

# LIABILITY FOR MASS SEXUAL ABUSE

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## ABSTRACT

*When harm is caused to victims by multiple injurers, difficult issues arise in determining causation of, legal responsibility for, and allocation of liability for those harms. Nowhere is this truer than in child pornography and sex trafficking cases, in which individuals have been victimized over extended periods of time by hundreds or even many thousands of injurers, with multiple and often overlapping victims of each injurer. Courts (and lawyers) struggle with these situations for a simple reason: they insist on applying tests of causation that fail when the effect was over-determined by multiple conditions. The failure to properly understand the causation issue has exacerbated failures to properly understand and distinguish the injury, legal responsibility and allocation of liability issues.*

*All of these issues, plus other significant issues, arose in *Paroline v. United States* (2014), in which the Supreme Court considered the statutory liability of a convicted possessor of child pornography to a victim whose images he possessed for the pecuniary losses that she suffered due to her knowledge of the widespread viewing of those images. In this article we critique the Justices' opinions in *Paroline* as part of a broader discussion that is intended to clarify and distinguish the causation, injury, legal responsibility and allocation of liability issues in general and especially in situations involving mass sexual abuse, while also criticizing the Court's ill-considered dicta that would make any compensatory award in civil as well as criminal cases subject to the constitutional restrictions on criminal punishment.*

## INTRODUCTION

When harm is caused to victims by multiple injurers, many actually or seemingly difficult issues arise in determining causation of, legal responsibility for, and allocation of liability for those harms. An area of special concern and difficulty

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encompasses situations, such as child pornography and sex trafficking, in which individuals have been sexually victimized over extended periods of time by hundreds or even many thousands of distinct injurers, with multiple and often overlapping victims of each injurer.

The harms suffered by victims of child pornography are not limited to their initial photographed sexual abuse but expand indefinitely and exponentially as a result of the subsequent distribution and viewing of those photographic images by other offenders. The harms suffered by involuntarily enslaved providers of sexual services are not limited to their initial enslavement/recruitment but include those caused by their subsequent involuntary transfers and sexual servicing of clients, whether or not those clients are aware of their status as victims of trafficking (VoTs). The harms, especially the emotional harm, caused in the aggregate by the subsequent activities often will greatly outweigh the harm that would have resulted from the initial activity in the absence of the subsequent activities. Legislatures, including the U.S. Congress, have recognized this by enacting statutes that impose liability on all those knowingly involved in a victim's mass sexual abuse.<sup>1</sup>

As is generally true for imposition of liability, these statutes require that it be proven that the defendant's individual wrongful action was a cause of the relevant harm suffered by a specific victim. Legislatures generally state this requirement without any attempt to state criteria for determining causation, instead relying upon (ambiguous and deficient) common understanding. The criteria generally employed by the courts—which require that the condition at issue must have been either (a) necessary for (a “but for cause” of) the effect or perhaps (b) “independently sufficient” for its occurrence—fail to identify as causes any of the distributors or possessors of child pornography, any of the clients of VoTs and, more generally, any condition which was neither necessary nor independently sufficient for the occurrence of the harm at issue. Contrary to what often is stated, this is a very common situation.<sup>2</sup> The failure by almost all courts and most academics, especially in criminal law, to identify and employ the proper comprehensive criterion for causation has led to failures to properly understand and distinguish the related issues of “divisible” versus “indivisible” injuries, attribution of legal responsibility for caused injuries, and allocation of liability among the multiple legally responsible causes of some injury.

All of these issues, and more, arose in a recent U.S. Supreme Court case, *Paroline v United States*,<sup>3</sup> in which the victim, “Amy,” sought restitution under a federal criminal statute from a possessor of images of her childhood sexual abuse for pecuniary (monetary) losses suffered by her as a result of her knowledge of the widespread distribution and viewing of those images. The major issues in the case

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1. See *infra* Part I.

2. See Richard W. Wright, *The Grounds and Extent of Legal Responsibility*, 40 SAN DIEGO L. REV. 1425, 1442–45 (2003) [hereinafter Wright, *Legal Responsibility*].

3. 572 U.S. 434 (2014).

were supposed difficulties in establishing causation of her losses by the individual possessor and the proper allocation of liability among the many possessors as well as the initial producer and subsequent distributors of the images. The Court majority, in an opinion written by Justice Kennedy joined by Justices Alito, Breyer, Ginsburg and Kagan, held that causation of the entirety of her statutorily specified losses could be established for each possessor, albeit as a supposed “legal fiction,” but that Amy could recover from each possessor only “an amount that comports with the defendant’s relative role in the causal process,” which “would not, however, be a token or nominal amount.”<sup>4</sup> Justice Sotomayor, dissenting, argued that Amy should be able to recover under the statutory scheme the entirety of her statutorily specified losses from any individual distributor or possessor.<sup>5</sup> Chief Justice Roberts, joined by Justices Scalia and Thomas, dissented and would allow no recovery, claiming a lack of proof of causation by any individual distributor or possessor, as required by the statute.<sup>6</sup>

Similarly thorny causation, attributable legal responsibility, and allocation of liability issues arise in the context of sex trafficking, knowing participants in which (including clients) are also subject to criminal liability under the U.S. Code, with restitution obligations that are governed by the same provisions that apply to participants in child pornography.<sup>7</sup> The Justices’ analyses in *Paroline* thus apply to victims of sex trafficking as well as child pornography. They also are highly relevant for other similar situations, such as the creation and distribution of so-called “revenge porn.”<sup>8</sup>

The criminal restitution provisions in the U.S. Code are based on general tort law principles, as are similar statutory provisions in other countries, such as the recently enacted Anti-Human Trafficking Act 2017 in the province of Ontario in Canada, which creates a tort of human trafficking.<sup>9</sup> However, there has been very little consideration and analysis of the proper application of the general tort

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4. *Id.* at 458–59.

5. *Id.* at 473 (Sotomayor, J., dissenting).

6. *Id.* at 463 (Roberts, C.J., dissenting).

7. *See infra* Part I.B.

8. Viewing images of child abuse is an example, at the extreme end of the spectrum, of unauthorized dissemination of nude images (UDONI), known more colloquially as “revenge porn.” In the Leverhulme Fellowship, RF-2016-3588, Keren-Paz explores the liability of viewers in this third instance of mass sexual abuse. Legislative and academic attention has focused thus far on the poster’s (mainly criminal) responsibility, with some attention to the position of internet intermediaries which are immune (in the U.S.) from liability based on § 230 of the Communications Decency Act of 1996, 47 U.S.C. § 230 (2012). *See, e.g.,* Danielle Citron & Mary Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 359–60 (2014); Derek Bambauer, *Exposed*, 98 MINN. L. REV. 2026, 2052 (2014); Clare McGlynn & Erica Rackley, *Image-Based Sexual Abuse*, 37 OXFORD J. LEGAL. STUD. 534 (2017). For a highlighting of the differences (for purposes of intermediary liability) between child pornography and revenge porn, see Nicolas Suzor et al., *Non-Consensual Porn and the Responsibilities of Online Intermediaries*, 40 MELB. U. L. REV. 1057, 1070 (2017).

9. Prevention of and Remedies for Human Trafficking Act, S.O. 2017, c. 12, Sched. 2 §§ 16-17. It is unclear whether a client purchasing sexual services from a victim of sex trafficking will be considered as “engaged in the human trafficking” (§16(a)) and therefore subject to liability.

liability principles in the doubly complicated context of mass sexual abuse of multiple overlapping victims by multiple overlapping defendants.<sup>10</sup> In this article, we consider and discuss in detail each of the relevant issues.

In Part I we summarize the facts in *Paroline* and the relevant statutory restitution provisions in cases involving child pornography, which apply as well to those knowingly involved in sex trafficking.

In Part II we analyze the two critical factual issues: (A) the required causation of the relevant legal injuries by the wrongful aspect of the individual defendant's conduct and (B) the "divisible" (separable) versus "indivisible" (inseparable) nature of the caused injuries. We criticize the Court's failure in *Paroline* to distinguish the NESS (necessary element of a sufficient set) criterion for causation, use of which is crucial in mass sexual abuse cases (and all other overdetermined causation situations), from the deficient aggregate but-for test and its wrongly viewing not only the latter but also the former as a legal fiction. We also explain that, contrary to some doubt expressed by the majority, the victim's emotional injury and related pecuniary damage is indivisible.

In Part III, after (A) discussing the general requirements for attribution of legal responsibility, we (B) examine the proper allocation of liability among the multiple legally responsible direct causes of the relevant injuries in situations involving mass sexual abuse, considering (1) traditional tort law principles, (2) alleged constitutional issues raised by the statutory inclusion of the restitution order in *Paroline* as part of the defendant's criminal sentence, and (3) the relevant statutory provisions. Relying on the supposed fictional nature of the NESS criterion for causation and an assumption that the mandated statutory restitution is intended to have a penal as well as compensatory purpose and, as such, might be subject to the constitutional limitations on punishment, the Court in *Paroline* stated that Paroline could only be held liable for "an amount that comports with the defendant's relative role in the causal process," which "would not, however, be a token or nominal amount."<sup>11</sup>

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10. A significant exception is TSACHI KEREN-PAZ, *SEX TRAFFICKING: A PRIVATE LAW RESPONSE* (2013) [hereinafter STPLR]. There are important differences between the arguments advanced in STPLR and the ones we undertake in this article. Most significantly, STPLR focuses on a novel and controversial demand based theory of causation and liability, which is not advanced or relied upon in this article. See *infra* note 102 and accompanying text. Second, and relatedly, STPLR focuses on "indirect" injuries caused by those with no direct involvement with the victim or images of the victim's abuse, while we consider only "direct" injuries caused by those who have such direct involvement. Third, STPLR focuses on sex trafficking, while we focus primarily on child pornography but apply our analysis also to sex trafficking. Fourth, STPLR focuses on the details of specific private law causes of action, while we focus on general liability principles as applied in statutory restitution provisions as well as in tort law generally. For example, STPLR argues that clients who had direct contact with victims could be strictly liable based on the torts of battery and (more controversially) conversion, even if unaware of the client's status as a VoT, and examines private law actions for restitution of profits by traffickers to victims and claims by victims against the state for restitution of what was confiscated from traffickers as profits of crime.

11. *Paroline*, 572 U.S. at 458–59.

In Part III.B.2 we discuss the Court's arguments regarding the possible applicability of constitutional restrictions on punishment to compensatory awards that might also serve a penal purpose, which are not supported by the precedents that it cites and, if taken seriously, would make all compensatory awards subject to such restrictions. As long as the restitution order simply compensates the victim for her actual losses, without any additional extra-compensatory element added for penal purposes, it should not give rise to any constitutional or other issues regarding appropriate punishment, despite the possible deterrent and perhaps rehabilitative effects of the compensation order.

In Part III.B.3 we discuss the vague and contradictory nature of the two basic allocation of liability criteria stated by the Court and the inapposite and inconsistent nature of the supposedly relevant subsidiary factors, all of which result from the Court's failure to appreciate the complex nature of the overdetermined causation in situations involving mass sexual abuse.

In Part III.C we discuss the inappositeness of the two traditional alternative allocation of liability rules, full "joint and several" liability or liability proportioned to relative causal contribution, as applied to viewers of child pornography and knowing clients of VoTs. We propose instead an equitable allocation of liability rule for such defendants, which is more suitable for the injuries suffered by victims of mass sexual abuse and would take into account the likely effect of a defendant's conduct considered by itself and in conjunction with only a few others and the need for timely full compensation, to the extent possible, of the victim.

## I. STATUTORY LIABILITY

### A. *Child Pornography*

In 2009, the defendant in *Paroline*, Doyle L. Paroline, pleaded guilty to knowing possession of 150 to 300 images of child pornography, in violation of 18 U.S.C. § 2252, including two images of "Amy" (a pseudonym). Paroline is one of a constantly expanding number of persons around the world who have viewed such images of Amy, who was repeatedly raped and forced to participate in other varieties of sexual activity by her uncle when she was eight and nine years old for the purpose of producing child pornography. When her abuse was revealed and terminated in 1998, Amy received psychological counseling, which ended in 1999 when her then therapist concluded that she was "back to normal" and engaging in age-appropriate activities with the support of her family. Her uncle was sentenced to 121 months in prison and required to pay \$6325 in restitution. Although supposedly back to normal, Amy's functioning appeared to decline in her teenage years, and she suffered a major psychological blow eight years later, at age 17, when she learned that the images of her sexual abuse constitute one of the most widely-trafficked sets of child sex abuse images in the world. At least 35,000 images of her abuse had been identified as part of the evidence in over 3200 federal and state criminal cases in the U.S. as of July 2009. The knowledge that her images have

been viewed and will continue to be viewed by an ever-expanding number of people in the United States and around the world, which constitutes for her a constantly repeated re-enactment of her abuse, renewed and amplified her trauma. She finds it hard to trust anyone, feels that she has no control over what happens to her, and avoids taking jobs that will require even routine contact with the public for fear that someone who has viewed the images of her abuse will recognize her.<sup>12</sup>

An assessment in 2009 of the *future* pecuniary costs to Amy caused by the production, distribution and, especially, viewing of the images of her sexual abuse included nearly \$3 million in lost income and almost \$500,000 in treatment and counseling costs.<sup>13</sup> She sought restitution for those costs, plus legal fees and costs, from Paroline and others convicted of distribution and/or possession of the images of her abuse under 18 U.S.C. § 2259, which in subsection (a) requires that, “in addition to any other civil or criminal penalty authorized by law, the court, in the sentencing shall order restitution.”<sup>14</sup> At the time of the Supreme Court’s decision in *Paroline* in April 2014, she had been granted restitution in about 180 cases<sup>15</sup> but had recovered only about forty percent of the total \$3.4 million, with over seventy-five percent of her recovery coming from a single offender.<sup>16</sup> The lower courts, like the Justices in the Supreme Court, had differed on whether § 2259 entitled her to recover from each convicted defendant all, only some, or none of these pecuniary costs.<sup>17</sup>

Before discussing the opinions of the Justices, it will be useful to describe the structure and content of the relevant statutory provisions. The issuance of a restitution order against someone convicted of a federal offense of knowingly producing, distributing or possessing child pornography<sup>18</sup> is mandatory.<sup>19</sup> The restitution order “shall direct the defendant to pay the victim (through the appropriate court mechanism) the full amount of the victim’s losses as determined by the court pursuant to

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12. *Paroline v. United States*, 572 U.S. 434, 440–41 (2014); Paul G. Cassell & James R. Marsh, *Full Restitution for Child Pornography Victims: The Supreme Court’s Paroline Decision and the Need for a Congressional Response*, 13 OHIO ST. J. CRIM. L. 5, 6–8, 11–12, 21, 23 (2015).

13. *Paroline*, 572 U.S. at 441.

14. 18 U.S.C. § 2259(a) (2012). Prior to attorney James Marsh’s efforts on behalf of “Amy,” beginning in 2008, “courts rarely awarded restitution in most child pornography cases, and almost never in possession cases.” Isra Bhatti, *Navigating Paroline’s Wake*, 63 UCLA L. REV. 2, 12 (2016).

