fail to make a trafficked victim whole, they presented the trial court with a series of options from which to choose.

California Penal Code section 1202.4(q) states as follows:

Upon conviction for a violation of Section 236.1, . . . . In determining restitution pursuant to this section, the court shall base its order upon the greater of the following: the gross value of the victim's labor or services based upon the comparable value of similar services in the labor market in which the offense occurred, or the value of the victim's labor as guaranteed under California law, or the actual income derived by the defendant from the victim's labor or services or any other appropriate means to provide reparations to the victim.<sup>76</sup>

#### IV. MONETARY RECOVERY FOR FORCED LABOR VARIES GREATLY DEPENDING ON THE UNDERLYING CIVIL CAUSES OF ACTION ASSERTED

While prosecution is the primary focus post-arrest, civil court remedies provide unique legal features the victim may tactically utilize. In a criminal proceeding, the victim's input may be sought by the prosecution, but definitive decisions regarding plea agreements and/or sentencing arrangements may be in direct conflict of the victim's wishes. Unlike a criminal case, where the state is the complaining party and is ultimately in control of legal strategy, in a civil case the victim controls the stratagem and the resulting course of action. Having the ultimate authority to assess and decide what course of action to engage can be empowering for the victim, providing a more personal mode of reprisal.

In a California civil action, the trafficked victim will have the opportunity to assert a myriad of claims, ranging from Civil Code section 52.5, tort based claims, quasi-contract or quantum meruit claims, or any combination therein. All of these causes of action provide very different remedies with very different methods of calculating damages. A victim would need to carefully examine the specific facts of his or her case before choosing which claims to advance. While a quasi-contract or quantum meruit claim may be easier to prove, they generally do not provide grounds for secondary or punitive damages. Navigating and assessing this corn-maze of claims

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often in support of victim service programs (i.e., California State Restitution Fund and the State Victim Compensation and Government Claims Board (VCGCB). The VCGCB uses these funds to assist victims and their families with economic losses suffered as a direct result of a qualifying crime.).

76. CAL. PENAL CODE § 1202.4(q) (West 2010).

and associated remedies are likely to frustrate and confuse not only a seasoned attorney, but surely a victimized novice civilian.

Two of the more common federal sources of tort liability for forced labor can be found in the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) and the Fair Labor and Standards Act (FLSA).<sup>77</sup> These laws generally mandate a worker get paid at least minimum wage and the correlating appropriate overtime wages.<sup>78</sup> While these would provide some basic monetary recovery, a victim of human trafficking, i.e. slavery, should not be valued at the lowest allowable calculation allowed under federal or state law. Allowing the trafficker to only be liable for a minimum standard of wages, may not only fail to have any deterrent effect, but it surely fails to achieve any monetary castigation. If the trafficker was forced to lawfully hire an employee to replace the forced labor, they would have been required to pay federal or state minimum wage rates regardless. Making the remedy for forced labor the mere value of minimum wage provides the lowest benefit to the victim, receiving the lowest possible valuation, thus providing very little downside for the perpetrator, because he/she is required to pay only what he/she would have been required to pay absent his/her unlawful acts.

While due diligence requires that all potential grounds of relief are examined and assessed, criminal restitution ought to be the bedrock foundation upon which any civil relief is sought. The flexibility California Penal Code 1204.2(q) provides in accurately calculating the victim's economic loss is invaluable. Properly calculating their economic loss gives the victim a fortified position in future civil claims.

Understanding the difficult position that trafficked victims find themselves in, the California Legislature had the foresight to construct a restitution code that provides the court an election of restitution formulas. The section states as follows:

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77. MIGRANT AND SEASONAL AGRICULTURAL WORKER PROTECTION ACT (MSPA), 29 U.S.C. § 1800; FAIR LABOR AND STANDARDS ACT OF 1938 (FLSA), 29 U.S.C. § 201. These statutes have very limited definitions as to what constitutes an employer and employee relationship. Because many trafficking scenarios may not qualify under these statutory definitions, state laws may provide better protections and remedies.

