



Department of Justice

STATEMENT OF

JILL STEINBERG

**NATIONAL COORDINATOR FOR CHILD EXPLOITATION
PREVENTION AND INTERDICTION**

BEFORE THE

**COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON CRIME, TERRORISM, HOMELAND
SECURITY, AND INVESTIGATIONS
UNITED STATES HOUSE OF REPRESENTATIVES**

AT A HEARING ENTITLED

**“CHILD EXPLOITATION RESTITUTION FOLLOWING THE
PAROLINE V. UNITED STATES DECISION”**

**PRESENTED
MARCH 19, 2015**

**Statement of
Jill Steinberg
National Coordinator for Child Exploitation Prevention and Interdiction
Before the Committee on the Judiciary
Subcommittee on Crime, Terrorism, Homeland Security and Investigations
United States House of Representatives
Entitled
“Child Exploitation Restitution Following the *Paroline v. United States* Decision”
March 19, 2015**

Chairman Sensenbrenner, Ranking Member Jackson Lee, and distinguished members of the Subcommittee, I would like to thank you for the leadership you have taken in addressing restitution for child pornography victims. On behalf of the Justice Department, I look forward to working closely with you to address the needs of these victims. I also want to thank you for this opportunity to speak to you today about what the Justice Department is doing to obtain restitution for child pornography victims.

Every day, individuals around the world advertise, distribute, transport, receive, possess, and access child pornography. These images of child sexual abuse are moved from computer to smart phone to tablet to cloud storage and back, seamlessly and instantly crisscrossing international borders without detection. When sexually explicit images of children become actively traded, those victims necessarily will be implicated in hundreds of otherwise unrelated cases all over the country and across time. In this way, victims of the trade and circulation of child pornography are unique among crime victims. Because of the mechanics of the crime committed against them, they continually suffer harm caused by countless individuals all over the country and the world. As the Supreme Court first recognized in *New York v. Ferber*, 458 U.S. 747, 759 & n.10 (1982), child pornography permanently records the sexual abuse of the victims, and its continued existence and circulation causes continuing harm by haunting those children in future years.

Like all crime victims, victims of child pornography are entitled to full and timely restitution as provided by law, including restitution for losses caused by the collection and distribution of these images. In 2009, for the first time, a victim sought restitution, not from the individual who sexually

abused her and produced and shared the images, but from all those individuals who traded and collected those images.

Soon, federal prosecutors across the country were seeking restitution for the small handful of child pornography victims pursuing restitution in federal courts in possession, receipt and distribution cases. For the most part, prosecutors were successful in obtaining restitution for these victims. For example, for the victim known as Amy, prosecutors obtained 188 orders of restitution in 64 different federal districts from 2009 through 2013. For another victim known as Vicky, prosecutors obtained 470 orders of restitution in 73 different federal districts from 2009 to 2013.

Despite the Department's overall success in obtaining orders of restitution for these victims, there were some hard-fought losses along the way. In particular, some courts struggled to determine whether an individual defendant proximately caused a victim's losses. If a defendant was only one of thousands who harmed the victim, then some courts indicated that he could not be said to have caused her losses, because those losses would be essentially the same if that particular defendant had never committed the crime. On that logic, some courts simply denied the restitution requests. Others demanded a showing as to how much an individual defendant's crime incrementally increased the victim's losses, imposing a generally insurmountable evidentiary burden.

Among courts that awarded restitution, many grappled with how to determine how much the defendant should pay to the victim. Although most of the awards clustered in the range of \$1,000 to \$5,000, courts adopted many different methods to calculate the restitution amount. Some courts would divide the victim's restitution claim by the number of defendants convicted of offenses involving her image, others would average the awards to date, others would use percentages, and others would simply determine what they felt would be reasonable. There was no single methodology employed by all district courts.