15. Cassell & Marsh, *supra* note 12, at 21. Amy has failed to obtain a restitution order in the great majority of cases due primarily to lack of counsel prior to 2008. *Id.* at 21 n. 107.

16. *Id.* at 21.

17. The federal district courts that had ordered restitution of only some of Amy’s pecuniary losses (rather than all or none) had specified amounts ranging from \$50 to \$530,000. *Paroline*, 572 U.S. at 469 (Roberts, C.J., dissenting). Overall, victims seeking restitution prior to the *Paroline* decision were successful against producers less than twenty percent of the time and against distributors and possessors only twelve to thirteen percent of the time. The awards against a single defendant, including producers, for all of his victims totaled only \$60 to \$3000 for fifty-five percent of the awards and \$60 to \$5000 for seventy-one percent of the awards. Bhatti, *supra* note 14, at 16–17.

18. See 18 U.S.C. §§ 2251, 2252, 2260 (2012).

19. 18 U.S.C. §§ 2259(a), 2259(b)(4)(A) (2012).



[the procedures specified in § 3664].”<sup>20</sup> A “victim” is defined as an “individual harmed as a result of a commission of a crime under this chapter.”<sup>21</sup> The “full amount of the victim’s losses” is defined to include:

any costs incurred by the victim for (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.<sup>22</sup>

Independent of the mandatory restitution ordered by § 2259, a child pornography victim who suffers any personal injury as a result of the offense, regardless of whether the injury occurred while the victim was a minor, may sue the offender in a civil suit in federal court. The victim can recover at least \$150,000, which prior to 2018 was legislatively presumed minimum actual damages but now is a liquidated damage award in lieu of actual damages, and the cost of the suit, including reasonable attorney’s fees.<sup>23</sup> Any real or personal property (a) “constituting or traceable to gross profits or other proceeds obtained from such offense” or (b) “used or intended to be used to commit or to promote the commission of the offense or any property traceable to such property” shall be forfeited to the United States under either a criminal or civil forfeiture proceeding.<sup>24</sup>

The Government is responsible for obtaining and enforcing the restitution order and bears the burden of proving “the amount of the loss sustained by a victim as a result of the offense” by “the preponderance of the evidence.”<sup>25</sup> It must notify each identified victim of the defendant’s conviction and, while making its own assessment of the victim’s loss after consultation, as possible, with each victim, inform the victim of his or her right to provide his or her own assessment.<sup>26</sup> Although the Government statutorily has the mandatory responsibility to determine and seek the proper amount of restitution for the victim’s loss, in practice the Government has shifted this responsibility to the victim by foregoing restitution claims not actively supported by the victim and by relying on the victim’s calculation of the relevant losses.<sup>27</sup>

A court may not decline to issue a restitution order because of the economic circumstances of the defendant or the fact that the victim has received or is entitled to

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20. § 2259(b)(1).

21. § 2259(c).

22. § 2259(b)(3).

23. 18 U.S.C. § 2255 (2012); *see infra* text accompanying notes 211–12.

24. 18 U.S.C. §§ 2253, 2254 (2012).

25. 18 U.S.C. § 3664(e).

26. § 3664(d).

27. *See* Bhatti, *supra* note 14, at 32 (noting that, in sixty-two percent of the post-*Paroline* cases in which no restitution was ordered, the victim had not requested restitution, but erroneously stating that there is no statutory requirement to award restitution unless the victim requests such).

receive compensation for his or her injuries from the proceeds of insurance or any other source, nor may such considerations be taken into account to award a victim less than the full amount of his or her losses.<sup>28</sup> However, the amount paid to a victim under a restitution order must be reduced by any amount recovered as compensatory damages for the same loss in a federal civil proceeding and any state civil proceeding, to the extent provided by that state's law, and, if a victim has received compensation for the same loss "from insurance or any other source" and "all restitution of victims required by the order" has been paid, the court shall order that restitution be paid to the provider of the compensation.<sup>29</sup>

The court has discretion, taking into account the financial resources and obligations of the defendant, to specify "the manner in which, and the schedule according to which, the restitution is to be paid," including partial payments at specified intervals rather than a single lump sum or, "nominal periodic payments if the court finds from facts on the record that the economic circumstances of the defendant do not allow the payment of any amount of a restitution order, and do not allow for the payment of the full amount of a restitution order in the foreseeable future under any reasonable schedule of payments."<sup>30</sup> If the court finds that more than one defendant has contributed to the victim's loss, it "may make each defendant liable for payment of the full amount of restitution or may apportion liability among the defendants to reflect the level of contribution to the victim's loss and [the] economic circumstances of each defendant."<sup>31</sup>

### B. Sex Trafficking

Convicted participants in sex trafficking, which under the statutory definitions include knowing clients of VoTs as well as those responsible for their initial enslavement and subsequent trafficking,<sup>32</sup> are subject to mandatory restitution requirements under 18 U.S.C. § 1593 that are essentially identical to those mandated for victims of child pornography under 18 U.S.C. § 2259,<sup>33</sup> with the definition of the "full amount of the victim's losses" expanded to include not only those listed in § 2259(b)(3) but also "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

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28. 18 U.S.C. §§ 2259(b)(4), 3664(f)(1).

29. § 3664(j).

30. § 3664(b)(3)(B).

31. § 3664(h). Note that § 2259 is the specific restitution provision in cases of child pornography, while § 3664 is the general provision regarding criminal restitution.

32. 18 U.S.C. §§ 1581–97 (2012) deals with human trafficking offences. Section 1591 criminalizes sex trafficking of children or by force, fraud or coercion of a person of any age. Congress amended § 1591 in 2015 to clarify (what could be inferred from the original definition, which included anyone who knowingly "benefits . . . by receiving anything of value") that the definition includes whoever knowingly "patronizes, or solicits" another for a commercial sex act. Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22, § 108, 129 Stat. 227 (2015).

33. § 1593 (2012); *see supra* text accompanying notes 19–31.



guaranteed under the minimum wage and overtime guarantees of the Fair Labor Standards Act (29 U.S.C. 201 et seq.).”<sup>34</sup>

## II. THE ACTUAL CAUSATION AND INJURY ISSUES

In this Part, we defer any discussion of legal responsibility to focus instead on two related factual issues that generally must be addressed as part of the determination of a defendant’s legal responsibility for any injuries allegedly suffered by the plaintiff: (A) whether (the wrongful aspect of) the defendant’s conduct was a cause of (contributed to) those injuries and (B) the “divisible” (separable) versus “indivisible” (inseparable) nature of the injuries.

### A. Actual Causation

“Actual” causation refers to causation in its core descriptive, scientific, laws of nature sense, putting aside the purposive limitations on legal responsibility that unfortunately are often misleadingly described as issues of “proximate/legal causation.”<sup>35</sup> Amy’s lawyers devoted substantial space and time in their written and oral arguments to the U.S. Supreme Court asserting that proof of “proximate causation” is not required for the specific cost items listed in 18 U.S.C. § 2259(b)(3)(A)-(F).<sup>36</sup> As the Court majority explained and all the Justices agreed, these arguments were not only weak but also irrelevant, since, assuming actual causation existed, proximate causation was clearly satisfied.<sup>37</sup>

The Justices’ arguments thus focused on the actual causation issue. They all agreed (as did all the parties) that the usual necessary condition (“but for”) test, which requires that the harm suffered by the victim would not have occurred in the particular circumstances in the absence of the defendant’s offense, would not be satisfied by Paroline or any other possessor of the images of Amy’s abuse—or likely any distributor other than the initial producer—given the very many possessors and distributors of the images of her abuse. As Justice Kennedy, writing for the Court majority, stated:

[T]he victim’s precise degree of trauma likely bears a relation to the total number of offenders; it would probably be less if only 10 rather than

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34. § 1593(b)(3).

35. See RESTATEMENT (THIRD) OF THE LAW OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 26 cmt. a (AM. LAW INST. 2010) [hereinafter RESTATEMENT THIRD: PHYSICAL AND EMOTIONAL HARM]; Richard W. Wright & Ingeborg Puppe, *Causation: Linguistic, Philosophical, Legal and Economic*, 91 CHI-KENT L. REV. 461, 463–64 (2016).

36. See Respondent Amy’s Brief on the Merits at 14–32, 35–37, 44–46, *Paroline v. United States*, 572 U.S. 434 (2014) (No 12-8561) [hereinafter Amy’s Merits Brief]; Transcript of Oral Argument at 37–41, *Paroline v. United States*, 572 U.S. 434 (2014) (No 12-8561). Wright provided *pro bono* advice to Amy’s lawyers at the Supreme Court certiorari and merits stages, including advice to eliminate or at least minimize the “proximate cause” arguments and instead focus on the critical actual causation and allocation of liability issues.

37. *Paroline*, 572 U.S. at 445–451; *id.* at 465 (Roberts, C.J., dissenting); *id.* at 474 (Sotomayor, J., dissenting); see *infra* Part III.A.

thousands had seen her images. But it 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 circulated.<sup>38</sup>

Chief Justice Roberts, joined in dissent by Justices Scalia and Thomas, viewed that as the end of the matter. He argued that, despite Congress's clear intent—which he acknowledged—that Amy be able to obtain recovery for the full amount of her pecuniary damages resulting from the production, distribution and possession of those images, Amy's and other victims' restitution claims must fail completely due to lack of proof of actual causation of any specific injury or loss by any individual possessor or distributor of those images, as required by the statute. He claimed that “[n]o one suggests Paroline’s crime actually caused Amy to suffer millions of dollars in losses,”<sup>39</sup> and he noted that it would be impossible for Amy to prove that Paroline’s offense was a cause of any distinct part of her losses: “Amy’s injury is indivisible, which means that Paroline’s particular share of her losses is unknowable.”<sup>40</sup>

Contrary to the Chief Justice’s assertion, Amy argued vigorously and the Government argued less vigorously and even inconsistently, given its preference for proportionate rather than full individual liability, that Paroline’s crime was a cause of (contributed to) all of Amy’s claimed losses.<sup>41</sup> What they did not argue or suggest was that Paroline’s crime was the sole cause of those losses or was by itself sufficient to produce them, which is what the Chief Justice apparently would require. Noting that in a prior decision, *Hughey v. United States*,<sup>42</sup> the Court had “interpreted virtually identical language, in the predecessor statute to section 3664, to require ‘restitution to be tied to the loss caused by the offense of conviction,’” the Chief Justice rephrased this as supposedly insisting that “restitution may not be imposed for losses caused by any other crime or any other defendant,”<sup>43</sup> but rather requires “proof of the harm caused *solely* by the defendant’s particular offense.”<sup>44</sup> Read literally, this would mean that a defendant could not be held liable for injuries that *were caused* by the offense for which he was convicted if they were *also*

38. *Id.* at 450; *see id.* at 463, 467–68 (Roberts, C.J., dissenting); *id.* at 474 (Sotomayor, J. dissenting).

39. *Id.* at 466 (Roberts, C.J., dissenting); *see id.* at 467 n.2 (stating that imposing liability for all of Amy’s losses “would hold Paroline liable for losses that he certainly *did not cause*, without any right to seek contribution from others who harmed Amy”) (emphasis in original).

40. *Id.* at 468 (Roberts, C.J., dissenting).

41. Brief for the United States at 19–27, 43–44 n.17, 47, *Paroline v. United States*, 572 U.S. 434 (2014) (No. 12-8561); Amy’s Merits Brief, *supra* note 36, at 42–43; Supplemental Brief for the United States, *Paroline v. United States*, 572 U.S. 434 (2014) (No. 12-8561); Respondent Amy’s Supplemental Brief after Argument at 1, *Paroline v. United States*, 572 U.S. 434 (2014) (No. 12-8561); Transcript of Oral Argument, *supra* note 36, at 18–22, 34–36, 41–45, 53.

42. 495 U.S. 411 (1990).

43. *Paroline*, 572 U.S. at 465–66 (Roberts, C.J., dissenting) (citing *Hughey*, 495 U.S. at 418) (emphasis in original).

44. *Paroline*, 572 U.S. at 470 (emphasis added).

caused by someone else, even if the defendant's offense was a but-for and/or independently sufficient cause.<sup>45</sup>

As Justice Sotomayor pointed out in her dissenting opinion,<sup>46</sup> this is a misrepresentation of what *Hughey* stated that also ignores the very different situation in *Hughey*, in which the Government tried to hold the defendant liable for losses caused by conduct of the defendant that was not part of the offense for which he was charged and convicted.<sup>47</sup> It is quite different, and contrary to several explicit provisions in §§ 2259 and 3664 that assume causation by multiple different persons, to state, as the Chief Justice does, that a defendant cannot be held liable under those provisions unless his offense was the sole cause of the victim's losses. As we explain below,<sup>48</sup> no condition is ever the sole cause of, or sufficient by itself to produce, anything, but rather must be conjoined with many other conditions to produce any event or state of affairs.

Amy and the Government relied upon—but failed to adequately distinguish—two broader actual causation tests, which Chief Justice Roberts did not describe or discuss but rather merely stated were “borrowed from tort law” and immediately dismissed, noting the majority's description of them as a “legal fiction.”<sup>49</sup> He further argued:

[E]ven if we apply this “legal fiction,” . . . and assume, for purposes of argument, that Paroline's crime contributed something to Amy's total losses, that suffices only to establish causation in fact. It is not sufficient to award restitution under the statute, which requires a further determination of the *amount* that Paroline must pay. He must pay “the full amount of the victim's losses,” yes, but “as determined by” section 3664—that is, the full amount of the losses *he* caused.<sup>50</sup>

As Justice Sotomayor stated,<sup>51</sup> this argument is a non sequitur based on a shift in the course of the argument from the broader causation theories to the narrower but-for (or independently sufficient) condition tests. If it can be established using one of the broader theories that the defendant's offense was a cause in fact of all of the victim's losses, then it logically follows that he was a cause of the full amount of the victim's losses.

The Court majority noted that “courts have departed from the but-for standard where circumstances warrant, especially when the combined conduct of multiple wrongdoers produces a bad outcome” and “there is ‘textual or contextual’ reason” for employing a different standard.<sup>52</sup> As the Court stated, the most common

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45. The Court majority made a similar argument. See *infra* text accompanying notes 77–80.

46. *Paroline*, 572 U.S. at 477.

47. *Hughey*, 495 U.S. at 413, 418.

48. See *infra* text accompanying notes 63–72.

49. *Paroline*, 572 U.S. at 467 (Roberts, C.J., dissenting).

50. *Id.* (citations omitted) (emphasis in original).

51. *Id.* at 478 n.2.