78. United States Department of Labor—Wage and Hour Division (WHD), *available at* <http://www.dol.gov/whd/flsa/> (last visited Jan. 31, 2011) (“The FLSA establishes minimum wage, overtime pay, recordkeeping, and youth employment standards affecting employees in the private sector and in Federal, State, and local governments. Covered non-exempt workers are entitled to a minimum wage of not less than \$7.25 per hour effective July 24, 2009. Overtime pay at a rate not less than one and one-half times the regular rate of pay is required after 40 hours of work in a workweek . . . . The federal minimum wage is \$7.25 per hour effective July 24, 2009. Many states also have minimum wage laws. In cases where an employee is subject to both state and federal minimum wage laws, the employee is entitled to the higher minimum wage.”).

Upon conviction for a violation of Section 236.1, the court shall, in addition to any other penalty or restitution, *order the defendant to pay restitution to the victim* in any case in which a victim has suffered economic loss as a result of the defendant's conduct. The court shall require that the defendant make restitution to the victim or victims in an amount established by court order, based on the amount of loss claimed by the victim or victims or any other showing to the court. *In determining restitution pursuant to this section, the court shall base its order upon the greater of the following: the gross value of the victim's labor or services based upon the comparable value of similar services in the labor market in which the offense occurred, or the value of the victim's labor as guaranteed under California law, or the actual income derived by the defendant from the victim's labor or services or any other appropriate means to provide reparations to the victim.*<sup>79</sup>

#### V. RESTITUTION REMAINS THE FIRST AND BEST OPPORTUNITY TO ACCURATELY CALCULATE THE VALUE OF FORCED LABOR

As a general rule, when third-party defendants are held liable for economic injuries, they are generally not subject to punitive damages principally due to the lack of, or difficulty in proving, the required element of scienter. Under these circumstances, accurately calculating actual damages is of the utmost import, because the finder of fact does not have the luxury of secondary sources of monetary damages to bestow the appropriate recompense.

The impact of incorrectly calculating forced labor wages could have a substantial and cascading effect on calculations and recovery of secondary civil damages that the victim has a statutory right to collect. Since treble and punitive damage calculations are generally calculated as a multiplier of actual monetary damages,<sup>80</sup> any miscalculation of the actual damage would flow to and exponentially poison a secondary recovery. For every dollar miscalculated, treble damages would be incorrect by three, and punitive damages could be misjudged by significantly more.

For example in *Peña Canal v. Dann*, Peña Canal's 12,530.04 hours of forced labor were valued at approximately \$9.88 per base hour, totaling

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79. CAL. PENAL CODE § 1202.4(q) (West 2010) (emphasis added).

80. See *Oliver v. Raymark Indus., Inc.*, 799 F.2d 95 (3d Cir. 1986); *Palmer v. Ted Stevens Honda, Inc.*, 238 Cal. Rptr. 363 (Cal. Ct. App. 1987).

\$123,740.34.<sup>81</sup> Under Civil Code 52.5, her treble damages could be valued at approximately \$371,221.02. If the court had applied a worker friendly wage<sup>82</sup> of \$14.51 per base hour, Peña Canal's restitution would have been valued around \$181,810.88,<sup>83</sup> making treble damages potentially worth approximately \$545,432.64. In this case, a \$4.63 per base hour differential mathematically manifests itself as a \$58,070.54 difference in restitution recovery and a \$174,211.62 difference in trebled recovery. Because punitive damages are determined by the court and are applied as a multiplier based upon actual damages, their disparity would also correlate similarly.

While these levels of restitution are potentially crippling to a defendant, the burden on the defendant should not be of primary concern of the court. Rather, the focus should be on how to best apply the statute as directed by the California Legislature and a nuanced understanding of how to fully restore the victim to their rightful position.