These two issues were brought to the Supreme Court last term in *Paroline v. United States*, 134 S.Ct. 1710 (2014). In that case, the defendant had been convicted of possession of child pornography in 2009. Among the images he possessed were two of the victim known as Amy. Although the district court observed that "Amy was harmed by Paroline's possession of Amy's two pornographic images," it also found that there was no evidence

to “show the portion of these losses specifically caused by Paroline’s possession of Amy’s two images.” As such, the court denied the restitution request. *United States v. Paroline*, 672 F.Supp.2d 781, 791-93 (E.D. Tex. 2009).

The case eventually arrived in the Supreme Court. After finding that the statute required proof of proximate causation for all the categories of losses referenced in the statute, the court summed up the problem this way:

In this case ... a showing of but-for causation cannot be made ... From the victim’s perspective, Paroline was just one of thousands of anonymous possessors. ... [I]t is not possible to prove that her losses would be less (and by how much) but for one possessor’s individual role in the large, loosely connected network through which her images circulate. ... Even without Paroline’s offense, thousands would have viewed and would in the future view the victim’s images, so it cannot be shown that her trauma and attendant losses would have been any different but for Paroline’s offense.

Paroline, 134 S.Ct. at 1722-23 (internal citations omitted).

To resolve this dilemma, the court adopted the less demanding aggregate causation standard, noting that:

alternative and less demanding causal standards are necessary in certain circumstances to vindicate the law’s purposes. It would be anomalous to turn away a person harmed by the combined acts of many wrongdoers simply because none of those wrongdoers alone caused the harm. And it would be nonsensical to adopt a rule whereby individuals hurt by the combined wrongful acts of many (and thus in many instances hurt more badly than otherwise) would have no redress, whereas individuals hurt by the acts of one person alone would have a remedy.

Id. at 1724. Therefore, the Court concluded that:

In this special context, where it can be shown both that a defendant possessed a victim’s images and that a victim has

outstanding losses caused by the continuing traffic in those images but where it is impossible to trace a particular amount of those losses to the individual defendant by recourse to a more traditional causal inquiry, a court applying § 2259 should order restitution in an amount that comports with the defendant's relative role in the causal process that underlies the victim's general losses.

Id. at 1727.

The Court then considered how district courts might determine the amount a given defendant should pay a victim in restitution. To provide guidance, the Court cited to a number of factors courts might consider, including “the number of past criminal defendants found to have contributed to the victim's general losses; ... whether the defendant reproduced or distributed images of the victim; whether the defendant had any connection to the initial production of the images; how many images of the victim the defendant possessed; and other facts relevant to the defendant's relative causal role.” *Id.* at 1728.

There is substantial evidence that *Paroline* is helping victims today by substantially improving the Department's ability to obtain restitution orders on their behalf. In the ten months since *Paroline* was decided, the Department has obtained almost 160 restitution orders in nearly sixty federal districts. Since *Paroline*, we are not aware of any district court judge denying a restitution request in a child pornography possession, receipt or distribution case for insufficient proof of causation. The aggregate causation standard is easily understood and applied. Therefore, proving causation is no longer an obstacle to obtaining restitution in these child pornography cases. With courts able to easily dispatch with the question of whether restitution should be ordered, they can focus on applying the *Paroline* factors to determine how much should be ordered.

Although *Paroline* has significantly improved the Department's ability to obtain restitution in these types of child pornography cases, this is still an area where legislation is needed to improve our ability to help these victims. Current data tells us that there are over 8,500 children who have been identified in images of child pornography. Yet as of today, there are only fifteen victims seeking restitution in child pornography distribution, receipt, and possession cases in federal court. The Department believes that

the reason that so few of these victims are exercising their right to restitution is because the process of litigating claims in hundreds of cases around the country over the course of years is simply too burdensome. In addition, there is an apparent significant barrier to entry that victims of these types of child pornography offenses must overcome simply to get in the door. Of the fifteen victims seeking restitution, all but one first hired an attorney to manage the process. Many obtained psychological and economic experts, who prepared lengthy (and likely costly) reports, to help prepare their claims. Thus, victims face challenges with respect to both getting the process started and seeing it through.