52. *Id.* at 451, 458 (quoting *Burrage v. United States*, 571 U.S. 204, 213 (2014)).

explicitly recognized exception is “where ‘multiple sufficient causes independently . . . produce a result’”<sup>53</sup>—e.g., two or more fires, each of which was “independently sufficient” (that is, sufficient independent of the other fires but in conjunction with other required conditions, such as the presence of oxygen and a certain wind direction) for the destruction of the plaintiff’s property. In such situations, neither independently sufficient condition would be treated as a cause under the but-for test. However, as the Court noted and the parties all agreed, the independently sufficient condition exception also would not apply in *Paroline*, since it is very unlikely that, if Paroline (or anyone else) had been the only viewer of the images of her abuse, Amy would have suffered the severe psychological harm that she actually suffers as a result of her knowledge of the many thousands of such viewings.<sup>54</sup>

The Court acknowledged the use of other causal standards when neither the but-for test nor the independently sufficient condition test is satisfied, but causation nevertheless clearly exists:

As the authorities the Government and the victim cite show, the availability of alternative causal standards where circumstances warrant is, no less than the but-for test itself as a default, part of the background legal tradition against which Congress has legislated. It would be unacceptable to adopt a causal standard so strict that it would undermine congressional intent where neither the plain text of the statute nor legal tradition demands such an approach.<sup>55</sup>

The Court considered two “less demanding causation tests endorsed by authorities on tort law” that were relied upon by Amy and the Government.<sup>56</sup> The first test is the aggregate but-for test, which has its foundation in and continues to receive primary support from criminal law doctrine and cases.<sup>57</sup> It was inserted by others into the posthumous fifth edition of William Prosser’s treatise on tort law, as a substitute for the question-begging “substantial factor” formula that Prosser had championed, and its description in this edition was relied upon by Amy and the Government and quoted by the Court:

When the conduct of two or more actors is so related to an event that their combined conduct, viewed as a whole, is a but-for cause of the event, and application of the but-for rule to them individually would absolve all of them, the conduct of each is a cause in fact of the event.<sup>58</sup>

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53. *Id.* at 451 (quoting *Burrage*, 571 U.S. at 214).

54. *Paroline*, 572 U.S. at 450.

55. *Id.* at 458 (citations omitted).

56. *Id.* at 451.

57. *See, e.g.*, MODEL PENAL CODE AND COMMENTARIES § 2.03, cmt. 2 at 258–59 (AM. LAW INST., revised ed., 1985) (originally published 1962); ROLLIN M. PERKINS, CRIMINAL LAW 689 (2d ed. 1969); Carl-Friedrich Stuckenberg, *Causation*, in THE OXFORD HANDBOOK OF CRIMINAL LAW 468, 477 (Mars D. Dubber & Tatjana Hörnle, eds., 2014).

58. *Paroline*, 572 U.S. at 451, (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 41, at 268 (5th ed., 1984)); Brief for the United States in *Paroline*, *supra* note 41, at 21–22; Amy’s

This aggregate but-for test is rarely mentioned by other authorities on tort law, and when mentioned it generally has been rejected due to its inability to distinguish duplicative causes from preempted conditions (since it will treat both the preemptive cause and the non-causal preempted condition as causes) or to exclude causally irrelevant conditions (which can simply be added to an aggregate set containing two or more independently sufficient conditions).<sup>59</sup> The same deficiencies apply to the “independently sufficient condition” test as usually stated.<sup>60</sup> Much worse is the question-begging “substantial factor” or “material contribution” criterion, which circularly references but does not define what constitutes a “factor” or “contribution” and then adds an improperly restrictive, undefined and ambiguous “substantial” or “material” qualifier. After many decades of its unanalyzed and unexplained use by the courts, generated by William Prosser’s advocacy of such use in his highly influential Torts treatises and its inclusion in the first and second *Restatements of Torts*, it has recently been strongly criticized and rejected in the *Restatement Third*.<sup>61</sup>

The second criterion mentioned by the Court, which requires that the condition at issue be part of the complete instantiation of an abstract set of conditions that is minimally sufficient for the occurrence of the consequence as specified by a causal generalization based on the laws of nature, is generally referred to as the “NESS” (necessary element of a sufficient set) criterion. It has been accepted by most tort law scholars, including the American Law Institute in the *Restatement Third*,<sup>62</sup> but so far only by some criminal law scholars and courts, due primarily to less

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Merits Brief, *supra* note 36, at 42; Transcript of Oral Argument in *Paroline*, *supra* note 36, at 15–21 (Government’s argument).

59. Wright & Puppe, *supra* note 35, at 477–78. Other proposed but also deficient modifications of the but-for test are discussed and criticized in *id.* at 474–79.

60. *Id.* at 479–80.

61. *Id.* at 463–64; see RESTATEMENT THIRD: PHYSICAL AND EMOTIONAL HARM, *supra* note 35, § 26 cmt. j; Richard W. Wright, *Causation in Tort Law*, 73 CALIF. L. REV. 1735, 1781–84 (1985).

62. RESTATEMENT THIRD: PHYSICAL AND EMOTIONAL HARM, *supra* note 35, § 26 states the necessary condition (“but-for”) criterion for a condition to be an actual cause. Section 27, titled “Multiple Sufficient Causes,” states: “If multiple acts occur, each of which under § 26 alone would have been a factual cause of the physical harm at the same time in the absence of the other act(s), each act is regarded as a factual cause of the harm.” Section 27 was meant to encapsulate the NESS criterion, which is discussed and employed in *id.* § 26 cmts. c, d, i, k; § 27 cmts. a, b, e, f, g, h, i, and related reporters’ notes. Instead it states an ambiguous modified necessity criterion (at what “same time”?) that would treat many preempted conditions as causes and fail to identify many duplicative causation situations. See Wright & Puppe, *supra* note 35, at 475–77. The *Restatement Third* attempts to paper over some of these defects in comments that limit section 27 to duplicative causation situations, without providing any criteria for distinguishing the two types of situations, and that refer preemptive causation situations to supposed resolution by section 26’s “but-for” criterion, which, however, cannot properly resolve such situations. See RESTATEMENT THIRD: PHYSICAL AND EMOTIONAL HARM § 26 cmt. k, § 27 cmts. e and h. The Dobbs hornbook erroneously interprets the *Restatement Third*’s “multiple sufficient causal sets” analysis, which is based on the NESS criterion, as an aggregate but-for test. DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, *HORNBOOK ON TORTS* 324 (2d ed. 2016).

familiarity with it.<sup>63</sup> It was introduced to the Supreme Court for the first time, unclearly, during its October 2013 Term by the Government's brief in *Burrage*<sup>64</sup> and Amy's and (especially unclearly) the Government's briefs and oral arguments in *Paroline*.<sup>65</sup>

The NESS criterion is very different from the aggregate but-for test in its form and its results, but it unfortunately was treated as a similar test by Amy,<sup>66</sup> the Government,<sup>67</sup> the Court<sup>68</sup> and the dissenting Justices,<sup>69</sup> even though it insists upon proof of individual causation by the specific defendant rather than causation by some aggregate group of defendants that includes the specific defendant. The Court, referring to its description and use in the comments to the *Restatement Third*, loosely described it as follows:

The Restatement adopts a similar exception for “[m]ultiple sufficient causal sets.” This is where a wrongdoer’s conduct, though alone “insufficient . . . to cause the plaintiff’s harm,” is, “when combined with conduct by other persons,” “more than sufficient to cause the harm.” The Restatement offers as an example a case in which three people independently but simultaneously lean on a car, creating enough combined force to roll it off a cliff. Even if each exerted too little force to move the car, and the force exerted by any two was sufficient to move the car, each individual is a factual cause of the car’s destruction.<sup>70</sup>

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63. Wright & Puppe, *supra* note 35, at 488–89.

64. Brief for the United States at 26 n.9, *Burrage v. United States*, 571 U.S. 204 (2014) (No. 12-7515). *Burrage* involved a causal situation similar to that in *Paroline*. The defendant supplied the major portion of a drug mixture that was ingested by the victim and likely was necessary and perhaps even independently sufficient to cause the victim’s death, but this could not be proven beyond a reasonable doubt. Recognizing, apparently for the first time, that situations exist in which a condition contributed to a result even though it was not (proven to be) necessary or independently sufficient, the Court nevertheless rejected the “substantial factor” and “contribution” rubrics used by many state courts in such situations as lacking the precision necessary for a criminal conviction and stated that proof of causation generally requires satisfaction of the “but-for” test, with a possible exception for independently sufficient conditions. See Eric A. Johnson, *Cause-in-Fact after Burrage v. United States*, 68 FLA. L. REV. 1728, 1728 (2016). There was no mention of the NESS criterion in the Court’s opinion or the oral argument.

65. Brief for the United States in *Paroline*, *supra* note 41, at 20–24, 22 n.9; Supplemental Brief for the United States in *Paroline*, *supra* note 41, at 4–5; Amy’s Merits Brief, *supra* note 36, at 43; Amy’s Supplemental Brief in *Paroline*, *supra* note 41, at 2–8; Transcript of Oral Argument in *Paroline*, *supra* note 36, at 34–36, 41–44 (Amy’s argument).

66. Amy’s Merits Brief, *supra* note 36, at 42–43.

67. Brief for the United States in *Paroline*, *supra* note 41, at 19–24, 24 n.9; Supplemental Brief for the United States in *Paroline*, *supra* note 41, at 4–5; see Brief for the United States in *Burrage*, *supra* note 64, at 26 n.9.

68. *Paroline*, 572 U.S. at 450.

69. *Id.* at 466 (Roberts, C.J., dissenting); *id.* at 476–76 (Sotomayor, J., dissenting); see *supra* text accompanying note 49; see *infra* text accompanying note 84.

70. *Paroline*, 572 U.S. at 451–52 (quoting RESTATEMENT THIRD: PHYSICAL AND EMOTIONAL HARM, *supra* note 35, § 27, cmt. f, at 380–81).



In the hypothetical referenced by the Court, no individual's leaning was either a necessary (but-for) condition or an independently sufficient condition for the car's rolling off the cliff. However, to deny that any individual's leaning was a cause would be irrational, leaving the car's rolling off the cliff as an unexplained miracle. The NESS criterion is satisfied: each person's leaning on the car was part of the instantiation of the at least minimal amount of force needed to move the car when all the other conditions making up the abstract minimally sufficient set of conditions (such as the specific slope, the lack of a guard rail, etc.) also are instantiated.<sup>71</sup> The but-for and independently sufficient condition tests are mere corollaries of the NESS criterion, which work only in some situations and depend for their proper application on the analysis specified by the NESS criterion.<sup>72</sup>

Unfortunately, the Court did not clearly distinguish the aggregate but-for test from the NESS criterion that is employed in the *Restatement Third*. If it had, it should have noted, as Paroline did,<sup>73</sup> that the aggregate but-for test was not satisfied in *Paroline* since one of the conditions for its application, that "application of the but-for rule to [the offenders] individually would absolve all of them," would not be satisfied. The conduct of the initial producer and distributor, at least, of the pornographic images generally will be a but-for cause. On the other hand, the NESS criterion was satisfied, as the Court recognized:

The cause of the victim's general losses is the trade in her images. And Paroline is part of that cause, for he is one of those who viewed her images. While it is not possible to identify a discrete, readily definable incremental loss that he caused, it is indisputable that he was a part of the overall phenomenon that caused her general losses.<sup>74</sup>

However, noting that if the actual causation requirement were satisfied, the "proximate" causation requirement would be easily satisfied,<sup>75</sup> the Court rejected "the strict logic" of the NESS criterion, according to which "each possessor of her images is part of a causal set sufficient to produce her ongoing trauma, so each possessor should be treated as a cause in fact of all the trauma

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71. The NESS criterion as initially elaborated required that a condition be necessary for the sufficiency of some set of conditions in the actual situation. It subsequently was revised to require only that a condition be part of the complete instantiation in a specific situation of a set of conditions that, in the abstract according to the laws of nature, is minimally sufficient for the occurrence of the relevant consequence. The NESS minimal sufficiency criterion is applied to the relevant causal laws, rather than the specific situation. Wright & Puppe, *supra* note 35, at 483–87.

72. *Id.* at 483–84.

73. Petitioner's Supplemental Brief after Argument, at 3–4, *Paroline v. United States*, 572 U.S. 434 (2014) (No 12-8561).

74. *Paroline*, 572 U.S. at 456; *see infra* text at note 98.

75. *Id.* at 452; *see infra* text at notes 106–12.

and all the attendant losses incurred as a result of the entire ongoing traffic in her images.”<sup>76</sup> It was unwilling to accept “the striking outcome of this reasoning—that each possessor of the victim’s images would bear the consequences of the acts of the many thousands who possessed those images.”<sup>77</sup>

In this statement, and even more so in other statements,<sup>78</sup> the Court seemed to assume, as Chief Justice Roberts and Justices Scalia and Thomas clearly did,<sup>79</sup> that holding one of the multiple contributors to an injury liable for all of the losses resulting from that injury results in holding that one liable for losses that were caused by others but not by that one. As Justice Sotomayor explained,<sup>80</sup> this is not true. A defendant in tort or criminal law is only held liable for injuries and consequent losses for which he was an actual and “proximate” cause. If there are other wrongful, proximate causes of the same injury and losses, this may provide an equitable basis in tort law for contribution among the multiple wrongful, proximate causes, and perhaps even for some form of proportionate initial allocation of liability among them based on relative contribution and/or culpability, but it does not negate the defendant’s being one of the causes of the entire injury and all the consequent losses. As has occurred often in the debates over joint and several liability in tort law,<sup>81</sup> the Court failed to distinguish the causation issue from the distinct legal responsibility and allocation of liability issues (which we discuss in part III below).

Having failed to distinguish the actual causation issue from the legal responsibility (“proximate” causation) and allocation of liability issues, and unwilling to hold each possessor of the images of a victim’s abuse liable for the entirety of her pecuniary losses caused by such possession, the Court described the broader causation tests as “legal fictions.” Yet it nevertheless relied upon those tests, primarily the NESS test, to justify ordering restitution for a portion of her losses:<sup>82</sup>

These alternative causation tests are a kind of legal fiction or construct. . . . Nonetheless, . . . [i]t 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. . . . Those are the policies that underlie the various aggregate causation tests the victim and the Government cite, and they are sound principles.<sup>83</sup>

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76. *Id.* at 453; *see also* the Court’s statements regarding market demand causation at 438.

77. *Id.* at 453.

78. *See id.* at 454, 461.

79. *See supra* text accompanying notes 42–45.

80. *Paroline*, 572 U.S. at 480–81 (Sotomayor, J., dissenting).

81. *See* Richard W. Wright, *The Logic and Fairness of Joint and Several Liability*, 23 MEM. ST. U. L. REV. 45, 51–62 (1992).

82. *See supra* text accompanying note 84.

83. *Paroline*, 572 U.S. at 452.

Once again, the Court failed to distinguish the actual causation issue from the legal responsibility and allocation of liability issues.