#### VI. A TRADITIONAL FAIR MARKET VALUE BASED EVALUATION MAY NOT BE THE MOST EQUITABLE METHOD OF CALCULATING RESTITUTION FOR FORCED LABOR TRAFFICKING VICTIMS

In order to understand how restitution could be more appropriately calculated, it is important to clarify and grasp the depth of victimization imposed. Human trafficking fundamentally differs from human smuggling. Smuggling generally includes a willing immigrant who pays a smuggler to help gain clandestine entry into the United States.<sup>84</sup> Once smuggled, the transaction is complete and the smuggled individual is generally free to leave.<sup>85</sup> A trafficked victim on the other hand, is often tricked or forced into servitude, thereby controlled by fear and/or physical violence.<sup>86</sup> This relationship continues until the trafficker fails to have any use for the victim.<sup>87</sup> It could be said that a smuggled person is partially complicit in the illegal

81. Press Release, U.S. DEP'T OF JUSTICE, *supra* note 36.

82. The AFL-CIO has compiled a data spreadsheet that compares the average hourly earnings of union and nonunion workers in selected occupations. *Average Hourly Earnings of Union and Nonunion Workers in Selected Occupations* (2009) (hereinafter *Hourly Earnings*), available at <http://www.aflcio.org/joinaunion/why/uniondifference/uniondiff11a.cfm> (last visited Feb. 2, 2011).

83. See *supra* note 51 for calculation formula: 12,530.04 base units hours times \$14.51 equals \$181,810.88. *Id.*

84. See generally, THE HUMAN SMUGGLING AND TRAFFICKING CENTER, FACT SHEET: DISTINCTIONS BETWEEN HUMAN SMUGGLING AND HUMAN TRAFFICKING, 2 (2006), available at <http://www.state.gov/documents/organization/90541.pdf> (last visited Jan. 31, 2011).

85. *Id.*

86. *Id.*

87. *Id.*

actions, whereas, a trafficked victim is victimized from the initial encounter, wielding no power or influence in the trafficker/trafficked relationship. Accordingly, using a traditional fair market value calculation to value forced labor would not accurately reflect the nature of the labor extracted.

A. A TRADITIONAL FAIR MARKET VALUE CALCULATION IS  
FOUNDATIONALLY BUILT UPON A FREELY NEGOTIATED EXCHANGE BY  
THE TRANSACTING PARTIES – HUMAN TRAFFICKING, BY DEFINITION, IS  
NOT AN ANALOGOUS EXCHANGE MODEL

Traffickers often use force, fraud or coercion—physical or psychological—to control their victim. Traffickers tactically exploit their victim’s fear of law enforcement to ensure their criminal enterprise remains covert. Many victims are extremely reluctant to contact officials. They are generally aware that they are in the United States illegally and are commonly led to believe they are subject to deportation. Trafficked victims most often come from countries where law enforcement officers are brutal and corrupt.<sup>88</sup> Traffickers encourage, reinforce, and exploit these fears to ensure compliance.

In a relationship where power and control is completely concentrated in one party, and that party has been found to have criminal culpability, they should not be afforded the benefits of a restitution calculation that is fundamentally built upon a negotiation between two similarly empowered parties. The “exchange” between the trafficker and his or her victim does not constitute an “arm’s length transaction” because it is neither a free willed exchange, nor a mutual negotiation of terms.<sup>89</sup> Allowing the trafficker to benefit from their extortion would reward the wrongful act and would further exacerbate the victim’s injury.

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88. HUMAN TRAFFICKING IN CALIFORNIA: FINAL REPORT OF THE CALIFORNIA ALLIANCE TO COMBAT TRAFFICKING AND SLAVERY TASK FORCE (2007), available at [http://www.ag.ca.gov/publications/Human\\_Trafficking\\_Final\\_Report.pdf](http://www.ag.ca.gov/publications/Human_Trafficking_Final_Report.pdf) (last visited Jan. 31, 2011).