We can do better. The Department urges Congress to create an alternative system to allow victims of the distribution and collection of child pornography to obtain some measure of compensation without having to endure litigation. Under this system, child pornography defendants would be ordered to pay a special assessment in addition to any restitution they may owe. The special assessment would go into a fund. Victims of these types of child pornography offenses could then choose whether to present their full restitution claims in court, as is currently done, or to obtain a one-time payment of administrative compensation. To obtain administrative compensation, victims would have to show only that they are a victim of this type of child pornography offense. Once that finding is made by a district court, the victim would receive a fixed amount of compensation. Victims who opt to litigate their restitution claim would be ineligible to obtain compensation from the fund. Victims who obtain compensation from the fund could later seek restitution for losses incurred since receiving compensation. This two-track process is meant to ameliorate the structural impediments that are preventing victims from coming forward, while preserving the option of obtaining full restitution for those who wish to do so.

We would welcome the opportunity to work with Congress on such a legislative approach. In the meantime, the Department has had an opportunity to review S. 295/H.R. 595, the Amy and Vicky Child Pornography Victim Restitution Improvement Act of 2015. The Department thanks Congress for its attention on this issue.

The Department's view is that for any legislation to make a meaningful impact, it must address the structural barriers that are preventing a vast number of victims from obtaining any measure of compensation. We

urge Congress to consider an approach that would provide victims of child pornography offenses of this kind with a choice: use a simple method to obtain a fixed amount of compensation, or pursue restitution in individual cases under the standards set forth in the *Paroline* decision. The introduced legislation would amend 18 U.S.C. § 2259, the child pornography restitution statute, in a few ways. First, it would eliminate the proximate causation requirement from the statute, except with respect to the catch-all category of losses. As noted above, proving proximate causation has not been a problem since *Paroline* announced the aggregate causation standard for these cases, and prosecutors now routinely prove that a child pornography defendant caused a victim's harm.

Of greater concern, however, is that any legislation must adhere to the *Paroline* Court's instruction that a proximate cause requirement serves "to preclude liability in situations where the causal link between conduct and result is so attenuated that the consequence is more aptly described as mere fortuity." 134 S.Ct. at 1719 (citation omitted). In fact, the Court regarded proximate cause as so elemental that the Court noted in dicta: "Even if § 2259 made no express reference to proximate causation, the Court might well hold that a showing of proximate cause was required. Proximate cause is a standard aspect of causation in criminal law and the law of torts. Given proximate cause's traditional role in causation analysis, this Court has more than once found a proximate-cause requirement built into a statute that did not expressly impose one." *Id.* at 1720. Thus, the introduced legislation's removal of the proximate causation element invites litigation without providing any attendant benefits.

The legislation also amends the definition of "full amount of the victim's losses" to include "losses suffered by the victim" from sexual activity committed "in preparation for or during the production of child pornography depicting the victim involved in the offense." To the extent that this would require child pornography collectors and distributors to be responsible for losses caused by the producer, this would be contrary to traditional notions about causation as it would require defendants to be liable for losses incurred before they committed their crimes, which they could not have factually caused, even under an aggregate causation theory. We note that in *Paroline*, the Supreme Court counseled that district courts begin their restitution calculations by determining the amount of loss suffered solely from the "continuing traffic" in the images. 134 S.Ct. at 1728. The Court went on to express serious reservations about holding a distributor or

collector of child pornography responsible for all of the victim's "general losses" caused by the activity, even suggesting that such an approach might run afoul of the Eighth Amendment. *Id.* at 1724-26. We are sensitive to the fact that it may be difficult in certain cases to disaggregate losses that are attributable to the production of the material from losses that are attributable to the trade of the material. But we do not see that evidentiary challenge as being insurmountable, nor as being so great as to depart from the Supreme Court's guidance concerning the scope of restitution. Again, the inclusion of this provision poses a litigation risk, which would further delay restitution making its way to the victims.