Justice Sotomayor concurred with much of the Court's reasoning, but she dissented with respect to its treatment of the actual causation and allocation of liability issues. Unfortunately, her discussion of actual causation focused on the aggregate but-for test, which as we discussed above is flawed and not actually satisfied in the child pornography context, rather than the NESS test, which she (incorrectly) stated is similar.<sup>84</sup> She noted that the failure to recognize as causes conditions that were neither necessary nor independently sufficient would prevent liability not only in cases like *Paroline* involving many offenders, but also, contrary to the assumptions of the other Justices, often in cases involving only a few (even only two) offenders. The Court and Chief Justice Roberts attempted to distinguish the "gang assault" situations posed by Amy's lawyers on the ground that the gang members "acted together, with a common plan, each one aiding and abetting the others in inflicting harm."<sup>85</sup> This description encompasses only one of the situations posed by Amy's lawyers, not the second in which unrelated attackers independently raped the victim on successive nights.<sup>86</sup> Moreover, as Justice Sotomayor noted,<sup>87</sup> in either situation the same problem exists as in *Paroline* of identifying individual causes of the victim's psychological injury and consequent pecuniary losses, which, as Chief Justice Roberts noted, are "indivisible, which means that [each offender's] particular share of her losses is unknowable."<sup>88</sup> They are not merely unknowable, but rather nonexistent as distinct shares.

As we discuss in section II.B below, there is at any moment only a single psychological state to which the conduct of each offender contributed, so it would make no sense to conclude that none of the possessors was a cause of that psychological state. The Court recognized this, while labeling such recognition as a legal fiction.<sup>89</sup>

The aggregate but-for test is a legal fiction, and a bad one, but the NESS criterion is not. Indeed, to deny actual causal status to a condition that satisfies the NESS criterion is the legal fiction, adopted for policy reasons by the Court in *Burrage* and *Paroline* to limit liability. This demonstrates both the Justices' lack of understanding of actual causation and their failure to distinguish the actual causation issue from the legal responsibility and allocation of liability issues.

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84. *Id.* at 472–74 (Sotomayor, J., dissenting).

85. *Id.* at 466 n.3 (Roberts, C.J., dissenting); *see id.* at 452–454.

86. Amy's Merits Brief, *supra* note 36, at 55.

87. *Paroline*, 572 U.S. at 478 n.3 (Sotomayor, J., dissenting).

88. *Id.* at 468 (Roberts, C.J., dissenting).

89. *See supra* text accompanying notes 74–83.

*B. The Caused Injuries: “Divisible” versus “Indivisible”*

Much confusion on this issue could and should be avoided by replacing the usual legal term “divisible” by “separable.” The latter term indicates much more clearly the relevant issue: whether some injury and its related losses can be separated, at least theoretically if not practically, into distinct (rather than mathematically divisible) injuries and losses caused by the same or different individuals, or instead was a single injury, with related losses, which was caused by multiple contributors. In deference to the usual usage, we will continue to refer to divisibility, but readers should keep in mind that this requires separability into distinct injuries or losses. A different issue, with which the separability issue is often confused, is the normative issue of how liability should be allocated among multiple contributors to the same theoretically or practically indivisible injury. We address this normative issue in Part III below.

Child pornography and sex trafficking produce several types of injury, each of which is compensable under a relevant tort action discussed in Part III.A below. One type is the dignitary (bodily autonomy) injury inherent in each instance of physical sexual abuse or wrongful deprivation of freedom, each of which is a distinct dignitary injury. For victims of sex trafficking, the entire experience of being forced into (sexual) labor, including curtailed autonomy in between the sexual acts they are forced to perform, involves a severe dignitary injury which cannot be captured by summing up the number of sexual encounters in which they participate. There also may be a distinct physical injury—physical trauma, venereal disease, gynecological problem, etc.—and related physical pain—resulting from one or more specific instances of physical sexual abuse.<sup>90</sup>

A third type of injury is the emotional distress caused by such dignitary and physical injuries, which may sometimes be separable into distress suffered at different times as a result of only one or some of the distinct dignitary and physical injuries, but usually will be a singular emotional state caused by all of them, or at least all of those that occurred prior to the relevant period of emotional distress. These physical and emotional injuries have a pecuniary aspect manifested in, e.g., reduced earning capacity, costs of medical care, and costs of psychological counselling as well as a non-pecuniary aspect manifested in, e.g., physical pain, mental suffering, disability and loss of enjoyment of life.

The Court majority in *Paroline* at one point stated, without elaboration and contrary to some of its other statements, that it was debatable whether Amy’s claimed losses are indivisible.<sup>91</sup> As the dissenting Justices all acknowledged,<sup>92</sup> Amy’s claimed losses, which under the statutory restitution scheme are limited to pecuniary losses caused by the particular defendant’s criminal offense, are theoretically

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90. See STPLR, *supra* note 10, at 175.

91. *Paroline*, 572 U.S. at 461.

92. *Id.* at 468 (Roberts, C.J., dissenting); *id.* at 472–73, 478–79 (Sotomayor, J., dissenting); *supra* text accompanying note 40.

as well as practically indivisible. Although the different elements of pecuniary loss that she claimed—primarily the costs of psychological counseling and lost income due to her inability to work in public environments—are separately calculable, they are all the result of her traumatic psychological state, which from moment to moment is a single indivisible emotional state<sup>93</sup> caused by her initial abuse (without which there would be no images of her abuse) and by her knowledge of the subsequent distribution and viewings of the images of her abuse, which not only publicizes but also constantly re-enacts in her mind the initial abuse.<sup>94</sup>

In both contexts—child pornography and sex trafficking—the emotional injury is indivisible since it cannot be divided at any specific point in time into distinct components. The sex trafficking victim’s emotional injury at any given moment is not the sum of distinct “quantum” of emotional trauma caused by each of the specific sexual encounters to which she did not consent. Rather, it is an indivisible emotional state caused by all of the prior and expected future infringements of her autonomy, dignity, bodily integrity and mental health. Similarly, in child pornography, there is no way, theoretically or practically, to separate the victim’s emotional state at any particular moment, or its economic consequences, into distinct components based on the number of images traded, the length of the trade or the number of viewers.

In England, harmful effects, such as asbestosis, that increase in severity with an increase in exposure to contributing conditions (subject to a possible threshold before any harm occurs and a possible plateau once the harm reaches a fixed maximum level) are described as “cumulative” and treated as “divisible,” with additional exposures supposedly being a cause of (and thus potentially liable for) only the marginal increase in severity given the added exposure.<sup>95</sup> Applying this analysis in the child pornography and sex trafficking context would result in little or no liability for later participants in the victim’s (direct or indirect) sexual abuse, as compared to earlier participants engaged in identical conduct.

The English doctrine is based on a misunderstanding of the causal situation. From moment to moment, each individual who has, up to or including that moment, participated in the victim’s sexual abuse is a NESS contributor to the entirety of her indivisible emotional state at that moment, rather than not having contributed at all to it or only to some distinct emotional state equivalent in size to the marginal increase, if any, in the severity of her emotional harm given that

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93. See SARAH GREEN, CAUSATION IN NEGLIGENCE 95–109 (2015); AM. PROF’L SOC’Y ON THE ABUSE OF CHILD., *APSAC Statement on the Harm to Child Pornography Victims*, Oct. 18, 2013 (“For the victims, the sexual abuse of the child, the memorialization of that abuse which becomes child pornography, and its subsequent distribution and viewing become psychologically intertwined and each compound the harm suffered by the child-victim.”).

94. See *Paroline*, 572 U.S. at 440 (“The harms caused by child pornography, however, are still more extensive because child pornography is ‘a permanent record’ of the depicted child’s abuse, and ‘the harm to the child is exacerbated by [its] circulation.’”) (quoting *New York v. Ferber*, 458 U.S. 747, 759 (1982)).

95. *Holtby v Brigham Cowan (Hull) Ltd.*, [2000] 3 ALL E.R. 421 (CA); Jane Stapleton & Sandy Steel, *Causes and Contributions*, 132 L. Q. REV. 363, 364 (2016).

individual's contribution compared to all prior contributions. If the contributions are all simultaneous, there clearly is no way to set off any one as a cause only of some non-existent distinct, marginal-increase emotional state. As a New York court stated in *Warren v. Parkhurst*,<sup>96</sup> a case in which twenty-six factories separately discharged "sewage and other foul matters" into a stream, each of whose discharge by itself was "merely nominal" and would not have caused any injury, but which when combined caused a stench that destroyed the usefulness of the plaintiff's property, "No one defendant [solely or as a but-for or independently sufficient cause] caused that injury. All of the defendants did cause it [as NESS contributors]."<sup>97</sup>

Although Amy's psychological trauma at any given moment, and the similar psychological trauma suffered by victims of trafficking at any given moment, is indivisible, it might be true that, theoretically although not practically, her trauma is divisible temporally, from moment to moment. At least for some initial period, it most likely increased in severity as Amy became aware of the continually expanding viewing of the images of her abuse and as the victims of trafficking suffered further confinement and sexual assault. Yet each individual offender contributed, at least, to the victim's indivisible psychological trauma at every moment after the time of the offender's offense, whether or not the victim was aware of the specific identity of the offender. As the Court acknowledged, each distributor and possessor, as well as the initial abuser, contributes to every moment of the victim's ongoing psychological trauma, regardless of whether the victim is aware of the identity of the initial abuser or subsequent distributors and possessors:

It is common ground that the victim suffers continuing and grievous harm as a result of her knowledge that a large, indeterminate number of individuals have viewed and will in the future view images of the sexual abuse that she endured. . . . The unlawful conduct of everyone who reproduces, distributes, or possesses the images of the victim's abuse—including Paroline—plays a part in sustaining and aggravating this tragedy.<sup>98</sup>

Amy only sought damages for the pecuniary expenses incurred as a result of her psychological trauma after the time of Paroline's offense. However, the Court's statement provides an argument for an offender to be found to be a cause of (and thus potentially liable for) the damages that she incurred prior to the time of his offense. The Court stated that Amy's emotional distress and related pecuniary costs are "a result of her knowledge that a large, indeterminate number of individuals have viewed *and will in the future* view images of the sexual abuse that she endured."<sup>99</sup> Both those who have already distributed and viewed the images of her

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96. 92 N.Y.S. 725 (N.Y. Sup. Ct. 1904), *aff'd*, 93 N.Y.S. 1009 (N.Y. App. Div. 1905), *aff'd*, 78 N.E. 579 (N.Y. 1906).

97. *Id.* at 725–26, 728.

98. *Paroline*, 572 U.S. at 457.

99. *Id.* (emphasis added).



abuse and those who will do so in the future are part of this indeterminate group, whether or not Amy is aware of their specific identity. The determination of their specific identity is only necessary for their criminal conviction and inclusion in a restitution order. Although Amy did not seek to hold Paroline liable for the pecuniary costs incurred as a consequence of her emotional distress prior to the time of his offense, under this causal analysis she would be able to treat Paroline as a contributor to her relevant past as well as future damages.<sup>100</sup>

An even broader causal analysis is suggested by another of the Court's statements. Noting Congressional statements on the need for broad and powerful legislative action to combat child pornography, the Court stated: "The demand for child pornography harms children in part because it drives production, which involves child abuse."<sup>101</sup> The market demand theory of causation suggested by this observation, which was advanced and defended by Keren-Paz a year earlier in the more complicated context of sex trafficking,<sup>102</sup> would treat any distributor or possessor of the images of Amy's abuse as a cause of (and thus potentially legally responsible for) the initial production of those images and the related physical abuse as well as all of the subsequent distribution and possession of those images by others. Indeed, under this analysis, causation of (and thus potential legal responsibility for) all of Amy's abuse-related injuries and losses could be extended even further to any producer, distributor or possessor of child pornography, whether or not he or she produced, distributed or possessed images of Amy's abuse.

We do not advance or rely upon Keren-Paz's innovative argument in support of the demand theory of causation and liability in this article. Keren-Paz leaves for another day discussion of whether the Court's observation supports liability of (a) viewers of the images of a plaintiff's abuse for the initial abuse and (b) viewers of the images of other victims' abuse for the plaintiff's injuries due to his/her initial abuse and the subsequent circulation and viewing of the images of that abuse, and whether the demand-based theory he has defended in the context of sex trafficking is compatible with the Court's observations and holding in *Paroline*. While being sympathetic to the causation argument, Wright is not willing at present to support extended legal responsibility and ultimate liability, as suggested above, to indirect causes in the child pornography or sex trafficking contexts, especially the most indirect alleged causes.

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100. For similar causal and liability analyses in the context of victims of trafficking see STPLR, *supra* note 10, at 207–09, 223–241.

101. *Paroline*, 572 U.S. at 439–40; see also Transcript of Oral Argument in *Paroline*, *supra* note 36, at 44–45 (Justice Breyer suggesting that a viewer of images of a victim other than Amy "contributed to her [injuries and losses], too, because it created a market for the entire situation.").

102. See STPLR, *supra* note 10, at ch. 6 (duty, especially at 160–62), ch. 7 (breach, especially at 174) and ch. 8 (causation and attribution).

### III. LIABILITY: DIRECTLY CAUSED INJURIES

Beyond the actual causation and injury issues, tort law addresses two distinct normative questions: whether a defendant should be legally responsible for any or all of the injuries and related harms that were actually caused by his tortious conduct and, if more than one person is legally responsible for some injury, the appropriate allocation of liability among them. We address these two issues in subparts A and B, respectively, of this Part for directly caused injuries, which we consider to be injuries that were caused by a defendant's knowing wrongful interaction with a specific victim or with images of the victim's sexual abuse.

#### A. *Legal Responsibility*

A defendant's legal responsibility for an injury suffered by the plaintiff generally requires (1) that the injury be of a legally recognized type, (2) wrongful (tortious) conduct by the defendant, (3) actual causation of the injury by the wrongful aspect of the defendant's conduct, (4) the absence of any limitation on the scope of the defendant's legal responsibility (so-called "proximate" or "legal" causation), and (5) the absence of any complete defense.

The various types of injury created by child pornography and sex trafficking are discussed in Part II.B above. The wrongful nature of the defendants' conduct and the absence of any defense are clear for the knowing direct participants in these activities. The initial abuse of a victim of child pornography or sex trafficking and the subsequent trafficking and further abuse by knowing clients of that victim are actionable by each such victim as an assault, battery and/or false imprisonment whether or not there is any physical injury in addition to the basic dignitary injury, and likely also as an intentional infliction of severe emotional distress. Each instance of distribution or viewing of the images of child sexual abuse is an invasion of privacy—as Justice Sotomayor noted<sup>103</sup>—and perhaps a tortious (intentional, reckless or negligent) infliction of emotional distress.

The mandatory restitution specified in 18 U.S.C. §§ 1593 and 2259 only includes recovery for pecuniary losses resulting from the convicted defendant's knowing participation in child pornography and/or sex trafficking, such as the costs of medical or psychological treatment, lost wages, and litigation expenses, and, for sex trafficking, disgorgement of any profits attributable to the offense. Recovery of non-pecuniary damages for emotional distress and/or punitive damages would have to be sought under relevant tort actions or, perhaps, the statutory civil action provided in 18 U.S.C. § 2255.<sup>104</sup>

The actual causation requirement as it applies to the injuries caused to a specific victim of child pornography by the various participants in the production, distribution and possession of the images of her abuse is discussed extensively in Part II.A

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103. *Paroline*, 572 U.S. at 483–84 (Sotomayor, J., dissenting).