89. *Labor Trafficking in the United States*, POLARIS PROJECT, available at <http://www.polarisproject.org/human-trafficking/labor-trafficking-in-the-us> (last visited Jan. 22, 2011) (“Labor traffickers use violence, threats, lies, and other forms of coercion to force people to work against their will in many different industries. Common types of labor trafficking include people forced to work in homes as domestic servants, farmworkers coerced through violence as they harvest crops, or factory workers held in inhumane conditions with little to no pay. In the United States, these forms of forced labor are more prevalent than many people realize.”).

B. A TRAFFICKER SHOULD BE FORECLOSED FROM ASSERTING A TRADITIONAL FAIR MARKET VALUE COMPUTATION BECAUSE HIS OR HER WRONGFUL ACTIONS HAVE A DIRECT AND SIGNIFICANT IMPACT ON THE SUPPLY-AND-DEMAND ECONOMIC MODEL, DRIVING DOWN THE FAIR MARKET VALUE OF LABOR IN A PARTICULAR GEOGRAPHIC AREA POTENTIALLY GIVING THEM AN OPPORTUNITY TO MONETARILY BENEFIT FROM THEIR CRIME

The criminal court system is too often asked to find the most efficient method to remediate abhorrent behavior, attempting to return the victim to the best available position. Analogous to other doctrines in law where a defendant is barred from asserting certain claims or defenses they have tactically manufactured,<sup>90</sup> a trafficker ought to be foreclosed from asserting a traditional fair market value calculation for forced or stolen labor.

Fair market value is generally understood as a locally appraised calculation,<sup>91</sup> one that consistently and rapidly fluctuates with time and locale. When trafficking victims, the defendant plays an integral role in this economic computation. By supplying free or reduced valued labor into a given market, the perpetrator is unilaterally altering the short-run supply curve in the labor supply-and-demand economic model.<sup>92</sup> By forcing victims to work, the trafficker is manipulating the supply chain, thereby artificially depressing the value of the labor in that market. In a putrid twist of mathematical outcomes, the more free or reduced labor the trafficker supplies, the fewer job openings will exist, and lower wages workers are able to demand in order to secure lawful employment. Decreasing the prevailing labor wage has the practical effect of decreasing monetary liability that a defendant would face under a traditional fair market value calculation, rewarding a trafficking kingpin. Permitting slave labor to be valued at an enhanced labor rate could prevent a trafficker from benefiting from their criminal enterprise. Continuing to administer a traditional fair market value formula not only provides the trafficker a potential discount on their monetary liability, but also fails in its deterrent effect.

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90. See, e.g., FED. R. EVID. 804(b)(6).  
Hearsay Exceptions; Declarant Unavailable. (b) Hearsay Exceptions.  
—The following are not excluded by the hearsay rule if the declarant is unavailable as a witness . . . (6) Forfeiture by wrongdoing.—A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

*Id.*

91. RESTATEMENT (SECOND) OF TORTS § 911, cmt. d (1979) (defining market to which the plaintiff resorts, retail price for consumer, wholesale price for retailers).

92. See generally Economic Theory of Supply and Demand, available at <http://www.netmba.com/econ/micro/supply-demand/> (last visited Jan. 31, 2011).

When the trafficker is afforded a lower labor rate value, the desired deterrent effects of treble and punitive damages are neutered and fail to achieve their full affect. The less the deterrent monetary effect, the greater the likelihood an unscrupulous trafficker may consider such penalties a cost of doing business, potentially passing the amount of treble or punitive fines on to the end consumer, completely subverting the entire spirit of secondary damages. Restitution for trafficking needs to be fashioned in such a way that its imposition will fully reimburse the victim for their loss and cause the convicted to reconsider their illegal enterprise, altering their future course of conduct.