S. 295/H.R. 595 then offers two procedures, one that applies in cases where the victim was harmed by one defendant, and one that applies in cases where the victim was harmed by multiple defendants. The Department proposes dividing the cases differently. Our experience tells us that the challenge arises not from the number of defendants, but whether or not they are joined in a single case. A conspiracy to produce child pornography may involve ten defendants, but they could be prosecuted jointly. In such a situation, traditional restitution procedures can easily be applied to divide liability among the multiple defendants. Where the difficulty arises is when defendants are prosecuted in otherwise unrelated cases, at different times, in different districts. That situation is unique to cases involving the possession, receipt and distribution of child pornography. Therefore, to the extent legislation is going to propose different procedures for different types of cases, we suggest there be one for production cases and one for these types of cases.

In cases where the victim is harmed by more than one defendant, the legislation also provides guidance on how much a defendant should pay the victim. The bill offers two alternatives: The court can order the defendant to pay the full amount of the victim's losses, or some apportioned amount that cannot go below certain floors. With respect to apportionment, the Department agrees that it would be helpful to provide minimum restitution amounts. The Department also agrees that a sliding scale should be used so that different minimum amounts apply depending on the nature of the offense.

For defendants who are ordered to pay the full amount of the victim's losses, the legislation provides that each such defendant "shall be jointly and severally liable to the victim with all other defendants against whom an

order of restitution is issued ... in favor of such victim.” On the surface, this may seem appealing because it would allow a victim to collect all her restitution quickly from a defendant with sufficient financial resources, leaving all the defendants the burden of sorting out contribution among themselves. However, because restitution operates in the context of the criminal justice system, it must comport with constitutional principles about sentencing. For its part, the *Paroline* Court was deeply skeptical about holding a single defendant liable for having caused all of the victim’s losses. 134 S.Ct. at 1724-26. At best, according to the Court, a right of contribution among defendants “*might mitigate to some degree* the concerns [such an] approach presents.” *Id.* at 1725 (emphasis added). As the Court said, holding a defendant liable for the full amount of a victim’s losses without a legal or practical means for seeking contribution is an “approach is so severe it might raise questions under the Excessive Fines Clause of the Eighth Amendment.” *Id.* at 1726.

The Court’s reference to a practical means of obtaining restitution is important. For the right of contribution to alleviate the constitutional concerns noted by the Supreme Court, it must be practicable and effective. While this legislation creates a right of contribution, it is unclear how it would work in practice. How can one court order a defendant to be jointly and severally liable with another defendant who is going to commit his crime years from now in a different state? Furthermore, any defendant who wants to seek contribution must do so without a right to an attorney and, most likely, while imprisoned. Identifying possible contributors will be challenging because the federal criminal justice system is decentralized, and does not track information based on the victim’s name. If very few defendants are ordered to pay the full amount of the victim’s losses, then there will be a negligible contribution pool. All these issues may be further aggravated by the impact of the proposed legislation’s five-year statute of limitations on a defendant’s ability to seek contribution.

Without a solution to these practical issues, we caution against implementing a regime that would hold a defendant accountable in a criminal sentencing proceeding for losses that he did not cause, and that he could not reallocate to a vast class of other, unknown defendants in other, unrelated cases through contribution actions. Creating a scheme that would likely generate protracted and difficult litigation would not serve the intent of Congress to provide victims with prompt and certain recovery. It is also unnecessary. Joint and several liability in a criminal case is not needed to

reach all the assets a defendant may have: victims could always maximize their recovery by initiating civil suits against defendants.

For these reasons, we recommend Congress consider an approach along the lines that the Department has suggested.

Closing

I appreciate the opportunity to share information with you about some of the challenges that the Department sees concerning restitution in child pornography cases and the efforts we have undertaken in this area. I look forward to continuing to work with Congress as it crafts practical, meaningful legislation that is consistent with Supreme Court precedent and that ensures that victims are able to obtain the restitution they deserve with some degree of certainty. Thank you for holding this important hearing and I look forward to answering any questions the Committee may have.