104. See *supra* text accompanying note 23.

above. The causal analysis is the same for the similar injuries caused to a VoT by the similar categories of knowing participants in her sex trafficking (traffickers, including “recruiters,” and knowing clients).<sup>105</sup>

Proof of not only actual causation but also so-called “proximate causation” is required for the losses for which recovery is allowed under §§ 1593 and 2259 and for ordinary tort liability.<sup>106</sup> As the Court explained and all the Justices agreed in *Paroline*, assuming actual causation could be proved, the usual “proximate causation” (scope of liability) requirements, which require that the injuries and losses for which redress is sought result from the realization of a foreseeable risk, without any superseding causes, and that it would not have occurred in the absence of wrongful conduct by anyone,<sup>107</sup> clearly were satisfied in that case and would generally be satisfied by every knowing participant in the exploitation by child pornography or sex trafficking of a specific victim with respect to the injuries and losses suffered by that victim.<sup>108</sup>

Although, as the Court noted in *Paroline*,<sup>109</sup> trivial contributions to over-determined harm generally are excused, they should be excused only if the defendant’s contribution by itself would have caused no or trivial harm, was not necessary for (a “but for” cause of) the relevant harm, and was trivial in comparison to the other *individual* contributions, rather than in comparison to the total contributions.<sup>110</sup> As the Court apparently recognized, since it upheld Paroline’s legal responsibility, Paroline’s contribution to Amy’s relevant harm was not trivial. As we discuss in Part III.B.3 below, Amy’s knowledge that even a single person had possession of and was viewing the images of her abuse would have caused her substantial emotional distress as well as being a distinct serious dignitary injury.<sup>111</sup> Treating Paroline’s contribution to her actual emotional distress as trivial by comparing it with the aggregate contributions by all viewers (knowledge of which caused her indivisible emotional distress) would nullify liability by all possessors and most distributors of child pornography and all clients of VoTs, contrary to Congress’s clear intent<sup>112</sup> and the Court’s reasoning and holding in *Paroline*.

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105. See STPLR, *supra* note 10, at 200–11.

106. See *supra* text accompanying notes 22 and 37.

107. See *infra* part III.B; Wright, *Legal Responsibility*, *supra* note 2.

108. *Paroline*, 572 U.S. at 449–50, 465–66 (Roberts, C.J., dissenting), *id.* at 473–74 (Sotomayor, J., dissenting).

109. *Id.* at 454 (citing RESTATEMENT (THIRD) OF TORTS: PHYSICAL AND EMOTIONAL HARM, *supra* note 35, § 36).

110. See Wright, *Legal Responsibility*, *supra* note 2, at 1450 n.84.

111. See *infra* text accompanying note 161.

112. Congress did provide an affirmative defense for a defendant who possessed fewer than three images of child pornography, who promptly and in good faith, and without retaining or allowing any person other than a law enforcement agency to access any image or copy thereof, took reasonable steps to destroy each such image or reported the matter to a law enforcement agency and afforded that agency access to each such image. 18 U.S.C. § 2252A(d) (2012).

## B. Allocation of Liability

### 1. Traditional Tort Law Allocation Principles

Under traditional tort law, multiple defendants acting in concert or independently whose actions combine to produce an indivisible injury are each held “jointly and severally” fully liable for the injury and its harmful consequences. The plaintiff cannot obtain more than full compensation, but she can obtain that full compensation from any one or several of the defendants, who can seek contribution from the other defendants based on their comparative responsibility. This remains the general rule in most civil and common law jurisdictions, but it has been legislatively replaced in many states in the United States, due to defense-funded “tort reform,” by a rule of proportionate several liability based on comparative responsibility in most or certain types of situations. However, joint and several liability remains the general or at least majority rule for defendants who acted in concert or whose tortious conduct was intentional and is often retained for environmental and toxic torts, which have a complex causal structure similar to that in the child pornography and sex trafficking cases.<sup>113</sup>

All of the participants in child pornography and all of the knowing participants in sex trafficking are intentional tortfeasors with respect to the particular victim of the child pornography or sex trafficking and arguably are acting in concert, as Justice Sotomayor argued in *Paroline*.<sup>114</sup> At the very least, they are independent contributors to the indivisible emotional injuries suffered by the victim. However, as with the underlying actual causation issue, there is little authority on the proper allocation of liability where the defendant’s contribution to an indivisible injury clearly was neither necessary nor independently sufficient.<sup>115</sup> The issue has arisen most often in nuisance cases. Some courts have imposed joint and several liability in these cases while others have treated the inseparable consequences as “divisible” based on relative contribution and imposed proportionate several liability.<sup>116</sup> For example, in *Northup v. Eakes*<sup>117</sup> the emission of oil by several defendants into the river caused a fire damaging the claimant’s property. The court held that “each

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113. See RESTATEMENT (THIRD) OF THE LAW OF TORTS: APPORTIONMENT OF LIABILITY §§ 12, 15 (AM. LAW INST. 2000) [hereinafter RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT]; Richard W. Wright, *Allocating Liability Among Multiple Responsible Causes: A Principled Defense of Joint and Several Liability for Actual Harm and Risk Exposure*, 21 U.C. DAVIS L. REV. 1141, 1168 (1988).

114. See *Paroline*, 572 U.S. at 482–83 (Sotomayor, J., dissenting). Each distributor and viewer of the images of a victim’s sexual abuse wrongfully and intentionally invades her privacy and dignity and intentionally or recklessly causes her severe emotional distress. For lack of space, we do not consider whether viewers of child pornography and clients knowingly purchasing commercial sex from VoTs ought to be considered as acting in concert, according to either the American or British authorities. The issue is complex, and we note that some literature has suggested that internet users reinforce each other’s behavior (therefore leaning towards a conclusion of action in concert). See, e.g., PHILIP JENKINS, BEYOND TOLERANCE: CHILD PORNOGRAPHY ON THE INTERNET 91, 94, 106–108 (2001).

115. STPLR, *supra* note 10, at 230–34.

116. See KEETON ET AL., *supra* note 58, § 52 at 345–46, 349, 351, 354–55.

117. 178 P. 266, 268 (Okla. 1918).

[contributor] is responsible for the entire result, even though his act or neglect alone might not have caused it.”<sup>118</sup> In *Burns v. Lamb*,<sup>119</sup> the flow of salt water from oil production operations by several different parties, including the defendant, damaged plaintiff’s adjacent land. Defendant was held liable for the entire damage. In *Warren v. Parkhurst*,<sup>120</sup> the facts of which and holding on causation we discussed above,<sup>121</sup> the court held each defendant fully legally responsible while supporting proportionate liability based on relative causal contribution, likely initially but perhaps only in terms of contribution claims among jointly and severally liable defendants:

All of the defendants may be enjoined, and, if the question of damages is urged, a reference may be had to determine what damage has been caused by each defendant. This power of a court of equity to grant exact justice and proper relief for or against each defendant relieves such an action of any possible hardship.<sup>122</sup>

In England it is also well established that liability for indivisible injury is joint and several, and *Baker v. Willoughby*<sup>123</sup> is widely taken to adopt joint and several liability for over-determined harm.<sup>124</sup> However, there is no direct English authority on the allocation of liability to (and indeed minimal authority on satisfaction of the actual causation requirement by) a defendant whose contribution was neither necessary nor independently sufficient.<sup>125</sup>

## 2. *The Criminal Restitution Complication*

Any ordered restitution to the victim of a defendant under the relevant federal criminal statutes in the United States, including Amy in *Paroline*, is formally part

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118. *Id.* at 266.

119. 312 S.W.2d 730, 732 (Tex. Civ. App. 1958).

120. 92 N.Y.S. 725 (N.Y. Sup. Ct. 1904), *aff’d*, 93 N.Y.S. 1009 (N.Y. App. Div. 1905), *aff’d*, 78 N.E. 579 (N.Y. 1906).

121. See *supra* text accompanying notes 96–97.

122. *Warren*, 92 N.Y.S. at 728.

123. [1970] AC 467.

124. ROBERT STEVENS, TORTS AND RIGHTS 138–41 (2007) is a notable exception based on his different interpretation of the facts.

125. See *Lambton v. Mellish*, [1894] 3 Ch. 163, 165–66 (Chitty, J.) (granting injunctions against two defendants whose organ noise together constituted a nuisance, on the ground that the noise of each was independently sufficient to create a nuisance or, alternatively, that each contributed to the total noise even if the noise created by one of them may have been neither necessary nor independently sufficient); *Thorpe v. Brumfitt*, [1873] 8 Ch. 650, 656 (L., J.J.) (granting injunction against multiple defendants whose combined actions obstructed a right-of-way: “The amount of obstruction caused by any one of them might not, if it stood alone, be sufficient to give any ground of complaint, though the amount caused by them all may be a serious injury.”); cf. *Williams v. Bermuda Hosp. Bd.* [2016] UKPC 4, at ¶¶ 26–49 (upholding findings of causation and full liability in a personal injury case without proof that the defendant’s tortious conduct was a necessary or independently sufficient condition but given proof that it “contributed” to an overall condition that was a but-for cause of the plaintiff’s injury).

of the offender's criminal sentence.<sup>126</sup> Consequently, an issue arose in *Paroline* that does not usually arise in civil law or other common law jurisdictions, which treat compensation for the private wrong to a criminal victim as a civil matter, even if, as in many civil law jurisdictions, the criminal courts are authorized to impose civil liability on the defendant in addition to criminal liability.<sup>127</sup> Countries other than the United States that have statutory victim compensation schemes separate them from the criminal process.<sup>128</sup>

To bolster its argument for proportionate rather than full liability for Paroline and other offenders, the Court adverted to Paroline's argument that imposing full liability would violate the Excessive Fines Clause in the U.S. Constitution.<sup>129</sup> While claiming that it would be "a major step" to hold Paroline liable for all of Amy's losses even in a civil tort action, the Court expressed special concern about doing so in a criminal action, stating that restitution ordered as part of a criminal sentence "serves purposes that differ from (though they overlap with) the purposes of tort law."<sup>130</sup> It argued that, although "the primary goal of restitution is remedial or compensatory, it also serves punitive purposes," primarily rehabilitation by "impressing on offenders that their conduct produces concrete and devastating harms for real, identifiable victims."<sup>131</sup> Given the assumed punitive purpose(s), requiring a single offender to pay all of the victim's losses, "with no legal or practical avenue for seeking contribution, . . . might raise questions under the Excessive Fines Clause of the Eighth Amendment [to the U.S. Constitution]."<sup>132</sup>

Our purpose in this section is not to argue that every person directly involved in a victim's mass sexual abuse should be fully liable for the victim's consequent injuries and losses. Indeed, we argue otherwise in section III.C.1 below. Our concern here is only to show that this conclusion has nothing to do with the Excessive Fines Clause or other constitutional limitations on criminal punishment, for three reasons. First, we believe it is clear that Congress's purpose in enacting the relevant restitution provisions was solely to provide full compensation to the individual victim, rather than serving additionally any penal purpose. Second, we believe that as long as the restitution order simply compensates the victim for her actual losses, without any additional extra-compensatory element added for penal

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126. See 18 U.S.C. § 2259(a) (2012).

127. Many tort claims in Israel by victims of sex trafficking have used the attached civil claim procedure following the defendant's criminal conviction. See STPLR, *supra* note 10, at 248; § 77 of the Courts Law (Consolidated Version) 1984. In Europe, to be compliant with the European Convention on Human Rights, courts, when imposing civil liability, must ensure that compensation for the private wrong does not impugn an acquittal in the criminal case. See Ringvold v. Norway, 2003–II Eur. Ct. H.R. 117; Y v. Norway, 2003–II Eur. Ct. H.R. 161.

128. See, e.g., BRITISH MINISTRY OF JUST., *THE CRIMINAL INJURIES COMPENSATION SCHEME 2012* 1, 8–9 (2012).

129. *Paroline v. United States*, 572 U.S. 434, 456 (2014).

130. *Id.* at 453 (citing *Kelly v. Robinson*, 479 U.S. 36, 49 n.10 (1986)).

131. *Id.* at 456.

132. *Id.* at 455.



purposes, it should not give rise to any constitutional or other issues regarding appropriate punishment, despite the possible deterrent and perhaps rehabilitative effects of the compensation order. Third, the Court's suggestion that the Excessive Fines Clause might be implicated is a major and unpersuasive stretch in light of its prior opinions and would have a disastrous effect on constitutional jurisprudence if taken seriously.

Analytically, and despite its inclusion in the federal criminal code and as part of the criminal sentence, the restitution order mandated in § 2259, as elaborated in § 3664, is structured and drafted solely with compensation of the individual victim in mind. The relevant provisions repeatedly stress that each restitution order must provide for full compensation of the victim, no more and no less, regardless of whether additional payments to the victim might serve any penal purpose.

The solely compensatory versus allegedly punitive nature of § 2259 restitution orders is especially evident when one considers that § 3664(j)(2) states that an offender's obligation under a restitution order "shall be reduced by any amount later recovered as compensatory damages for the same loss by the victim in (A) any Federal civil proceeding; and (B) any State civil proceeding, to the extent provided by the law of the State."<sup>133</sup> Read literally, this would include payments by anyone for the same loss, rather than only the specific offender. Even if it is meant to be limited to payments in a civil action by the specific offender, it undercuts any supposed penal purpose by replacing the penal sanction with a mere civil payment obligation carrying with it no necessary implication of criminally blameworthy conduct.

The argument for a supposed penal purpose for § 2259 restitution orders is further undermined by the fact that, once a victim is fully compensated, no further payments are due to the victim from any offender. Some equitable shifting of payment obligations among the offenders and others could and should occur under the provisions specified in § 3664(j),<sup>134</sup> but, as we discuss in Part III.B.3 below, the Court majority ignored those provisions. Instead, to have the supposed penal rehabilitation purpose extend to as many offenders as possible, the Court adopted proportionate liability based on the offender's relative causal role, which, as the Court recognized, if actually implemented would result in token or nominal liability for the many thousands of offenders like Paroline. The Court turned § 2259 on its head by claiming, despite Congress's insistence that each order of restitution encompass the full amount of the victim's losses,<sup>135</sup> that "Congress has not promised victims full and swift restitution at all costs" and that the Congressional purposes underlying § 2259 allegedly are better served by stretching restitution out into small amounts over decades "so that more [offenders] are made aware, through the

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133. 18 U.S.C. § 3664(j)(2) (2012).

134. See *supra* text accompanying notes 30–31.

135. See *supra* text accompanying notes 18–20.

concrete mechanism of restitution, of the impact of child pornography on victims.”<sup>136</sup> However, given the resulting nominal liability, there will be no rehabilitative (or deterrent) effect. The Court’s allocation-of-liability scheme will not serve any penal purpose, while being a complete abandonment of Congress’s admitted primary and actual sole purpose: full compensation of the victim in a timely fashion.