Equity demands the trafficker be foreclosed from using the fair market value as a benchmark for restitution when the trafficker's own actions helped to drive down the prevailing wage. If not, taken to its ultimate conclusion, if a trafficker trafficks enough individuals into a geographic area—enough to saturate a specific labor field to the extent labor had little to no monetary value—then the trafficker would not owe any restitution, and potentially avoid any civil liability. The foregoing is clearly an extreme example, but it demonstrates how basing a trafficked victim's damages on a volatile benchmark, one in-which the perpetrator's actions are a direct variable, fails to adequately compensate the victim for their loss.

## VII. CALIFORNIA PENAL CODE SECTION 1202.4(Q) PERMITS THE COURT TO LOOK TO OTHER, MORE EQUITABLE METHODS OF CALCULATING RESTITUTION

### A. THE STATUTORY SCHEME AND SPIRIT OF PENAL CODE 1202.4(Q) COMMANDS THAT THE COURT SELECT A RESTITUTION CALCULATION THAT MAXIMIZES THE RECOVERY FOR THE VICTIM

Penal Code 1202.4(q) provides the following

In determining restitution pursuant to this section, *the court shall base its order upon the greater of the following*: the gross value of the victim's labor or services based upon the comparable value of similar services in the labor market in which the offense occurred, or the value of the victim's labor as guaranteed under California law, or the actual income derived by the defendant from the victim's labor or services *or any other appropriate means to provide reparations to the victim.*<sup>93</sup>

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93. CAL. PENAL CODE § 1202.4(q) (West 2010) (emphasis added).

The legislative intent outlined in Penal Code section 1202.4(q) clearly gives the trial court an abundance of flexibility to fashion restitution from a myriad of calculations and commands the court to choose the recovery that *best* mitigates the injury. The legislature chose to use the term “reparations” to describe the victim’s injuries. This is a multifaceted term, which addresses not only monetary loss, but also addresses the conduct and nature of the wrongdoing.<sup>94</sup> The court should appreciate that a trafficked victim’s injury is not limited to the loss of labor wages, and should also consider how the labor was extracted. While different forms of trafficking may benefit from the enumerated calculations, courts should not be reluctant to follow the directive and spirit of the legislature and creatively construct their own nuanced restitution framework. As long as the method employed is rationally based and non-arbitrary, it will stand.<sup>95</sup>

B. VICTIMS OF HUMAN LABOR TRAFFICKING SHOULD BE ALLOWED TO ASSERT A WAGE VALUATION THAT IS MORE ADVANTAGEOUS AND WORKER DOMINANT TO REMEDY THE PAST DISPARITY IN NEGOTIATING POWER

When a court selects or constructs a framework that maximizes forced labor recovery, the court should select a wage evaluation that compensates the victim’s former lack of bargaining influence in the forced labor relationship. Since the trafficker/victim relationship was wholly weighed in favor of the trafficker, it would stand that a restitution order should be created to overcome this disparity.

The court should be guided by wages that have been negotiated by workers with significant negotiating control and power—i.e. collective bargaining wages.<sup>96</sup> In the creation of a collective bargaining agreement, labor units have significant power and influence in the prevailing wage and con-

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94. The term “reparation” is defined as, “*the making of amends for wrong or injury done: reparation for an injustice.*” Available at <http://dictionary.reference.com/browse/reparation> (last visited Feb. 9, 2011).

95. *People v. Broussard*, 856 P.2. 1134 (Cal. 1993); *People v. Valdez*, 30 Cal. Rptr. 2d 4 (Cal. Ct. App. 1994).

96. The AFL-CIO has compiled a data spreadsheet that compares the average hourly earnings of union and nonunion workers in selected occupations. See *Hourly Earnings*, *supra* note 82. Some of the pertinent professions and hourly union wages are as follows: Child care workers union \$11.97 versus nonunion \$9.65; Combined food preparation and serving workers, including fast food union \$11.36 versus nonunion \$8.60; Cooks union \$13.22 versus nonunion \$9.54; Farming, fishing, and forestry occupation union \$17.87 versus nonunion \$10.19; Food preparation workers union \$10.75 versus nonunion \$8.96; Food servers, non-restaurant union \$14.92 versus nonunion \$10.13; Laundry and dry-cleaning workers union \$12.20 versus nonunion \$9.49; Maids and housekeeping union \$14.51 versus nonunion \$9.65; and Packers and packagers union \$12.32 versus nonunion \$10.12. *Id.*

tract terms. Unlike a fair market value calculation, where business interests and labor interests often collide, the primary goal of collective bargaining units is the most advantageous terms possible to improve the wages and working conditions for their members.<sup>97</sup> Selecting a prevailing union wage could be easily accessed and verified and would not be so cumbersome as to grind to a halt the wheels of justice.<sup>98</sup>

For forms of labor that may not have a specified or easily verifiable prevailing collective bargaining wage, the court should look to alternate forms of worker favorable valuations. In family law quantum meruit cases, caretakers with a family relationship to their patient can expect a premium rate for the care provided. The courts rationale is that a patient would rather have a family member care for them; therefore the provided care has a higher intrinsic value. This form of enhancement could also be a guiding example of how to value domestic servitude labor.

After all potential wage rates have been assessed, if a traditional fair market value calculation provides the maximum recovery, then a trafficked victim ought to receive the benefit of that calculation.

### VIII. CONCLUSION

In a world where predators continue to disregard the human rights and physical wellbeing of their fellow man, the innocent and vulnerable will continue to be at risk of subjugation for the sole benefit of another. Our legislatures and legal systems have begun to formulate and structure the necessary and required responses to protect those who are trafficked. The State of California had the foresight to understand that human trafficking is an immensely complex scenario, infiltrating and entangling every economic sector and strata, and its residents chose to craft a criminal restitution statute flexible enough to achieve its greatest good.

The California judicial system is at a critical juncture; it is starting to build foundational case law and judicial reasoning, upon which, future per-

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97. *What We Stand For: Mission Goals of the AFL-CIO*, available at <http://www.aflcio.org/aboutus/thisistheaflcio/mission/> (last visited Jan. 31, 2011).

98. Prevailing wage rates became common with the passage of the Federal Davis-Bacon Act of 1931. 29 C.F.R. § 1.5-1.6(b). This legislation required federally funded projects to pay all workers a pre-specified wage rate. *See id.* This allowed union and non-union shops to compete for federal contracts and ensure qualify tradesman. In a collaborative effort by the Office of Management and Budget, Department of Labor, Department of Defense, General Services Administration, Department of Energy, and Department of Commerce, the Federal Government has compiled a database of prevailing union wages for numerous locations on a myriad of professions. You can access the prevailing union wage for a specified locale and trade at [WageDeterminationsOnLine.gov](http://www.wdol.gov/dba.aspx#0), available at <http://www.wdol.gov/dba.aspx#0> (last visited Jan. 31, 2011). Not all labor services are included.

petrators of this pernicious crime will be judged and held monetarily accountable. In these early stages it is imperative to come to this new dynamic with an insightful and nuanced understanding of the damage the victims incur and how a traditional framework of remedies may not properly redress the extent of damage inflicted. California Penal Code section 1202.4(q), with its insightful alternative methods for calculating restitution, ought to be utilized to achieve its maximum benefit for the victim.

As demonstrated above, defendants convicted of human labor trafficking should not be afforded the luxury of a traditional fair market value calculation for forced wages. Respective to forced labor trafficking, a traditional fair market value calculation could be abused and exploited by the perpetrator. The state should assert a more victim favorable method of valuation, one that fully and accurately encompasses the entire scope of their victimization. By continuing to refine our legal and justice systems and reassessing and evolving our understanding of the economics of criminal acts, we are better situated to fully redress and calculate a proper restitution decree.