If, instead, as the Court inconsistently suggested,<sup>137</sup> some undefined non-token liability is imposed, the larger it is the quicker full compensation will be achieved, but subsequently convicted offenders again will have no restitutionary liability, undercutting any supposed penal purpose, while the smaller it is the longer it will take the victim to obtain full compensation. The attempt to have the restitution orders serve a penal purpose results in the tail wagging the dog, in an inconsistent and arbitrary manner.

Of course, any amount the defendant has to pay may have a deterrent or (much less likely) rehabilitative effect, whether it be in the form of compensatory damages to the victim, a criminal or civil fine, punitive or gain-based damages payable to the victim or the state, or a tax payable to the state. What makes a restitution order compensatory and not punitive is simply the fact that its purpose and effect is to compensate the victim. Even if the restitution order also has the effect of serving some penal purpose, it is not subject to the constitutional restrictions on penal sanctions if it can be justified in its entirety as a measure to make good the victim’s loss, as the Court itself has held.<sup>138</sup> To hold, instead, that the constitutional restrictions apply whenever some penal purpose is served, if only incidentally, would make every compensation order, whether issued by a civil court or a criminal court, subject to the constitutional limitations on penal sanctions.

Even if we were to accept that the restitution orders mandated by § 2259 were meant to serve some (unstated by Congress) penal purpose in addition to Congress’s explicitly and repeatedly stated compensatory purpose, the Court’s approach, which will clearly result in victims’ receiving much less than they would receive given the stated full-compensation purpose, does not make any sense, practically or as a matter of principle. As we explain in section III.B.3 below, proportionate liability is both impractical and inconsistent with the mass condition that caused the victim’s injury. Even more troubling is the fact that the rehabilitative purpose is allegedly served by using the victim as an instrument to educate offenders—the victim receives much less than what the compensatory goal would warrant to provide an incentive for the victim to chase as many offenders as possible to impress upon them the understanding that their crime has negative consequences on victims. This is troubling on both Kantian morality and distributive

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136. *Paroline*, 572 U.S. at 461.

137. *Id.* at 460 (“These factors need not be converted into a rigid formula, especially if doing so would result in trivial restitution orders.”); *id.* 459 (“[I]t would not, however, be a token or nominal amount.”).

138. See *infra* text accompanying note 144.

justice grounds. On Kantian grounds, since it uses the victim as an instrument to educate the offender. On distributive grounds, since the victim's lessened access to full compensation is a form of regressive subsidy: the injured victim subsidizes the state's criminal penal process. Moreover, such unjust consequences are unnecessary: recognizing a right to contribution between offenders could serve the rehabilitative purpose by expanding the number of contributing offenders without sacrificing the victim's interests.

We turn now to the Court's very brief discussion of its prior decisions. As the Court acknowledged<sup>139</sup> it has consistently held, as stated in *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*,<sup>140</sup> the first case in which it considered the Excessive Fines Clause, that at the time the Eighth Amendment was drafted, the term "fine" was "understood to mean a payment to a sovereign as punishment for some offense," and that the Excessive Fines Clause "was intended to limit only those fines directly imposed by, and payable to, the government."<sup>141</sup> It therefore held, in *Browning-Ferris*, that punitive damages awarded in civil tort cases are not subject to the clause, despite their (supposed) punitive, non-compensatory nature, since those awards result from actions brought by the injured individuals and are paid to those individuals rather than the government.<sup>142</sup> Every Excessive Fines Clause case considered by the Court since, prior to *Paroline*, has involved payment to a governmental entity. The compensation mandated under § 2259 is to the private victim rather than any governmental entity. That should have put a quick end to the alleged Excessive Fines Clause issue.

However, noting that the restitution order in *Paroline* was imposed as part of a successful criminal proceeding, the Court stated that, in that context at least, restitution "also serves punitive purposes."<sup>143</sup> The Court failed to note that all the cases that it cited involved required payments to a governmental entity. It also failed to note that, even when the required payments are to a governmental entity, the Court has consistently stated that the constitutional restrictions on penal sanctions do not apply unless the required payments cannot be explained solely by a compensatory purpose, but only by some penal purpose.<sup>144</sup>

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139. *Paroline*, 572 U.S. at 455–56.

140. 492 U.S. 257 (1989).

141. *Id.* at 265, 268.

142. *Id.* at 274–76. Noting that "this Court's cases leave no doubt that punitive damages serve the same purposes—punishment and deterrence—as the criminal law," rather than a compensatory purpose, Justice O'Connor, joined by Justice Stevens, dissented. *Id.* at 287, 292–93, 297–98. The proper compensatory purpose of punitive damages in tort law is discussed in Richard W. Wright, *Principled Adjudication: Tort Law and Beyond*, 7 CANTERBURY L. REV. 265, 292–93 (1999).

143. *Paroline*, 572 U.S. at 455 (citing *United States v. Bajakajian*, 524 U.S. 321, 329 n.4 (1998); *Pasquantino v. United States*, 544 U.S. 349, 365 (2005); *Kelly v. Robinson*, 479 U.S. 36, 49 n.10 (1986)).

144. *See, e.g.*, *Halper v. United States*, 490 U.S. 435, 448–49 (1989) ("[A] civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment."); *cf. id.* at 453 (Kennedy, J., concurring) ("I agree with the Court that the controlling circumstance must be whether the civil penalty imposed . . . bears any rational relation to the damages suffered by the Government."). The Court extended this holding and rationale to claims under the

In one of the two principal cases that it cited, *Kelly v. Robinson*,<sup>145</sup> the Court, following a longstanding policy against interference by federal bankruptcy courts with state criminal proceedings, relied upon the fact that the restitution order imposed in the state criminal proceeding, in favor of the state for fraudulently claimed welfare benefits, was discretionary and thus “part of the mix” used to achieve the proper criminal punishment, to avoid holding that the restitution order was remedial and thus subject to discharge under the federal bankruptcy code.<sup>146</sup>

The restitution orders under § 2259 are in favor of the private criminal victim, rather than a governmental entity, are mandatory rather than discretionary, and incorporate only the pecuniary losses caused to the private victim by the offense of conviction, with no mention in the statute or its legislative history of any rehabilitative, deterrent or other penal purpose. The clear sole purpose of the § 2259 restitution orders is rectification of the harm caused to the private victim through a more efficient process than having to pursue a separate civil action.<sup>147</sup>

In sum, the Court’s purported concern that the Excessive Fines Clause might be implicated in *Paroline* is a major and unpersuasive stretch given the precedents and would have a disastrous effect on constitutional jurisprudence if taken seriously. It is best viewed as a makeweight argument to bolster the Court’s preferred result, given its dislike of the idea of holding a single offender (or group of offenders joined in the same restitution order) liable for the entirety of the victim’s pecuniary losses, which, as we discuss in the next section, is literally required by the statute.

### 3. Statutory Liability

18 U.S.C. §§ 1593, 2259 and 3664 contain provisions similar to those in tort law for preventing disproportionate liability for wrongfully caused injury. These include limitations on protected interests and types of recoverable damages, statements of required wrongful conduct, “proximate cause” limitations on attributing individual legal responsibility for injuries caused to legally protected interests by relevant wrongful conduct, and rules for apportioning liability among multiple responsible defendants.

All of the Justices in *Paroline* agreed, as had every lower court, that Congress’s intent in enacting § 2259 was to mandate restitution to victims of child pornography for all of the victim’s pecuniary losses caused by the production, distribution,

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Excessive Fines clause in *Austin v. United States*, 509 U.S. 602, 610 (1993) (explaining that for the Excessive Fines Clause to apply to a civil sanction, the Court “must determine that it can only be explained as serving in part to punish.”); cf. *Bajakajian*, 524 U.S. at 329 (“[F]orfeiture . . . here does not serve the remedial purpose of compensating the Government for a loss.”).

145. 479 U.S. 36 (1986). See also *Bajakajian*, 524 U.S. at 329.

146. *Kelly*, 479 U.S. at 52–53.

147. Notwithstanding that the offender would be estopped in the civil action from denying the facts constituting the offense of conviction. 18 U.S.C. § 3664(l) (2012); *id.*

or possession of images of their sexual abuse.<sup>148</sup> Section 2259 states that the issuance of a restitution order against someone convicted of a federal offense of production, distribution, or possession of child pornography is mandatory<sup>149</sup> and that the restitution order “shall direct the defendant to pay the victim (through the appropriate court mechanism) the full amount of the victim’s losses as determined by the court pursuant to [the procedures specified in § 3664].”<sup>150</sup>

The Justices disagreed, however, on whether the statutory language could and should be read to achieve that purpose and, if so, how, given the “somewhat atypical causal process underlying [those] losses.”<sup>151</sup>

Chief Justice Roberts, joined by Justices Scalia and Thomas, argued that the Congressional purpose could not be implemented due to the supposed impossibility of a victim’s proving causation of any of her claimed pecuniary losses by any individual possessor or distributor (other than the initial creator and distributor of the images), as required by § 2259.<sup>152</sup> As we discussed in Part II.A above, this is incorrect.

Although it was unwilling to adopt “aggregate causation logic,” the Court stated that “it would undermine the remedial and penological purposes of § 2259 to turn away victims in cases like this.”<sup>153</sup> The Court relied upon “the broader principles underlying the aggregate causation theories”—especially the NESS analysis, which however is not an “aggregate causation” theory—to justify, albeit as a supposed legal fiction, holding individual possessors and distributors of child pornography liable for some, rather than all or none, of their victims’ total pecuniary losses, based on the defendant’s “relative role in the causal process”:<sup>154</sup>

[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. The amount would not be severe in a case like this . . . . It would not, however, be a token or nominal amount.<sup>155</sup>

The Court mentioned the following factors as being possibly relevant in determining a defendant’s “relative role in the causal process”:

[T]he number of past criminal defendants found to have contributed to the victim’s general losses; reasonable predictions of the number of future offenders

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148. *Paroline*, 572 U.S. at 443, 456–57; *id.* at 464 (Roberts, C.J., dissenting); *id.* at 472 (Sotomayor, J., dissenting).

149. 18 U.S.C. §§ 2259(a), 2259(b)(4)(A) (2012).

150. § 2259(b)(1); *see also* §§ 2259(b)(4)(B), 3664(f)(1) However, although the amount of each defendant’s restitution order is strictly set to equal the amount of the victim’s losses, there are provisions providing for equitable sharing of liability among the defendants. *See* § 3664(f)(2), (h) & (i); *see supra* text accompanying notes 30–31.

151. *Paroline*, 572 U.S. at 449.

152. *See supra* text accompanying notes 38–51.

153. *Paroline*, 57 U.S. at 457.

154. *Id.* at 458; *see supra* text accompanying notes 74–77, 82–83.

155. *Paroline*, 572 U.S. at 458–59.

likely to be caught and convicted for crimes contributing to the victim's general losses; any available and reasonably reliable estimate of the broader number of offenders involved (most of whom will, of course, never be caught or convicted); 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.<sup>156</sup>

The vague and contradictory nature of the basic criterion and the subsidiary factors was pointed out by the Chief Justice and Justice Sotomayor.<sup>157</sup> Although the Court stated that "[t]hese factors need not be converted into a rigid formula, especially if doing so would result in trivial restitution orders,"<sup>158</sup> its repeated statements that a defendant's liability should be based on its "relative role in the causal process" and its focus on quantitative factors such as the total number of offenders, images possessed, etc., result in a proportionate liability rule based on some measure of relative causal contribution, which, as all the Justices recognized, would result, contrary to the Court's qualifier, in only "token or nominal" liability.<sup>159</sup> An analysis of the factors suggested by the Court as relevant for determining the defendant's relative causal role suggests that they are not very helpful.

Two of the factors address whether the possessor was involved in the production or distribution of the images of the victim's abuse, which generally will play a much larger causal role than any individual possession (but only if there is at least some individual possession!), since the production generates and the distribution multiplies, exponentially, the number of individual possessions. Knowing this, however, does not tell us how to quantify and compare the relative causal roles, absent detailed knowledge of the complete structure of the distribution of the images.

The number of images of the victim that were possessed by the particular defendant is a questionable factor. The primary factor affecting the victim's emotional distress is the assumed number of viewers, rather than the number of images possessed by any individual viewer or by all viewers. If the level of individual consumption of the images were to be relevant at all, it would be better to consider the amount paid for the images by each consumer, rather than the number of images possessed, under the assumption that the motivation of the producers and distributors is financial. For example, if one set of images purchased by X includes 5 photos and costs \$50, while another set purchased by Y includes 1 photo and costs \$100, X's relative contribution is half of Y's, rather than being five times Y's. Whatever the assumptions about producers' and distributors' motivations are, the number of images of the victim possessed by a defendant seems to be only partially

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156. *Id.* at 459–60.

157. *Id.* at 471 (Roberts, C.J., dissenting); *id.* at 478–88 (Sotomayor, J., dissenting).

158. *Id.* at 460.

159. *Id.* at 459; *id.* at 470 (Roberts, C.J., dissenting); *id.* at 487–88 (Sotomayor, J., dissenting).



relevant for assessing the defendant's relative causal contribution to her emotional distress.

Other factors that the Court mentions—“the number of past criminal defendants found to have contributed to the victim's general losses,” “reasonable predictions of the number of future offenders likely to be caught and convicted for crimes contributing to the victim's general losses,” and “any available and reasonably reliable estimate of the broader number of offenders involved (most of whom will, of course, never be caught or convicted)”—are in tension with each other as well as with the previously discussed factors. The first two factors, but not the third, are relevant for the purpose of making it at least theoretically possible, albeit unlikely, for the victim eventually to be able to recover in full, as Congress clearly intended, under a proportionate liability scheme. Notionally, a court can divide the sum reflecting full compensation by the estimated number of defendants from whom the victim can recover and set this amount as the amount to be paid by each defendant.<sup>160</sup> However, only the third factor is relevant under a straightforward relative causal contribution liability rule, according to which the comparison should be with all those contributing to the injury, rather than only those likely to be within the claimant's reach.<sup>161</sup>

Moreover, and most importantly, measuring a defendant's relative contribution to the victim's indivisible emotional injury as a proportion of the overall number of viewers (or images) misunderstands the nature of the underlying causal relationship. Although, as the Court noted,<sup>162</sup> the psychological trauma suffered by a victim of child pornography likely will increase as she becomes aware that there are increasing numbers of viewers of the images of her sexual abuse, the relationship between the overall number of viewers (whose specific identity she will rarely know) and the severity of the psychological trauma is not linear. There usually will be serious emotional distress when there is knowledge of even a single viewer, whether or not his identity is known, which will increase to a severe level with knowledge of even a limited yet substantial number of viewers, with the marginal increase in severity thereafter declining substantially with knowledge of more widespread viewing. The pecuniary losses for which the victim is entitled to receive restitution, which include primarily the costs of psychological counseling and lost income due to being unable to work in public environments, will not increase proportionately with each additional viewer, but rather will reach an essentially steady but perhaps minimally increasing state once there is knowledge of even a limited number of viewers. It is erroneous and unprincipled to treat Paroline or any other viewer as making only a trivial or minor contribution to the

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160. See RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT, *supra* note 113, § 17 (track C) (reallocating pro-rata the shares of insolvent defendants to all other parties (including the claimant) according to comparative responsibility).

161. See *Paroline*, 572 U.S. at 471 (Roberts, C.J., dissenting).

162. *Id.* at 450.

victim's emotional trauma and consequent pecuniary costs because he is only one of the hundreds or thousands of viewers, rather than treating him as one whose actions alone were sufficient to cause substantial emotional distress and as one of the much more limited number sufficient to produce severe emotional distress.

The Chief Justice, Justice Sotomayor and Amy correctly noted that a proportionate allocation of liability rule would consign Amy and other victims to piecemeal restitution claims extending over decades of litigation that likely will never lead to full recovery. Amy and Justice Sotomayor also argued that it is inconsistent with § 2259's explicit requirement that each offender be liable for the full amount of the losses caused by his offense.<sup>163</sup>

The Court's response was three-fold. First, the Court stated, without elaboration and contrary to some of its other statements, that it was debatable whether Amy's claimed losses were indivisible.<sup>164</sup> As we discussed in Part II.B above and the dissenting Justices all acknowledged,<sup>165</sup> her losses clearly are indivisible from moment to moment and, less obvious but also true, over time.

Second and principally, the Court argued that even if the victim's losses are indivisible, so that "it is in a sense a fiction to say that Paroline caused \$1000 in losses, \$10,000 in losses, or any other lesser amount," to claim that Paroline was a cause of all of the victim's losses would be a "much greater fiction" that "stretches the fiction of aggregate causation to its breaking point."<sup>166</sup> As we explained in part II. A above, the Court's treating the NESS criterion of actual causation as a legal fiction (while nevertheless relying upon it) is the actual legal fiction, adopted for policy reasons (the Court's dislike of the mandated liability result) despite the clear statutory language. Each distributor and possessor of the images of her abuse, as well as the original creator of the images, is a cause of her emotional distress and related pecuniary losses for every indivisible moment of that distress.

Third, as we discussed and criticized in the previous section, the Court suggested, but did not hold, that to hold Paroline individually liable for the full amount of Amy's pecuniary losses might run afoul of the Excessive Fines Clause in the U.S. Constitution. Under the Court's reasoning, the highly debatable penal rehabilitation purpose supposedly underlying § 2259 has become the primary purpose, the "tail wagging the dog," and the explicitly mandated full compensation purpose has been ignored.

The Court stated that, if a defendant were able to seek contribution from other offenders who also contributed to those losses, its concerns about imposing full liability on each offender "might [be] mitigate[d] to some degree."<sup>167</sup> However, it noted, there is no general federal right to contribution, the relevant statutory

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163. *Id.* at 473, 480–81 (Sotomayor, J., dissenting); Amy's Merits Brief, *supra* note 36, at 57–58.

164. *Id.* at 461. *But see supra* text accompanying note 74.

165. *Paroline*, 572 U.S. at 472 (Roberts, C.J., dissenting), 479 (Sotomayor, J. dissenting).

166. *Id.* at 461.

167. *Id.* at 455.

provisions do not expressly provide for contribution, and considerable practical difficulties would arise in trying to implement any contribution scheme, presumably extending indefinitely into the future, with repeated recalculations of relative shares among past and future convicted offenders.<sup>168</sup>

There is no express provision for contribution in the relevant statutory provisions. However, there are several provisions which come very close and indicate that Congress was not opposed to but rather intended equitable sharing of compensatory liability among the multiple offenders with respect to a particular victim, but only as long as each restitution order ensures that the victim will be able to receive full compensation for her losses, insofar as is possible, from those defendants subject to the specific order. These provisions state: (1) that the funds required for full restitution of a victim under each restitution order shall be paid to an insurer “or any other source” who provided compensation for a relevant loss once all restitution of victims required by the order has been paid and (2) that “any amount paid to a victim under an order of restitution shall be reduced by any amount later recovered as compensatory damages for the same loss” in a federal or state civil proceeding.<sup>169</sup> The reference to “any other source” in (1) literally would include other offenders who have paid compensation to the victim under the same or any different restitution order,<sup>170</sup> who also would be included under (2) insofar as they made any payment to the victim in a federal or state civil proceeding to compensate for the same injuries and losses. Furthermore, § 3664(h) states:

If the court finds that more than 1 defendant has contributed to the loss of a victim, the court may also make each defendant liable for payment of the full amount of restitution or may apportion liability among the defendants to reflect the level of contribution to the victim’s loss and the economic circumstances of each defendant.<sup>171</sup>

This section expressly authorizes joint and several liability (full liability by each defendant), with or without contribution (but with no more than full compensation of the victim in the aggregate), while at least providing implicit support for equitable contribution among the defendants if joint and several liability is imposed. The Government argued, and the Court apparently agreed, that this provision only applies to defendants all joined in the same criminal trial.<sup>172</sup> Yet this argument undermines rather than strengthens their argument for minimal proportionate liability based on relative causal contribution for each defendant. Taken together with § 2259 and the various other provisions cited above, it seems clear that

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168. *Id.*

169. 18 U.S.C. § 3664(j)(2) (2012) (emphasis added).

170. *See Paroline*, 572 U.S. at 481 (Sotomayor, J., dissenting) (making this point with respect to similar language in § 2259(b)(4)(B)(ii)); Petitioner’s Brief on the Merits, at 52 n.21, *Paroline v. United States*, 572 U.S. 434 (2014) (No 12-8561) (same).

171. 18 U.S.C. § 3664(h).

172. *Paroline*, 572 U.S. at 454; *see supra* text accompanying notes 167–68.

Congress intended for the restitution order in a specific case to provide for full compensation of the victim by the defendants in that case, which can be achieved by holding each defendant in that case either fully liable (under joint and several liability with or without contribution) or proportionately liable but only if that can be done while ensuring full compensation of the victim by the defendants in that case.

Justice Sotomayor acknowledged and shared the Court's concern that, in the supposed absence of any right to contribution, imposing full liability on each offender would often lead to inequitable disproportionate liability among similarly situated offenders. However, she pointed out, even though § 2259 states that each restitution order must provide for restitution of the full amount of the victim's pecuniary losses, § 3664(f)(2) gives considerable discretion to the court making the order to structure the payment schedule for each person subject to the order, taking into account his economic circumstances. Payments could be stretched out not only for offenders less well off, but also for wealthy offenders, so that they would pay only an equitable share in total by the time that the victim's pecuniary losses were fully compensated.<sup>173</sup> Referencing the statutorily imposed \$150,000 minimum civil remedy in § 2255, as it then provided, Sotomayor suggested that Congress might want to specify fixed minimum restitution amounts.<sup>174</sup>

### C. Allocation Options

In what follows we defend the following claims: First, a mass injurer-victim situation—which exists when there are multiple injurers each with multiple overlapping victims—justifies a deviation from the traditional principle of initial full individual liability to each victim by each defendant who tortiously contributed to an indivisible injury to that victim.<sup>175</sup> This is so at least when an injurer was clearly neither a necessary (but-for) nor an independently sufficient cause of a victim's injury. Second, that a proportionate liability scheme based on relative causal contribution or role, as stated by the Court in *Paroline*, would be both unworkable and unjust. Third, that there is therefore a need for an intermediate equitable allocation

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173. *Paroline*, 572 U.S. at 485–86 (Sotomayor, J., dissenting) (citing 18 U.S.C. § 3664(f)); see *supra* text accompanying notes 30–31.

174. *Paroline*, 572 U.S. at 488 (citing 18 U.S.C. § 2255 (2012)). Section 2255 was subsequently amended to make the \$150,000 a liquidated damages option in lieu of actual damages. See *infra* text at notes 211–12.

175. Most commentators on *Paroline* criticize the decision for not affording victims with full restitution, thereby both failing victims and acting contrary to Congress's intention. See Alanna D. Francois, *Paroline v. United States: Mandatory Restitution an Empty Gesture, Leaving Victims Of Child Pornography Holding the Bag*, 42 S.U. L. REV. 293, 295–97 (2015); Cassell & Marsh, *supra* note 12, at 5; Janet Lawrence, *The Peril of Paroline: How the Supreme Court Made It More Difficult for Victims of Child Pornography*, 2016 BYU L. REV. 325, 342 (2016). A notable exception is Bhatti, *supra* note 14, who, based on post-*Paroline* empirical analysis, agrees that neither the solution in *Paroline* nor full restitution is principled or practical. See *infra* text accompanying note 218 for a description of her proposal. For a criminal defendant practitioner's view favorable to the *Paroline* decision, see David R. Bungard, *Depending Restitution Claims in Child Pornography Cases in a Post-Paroline World*, 40 CHAMPION 16 (2016).

of liability rule, which would award a significant amount that is not full but much higher than what a proportionate (based on relative contribution) allocation of liability rule would give.

One of us (Keren-Paz) supports a flat amount (a conventional award) while the other (Wright) supports a more individuated approach. We both support, as a matter of principle, the *Paroline* Court's opting for an intermediate solution, rather than full or no liability by each possessor of the images of a victim's abuse, but criticize its failure to provide to the extent possible, as Congress mandated, full compensation for each victim of child pornography (and, by extension, sex trafficking), its dalliance with irrelevant constitutional limitations on criminal punishment, and its specific allocation of liability criteria, which will achieve neither just compensation nor (irrelevant under the statutory provisions at issue) meaningful criminal punishment.

### 1. *The Arguments Against No or Full Individual Liability*

It is hard to imagine an argument for no liability by someone who has been found to be a knowing participant in a specific person's victimization by child pornography or sex trafficking. Chief Justice Roberts's argument for no liability in *Paroline* was not based on principle or policy—indeed, he believed there should be liability<sup>176</sup>—but rather on a supposed lack of proof of actual causation of any of Amy's injuries and relevant harm, as required by the relevant statute. As we have explained in Part II.A above, his argument, which treated as causes only conditions that were not only necessary but also the sole cause of some event, is scientifically, philosophically and legally invalid and would lead to there being no causes of anything.<sup>177</sup> His conclusion that the relevant injury was indivisible should have led him either to conclude that Paroline was fully liable, under the traditional joint and several liability rule, or to offer some alternative allocation of liability rule. Even if the relevant injury were theoretically divisible, current tort liability rules would hold each defendant fully liable unless it proves that it (could have) caused only a certain part of the injury.<sup>178</sup>

While each knowing participant in child pornography or sex trafficking should be individually fully liable for the discrete dignitary and physical injuries caused to his known victims by his specific offense(s), there are strong arguments against imposing individual full liability for the victim's indivisible emotional injuries and consequent pecuniary losses, caused by each and all of those involved in her abuse, on each viewer of child pornography or each client of a VoT.

First, in the absence of a practical contribution scheme, full liability for each viewer or client, regardless of his relative contribution, equates the responsibility of the viewer or client with that of the producer, distributor or trafficker. Such

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176. *Paroline*, 572 U.S. at 463 (Roberts, C.J., dissenting).

177. See *supra* text accompanying notes 41–48.

178. See DOBBS ET AL., *supra* note 62, § 14.9; STPLR, *supra* note 10, at 236.

equivalent full responsibility and liability traditionally has been thought appropriate when each defendant was either a necessary (but-for) or (especially) an independently sufficient cause of a victim's injuries, but, as we discussed in section III. B.1 above, the courts have divided on applying individual full rather than proportionate liability when a defendant's contribution was clearly neither necessary nor independently sufficient. The producer of the child pornography and each trafficker of the VoT is a but-for cause of all of his victim's subsequent injuries.<sup>179</sup> On the other hand, each viewer's or client's contribution is clearly neither independently sufficient nor necessary for the indivisible emotional distress and related pecuniary damages that is caused by everyone involved in her victimization. The relative causal role of each distributor of the images of a victim's sexual abuse will vary depending on the number of distributors and the distributor's high or low position in the expanding distribution network. Each distributor will be a necessary or independently sufficient cause of subsequent dignitary injuries caused by those viewing the images that he distributed, but usually will not be a necessary or independently sufficient cause of the victim's indivisible emotional injury and related pecuniary damages. The major disparity in the causal role of each producer, distributor or trafficker and each viewer or client, as well as the foreseeable consequences, is a significant factor in, and usually will be accompanied by, a similar major disparity in the moral reprehensibility of each individual's conduct. The Court in *Paroline* clearly was concerned, and rightly so, not to equate the responsibility of a viewer with that of the producer and distributor of the child pornography:

Paroline's contribution to the causal process underlying the victim's losses was very minor, both compared to the combined acts of all other relevant offenders, and in comparison to the contributions of other individual offenders, particularly distributors (who may have caused hundreds or thousands of further viewings) and the initial producer of the child pornography.<sup>180</sup>

Second, and underpinning the first reason, a defendant has a very limited chance of recovering equitable contribution from other responsible offenders, even assuming a statutory or common law right to such contribution.<sup>181</sup> The viewer or client is unlikely to be able to obtain and enforce a judgment against even an identified producer, distributor or trafficker, and even less likely to be able to identify, much less recover from, all of the relevant distributors, traffickers, viewers or clients. While the point of joint and several liability is to try to assure full compensation of the victim by shifting the risk of the unavailability or insolvency of other contributors to the victim's injury and the costs of obtaining proportionate recovery from each available and solvent contributor from the victim to the tortfeasor, making a

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179. For support of full joint and several liability of traffickers with respect to tort damages see STPLR, *supra* note 10, at 34-35.

180. *Paroline*, 572 U.S. at 454.

181. See *supra* text accompanying notes 167-71.



peripheral party pay for the entire damages is troubling.<sup>182</sup> The practical impossibility of any fully equitable sharing of liability among all the legally responsible causes is especially clear in the child pornography context, in which distribution and viewing of the images will continue and expand indefinitely into the future, thus requiring repeated, never-ending recalculation of relative shares among past and future convicted offenders.

Third, each producer, distributor or viewer of child pornography and each trafficker or client of a VoT likely will be liable to several, perhaps numerous, victims. This fact not only significantly exacerbates the problems discussed in points one and two above, related to an equitable sharing of liability among the multiple injurers of a particular victim, but also raises a more important issue: the equitable sharing of compensation among multiple victims of the same defendant. Allowing one or some victims to obtain full compensation from a defendant who also injured other victims may well make it impossible for those other victims to obtain any compensation from that defendant.<sup>183</sup>

## 2. *The Arguments Against Proportionate Liability*

The arguments against proportionate liability based on the defendant's "relative role in the causal process," as specified by the Court in *Paroline*, are discussed in section III.B.3 above. The Court's approach is based on a fundamental misunderstanding of the nature of causal contribution in situations involving causal overdetermination and the related proper implications for attributing legal responsibility and allocating liability. As the dissenting Justices stated and the Court acknowledged,<sup>184</sup> it will result in minimal liability for each viewer or client and necessitate the victim's filing hundreds of restitution claims over decades with little or no hope of ever receiving anything close to aggregate full compensation.

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182. Cf. Jane Stapleton, *Duty of Care: Peripheral Parties and Alternative Opportunities for Deterrence*, 111 L. Q. REV. 301 (1995). This perceived unfairness is partially behind the reforms to joint and several liability documented as tracks C–E in the RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT, *supra* note 113, § 17, and in particular track C, which reallocates pro-rata the shares of insolvent defendants to all other parties (including the claimant) according to comparative responsibility.

183. This problem might provide an argument against initial full individual liability for any of a specific victim's losses by even producers and traffickers. Whether it is convincing depends also on the extent to which bankruptcy rules and victims' access to justice are satisfactory. The courts have faced this problem before, with considerable controversy regarding the proper allocation of liability rules, in several contexts, especially in claims by those suffering from mesothelioma against multiple defendants who allegedly exposed them to inhalation of asbestos fibers. In those claims, the causal issue is even more complicated due to disagreement on the one-hit versus cumulative nature of the causal process. See, e.g., Jane Stapleton, *Lords A'leaping Evidentiary Gaps*, 10 TORTS L.J. 276, 280–81 (2002).

184. *Paroline*, 572 U.S. at 461–62; *id.* at 470 (Roberts, C.J., dissenting); *id.* at 487–88 (Sotomayor, J., dissenting).

Moreover, as Chief Justice Roberts noted<sup>185</sup> and many courts have stated in cases decided since the *Paroline* decision,<sup>186</sup> there is no rational, non-arbitrary way to employ the criteria and factors set forth by the Court for determining a defendant's "relative role in the causal process." Given the impossibility of doing so, some courts have continued to refuse to award the victim any restitution,<sup>187</sup> while the rest employ admittedly arbitrary calculations and guesses to come up with inconsistent subjectively based awards<sup>188</sup> that usually amount to only a few thousand dollars total for all of an offender's victims.<sup>189</sup> An empirical study of federal child pornography cases for the four years before and one year after the *Paroline* decision concludes:

[T]he current restitution system remains broken . . . . In most cases, even those involving child pornography production, victims come away with no restitution at all. The relatively few courts that have awarded restitution have done so in a wide variety of amounts even post-*Paroline*, with median awards in the low thousands. These amounts, moreover, are typically related to neither offense characteristics nor victim losses. In addition, few courts have chosen to follow *Paroline*'s guideposts in calculating restitution—guideposts that have largely proven to be impractical, detached from reality, and internally incoherent. Instead, courts seem to have taken *Paroline* as a license to use their discretion to calculate any reasonable amount of restitution using any non-arbitrary method of calculation.<sup>190</sup>

The difficulties faced by the courts in imposing proportionate liability on possessors and distributors are further complicated by the holdings of some U.S. Courts of Appeals, building on a suggestion by the Court in *Paroline* that "[c]omplications may arise in disaggregating losses sustained as a result of the initial physical

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185. *Id.* at 470 (Roberts, C.J., dissenting).

186. *E.g.*, *United States v. Campbell-Zorn*, No. CR 14–41–BLG–SPW, 2014 WL 7215214, at \*3 (D. Mont. Dec. 17, 2014) ("These tools provided by *Paroline*, while seemingly useful in a theoretical sense, have proven to have very difficult, and very limited, practical application."); *United States v. Austin*, No. 3:14–CR–0070–LRH–WGC, 2015 WL 5224917, at \*2 (D. Nev. Sept. 8, 2015) ("*Paroline* is of limited use because no logical starting point can be determined."); *United States v. Dileo*, 58 F. Supp. 3d 239, 244 (E.D.N.Y. 2014) (characterizing application of the *Paroline* factors as "akin to piloting a small craft to safe harbor in a Nor'easter"); *United States v. Miner*, 1:14–cr–33 (MAD), 2014 WL 4816230, at \*9 (N.D.N.Y. Sept. 25, 2014) (noting difficulty in applying the *Paroline* framework and finding other district courts' concerns with the *Paroline* factors "well founded"); *United States v. Crisostomi*, 31 F. Supp. 3d 361, 364 (D.R.I. 2014) ("It appears to this Court that some of the factors the Supreme Court suggests be considered are at best difficult, and at worst impossible to calculate in this case as in most similar cases."); see Bhatti, *supra* note 14, at 36, 42; *infra* text accompanying notes 194–95.

187. See Bhatti, *supra* note 14, at 32, 34 n.147, 47; Cassell & March, *supra* note 12, at 25.

188. Bhatti, *supra* note 14, at 5, 7, 34–42; Cassell & Marsh, *supra* note 12, at 24–26.

189. See Bhatti, *supra* note 14, at 33 n.144 (noting that the total award against a single defendant for all of his victims post-*Paroline* was between \$56 and \$3000 for fifty percent of the awards and between \$56 and \$5000 for 65.5% of the awards, including the somewhat higher amounts awarded against producers, with only 2.8% of the awards being over \$100,000 and only one award exceeding \$250,000. The awards in possession cases ranged from \$50 to \$33,000, with an average of \$6636 and a median of \$4000).

190. Bhatti, *supra* note 14, at 5 (footnotes omitted); see *id.* at 7, 28–42.

abuse,”<sup>191</sup> that the losses caused by the original abuser must be “disaggregated” (removed) from the restitution awarded against later possessors and distributors.<sup>192</sup> As usual, little or no guidance has been given on how this could or should be done. Since the emotional injury is indivisible,<sup>193</sup> by definition neither it nor the related losses can be disaggregated, although for policy reasons liability can be apportioned. After requiring disaggregation, a panel of the U.S. Court of Appeals for the Ninth Circuit stated:

We express no opinion about what portion of a victim’s ongoing loss should be attributable to an original abuser. No doubt that will vary from case to case depending on many factors, for example: egregiousness of the original abuse; how a victim can (or does) cope with that kind of abuse when distribution of images does not follow; and the particular victim’s own reactions to the various traumas to which the victim has been subjected.<sup>194</sup>

The court acknowledged that “the ultimate decision will be a mix of ‘discretion and estimation’,” under an allocation scheme that “at least approaches the limits of fair adjudication.”<sup>195</sup>

### 3. *Equitable Allocation of Liability*

Individual full liability for each viewer of child pornography (or each knowing client of a VoT) for the indivisible emotional injuries suffered by their victims is inappropriate considering equitable allocation of liability among the multiple contributing defendants for each victim’s injuries and, more importantly, equitable compensation of all of the victims of each defendant. Proportionate liability based on relative causal contribution is an inapt test, since it would result in trivial individual liability inconsistent with the defendant’s actual substantial causal role<sup>196</sup> and, in the aggregate, very much less than full compensation of the victim. We need, instead, an appropriately tailored intermediate liability rule, which we argue should be either damages at large, the size of which is determined based on estimation by the court of what is just and equitable in the circumstances based on a principled and consistent set of basic criteria, or a conventional (flat) award paid by each defendant at least equal to the estimated average amount paid under the first, more individualized approach.

In either case, the total recovery by each victim should be limited to the full amount of the victim’s losses, but every convicted offender should be held liable to each of his victims under the applicable liability rule without any *required* claim

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191. *Paroline*, 572 U.S. at 449.

192. *United States v. Galan*, 804 F.3d 1287, 1290–91 (9th Cir. 2015); *United States v. Dunn*, 777 F.3d 1171, 1181–82 (10th Cir. 2015); *see also* *United States v. Rogers*, 758 F.3d 37, 39–40 (1st Cir. 2014) (per curiam).

193. *See supra* Part II.B.

194. *Galan*, 804 F.3d at 1291.

195. *Id.*

196. *See supra* text following note 162.

by, involvement of, or litigation expenses paid by any victim, as is literally required now but ignored in practice by the Department of Justice.<sup>197</sup> Liability awards that would result in more than full recovery by a specific victim should be put into a legislatively established fund to ensure full compensation (to the extent possible) of other victims of the same defendant (as arguably is authorized by the current federal criminal restitution provisions<sup>198</sup>) or, preferably, for the benefit of all victims. The defendant's liability to each of his victims should be set at a level which would be sufficient to compensate, in the particular case or on average (depending on the applicable liability rule), at least for the emotional distress and related pecuniary costs that would have been suffered by the victim solely as a result of the defendant's offense or, preferably, the defendant's offense combined with only a few other offenders' similar offenses. It should also compensate for any discrete dignitary and physical losses suffered by the victim as a result of the defendant's conduct. Finally, it should be sufficient to implement, under the relevant federal statutes, the U.S. Congress's intention to achieve full compensation for each victim for at least her pecuniary losses, while also reflecting the usually minor role of an individual viewer or client in comparison to the relevant producer and distributors or traffickers.

The conventional award given by the House of Lords in *Rees v. Darlington Memorial Hospital*<sup>199</sup> is a significant example of awarding an imprecise equitable amount in order to give partial compensation for violation of an important interest. In *Rees*, the House put a gloss on its previous decision in *McFarlane v. Tayside Health Board*,<sup>200</sup> in which it refused to compensate parents for the costs of raising an unwanted child. The gloss was that in recognition of the fact that the birth of an unwanted child involves a serious interference with the parents' reproductive autonomy, the defendant will have to compensate the parents by way of a conventional award of £15,000.<sup>201</sup> It is useful to see the similarities and differences between the wrongful conception and the child pornography contexts. *Rees* did not involve any difficulty in apportioning liability among several defendants who all contributed to the claimant's injury. Rather, the question was the appropriate scope of protecting an interest (reproductive autonomy) not hitherto directly protected by the tort of negligence. To complicate things further, the claimants in *McFarlane* and *Rees* did not ask for an unorthodox compensation for the injury to their autonomy per se; what they asked for was compensation for their economic loss from the need to raise an unplanned child.

It is not our purpose to evaluate fully here the merits of the decision to give a conventional award in *Rees*. For current purposes we would like to note that to the

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197. See *supra* text accompanying notes 25–27.

198. See *supra* text accompanying notes 169–74.

199. [2003] UKHL 52.

200. [2000] 2 AC 59.

201. The award is given in addition to the mother's pain and suffering from the unwanted pregnancy and labor and the financial costs involved in lost earnings which immediately follow the labor.

extent the decision is deficient,<sup>202</sup> it is *not* due to its deviation from settled principles about compensation and corrective justice, the related institutional concern about courts' power to adopt such rules, or the necessary impreciseness in setting a figure for the size of the award<sup>203</sup> (impreciseness seems to have been the focus of Chief Justice Roberts's discontent with the Court's holding in *Paroline*).<sup>204</sup>

Both solutions—damages at large and a conventional award—have advantages and disadvantages. In the context of tort claims against sex traffickers, following *Plonit (K) v. Jaack*,<sup>205</sup> Israeli courts award general damages at large, without even hearing testimony from the claimant about her individual losses.<sup>206</sup> Wright strongly prefers the individualized damages at large approach, while Keren-Paz prefers a conventional award.<sup>207</sup> In either case, the size of the damages awarded is bound to be somewhat arbitrary, but especially if it is assessed as a uniform (conventional) sum rather than being assessed individually as damages at large. From a corrective justice perspective, and possibly from a deterrence perspective, individual assessment (as adopted in *Paroline*) is to be preferred and better fits with existing doctrines. It allows courts to set the damages at a level influenced by both the individual experience of the claimant (her overall damage) and the defendant's behavior (nature and incidence of consumption and likelihood of causing various frequencies and levels of injury). On the other hand, the advantage of a uniform award is that it does away with the need to litigate over the defendant's individual behavior and to delve into the assessment of the victim's specific damage.

One of us (Keren-Paz) has defended a departure from the venerable principle prohibiting more than 100 percent recovery by a plaintiff for any injury in the sex trafficking context.<sup>208</sup> A similar argument, which is clearly incompatible with the holding in *Paroline*,<sup>209</sup> could be made in the child pornography context. However, those committed to the no excessive recovery rule could still adopt a conventional

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202. *Rees* raises the questions whether injury to autonomy should be actionable damage in negligence, if so, whether an individuated award is to be preferred, whether such award ought to accumulate with upkeep costs, and whether the award given was too low, all discussed in Tsachi Keren-Paz, *Compensating Injury to Autonomy: A Conceptual and Normative Analysis*, in PRIVATE LAW IN THE TWENTY-FIRST CENTURY 411 (Barker, Fairweather & Grantham eds., 2017), Tsachi Keren-Paz, *Compensating Injury to Autonomy in English Negligence Law: Inconsistent Recognition*, 26 MED. L. REV. 585 (2018), and Tsachi Keren-Paz, *Gender Injustice in Compensating Injury to Autonomy in English and Singaporean Negligence Law*, FEMINIST LEGAL STUD. (2018).

203. See the dissenting opinions by Lord Steyn [46] and Lord Hope [73]–[77].

204. *Paroline*, 572 U.S. at 463–64 (Roberts, C.J., dissenting).

205. CC (TA) 2191/02 Plonit (K) v. Jaack, Tak-Meh 2006 (1) 7885 (2006) (Isr.).

206. STPLR, *supra* note 10, at 30–32.

207. Keren-Paz believes that, compatible with corrective justice, a conventional award is to be preferred over damages at large precisely since the overdetermined nature of causation in mass sexual torts makes any differential allocation of liability among viewers and clients unprincipled. A conventional award reflects better than damages at large the irrelevance of the different consumption patterns to the violation of the victim's right.

208. STPLR, *supra* note 10, at 239–40.

209. *Paroline*, 572 U.S. at 462 (assuming full individual liability would result in a victim “collect[ing] her full losses from a handful of wealthy possessors and [leave] the remainder to pay nothing because she had already fully collected”); *id.* at 487 n.5 (Sotomayor, J., dissenting) (“§ 2259 does not displace the settled joint and several liability rule forbidding double recovery”).

award rule. Once the victim recovered judgments which satisfy her full injury, she would not be able to recover any longer, but, at least under a legislative compensation scheme, the excess funds due from the defendant could be put into a fund to help ensure full compensation of other victims, if there are or may be any others who have not yet been fully compensated.<sup>210</sup>

Those uncomfortable with a pure conventional award can think of variations of this rule. The conventional award could work as a baseline from which courts could adjust upwards or downwards the amount in individual cases. This could reflect an understanding that part of the damage might be theoretically divisible, while another is not, or a concession that individual assessment of responsibility is important, even in cases in which a strict relative causal role test cannot work. This approach until recently was taken in 18 U.S.C § 2255, which, as previously mentioned,<sup>211</sup> creates a federal civil action for anyone who was a victim of child pornography or of sex trafficking while a minor and allows recovery for any actual damages resulting from personal injury caused by the federal offense, plus the cost of the suit including reasonable attorney's fees. Previously, the actual damages were statutorily assumed to be at least \$150,000. However, a recent amendment converted the \$150,000 from a minimum actual damage award to a (conventional) liquidated damages award as an alternative to actually proved damages.<sup>212</sup>

Some might think that a \$150,000 conventional award is too harsh against viewers. The conventional award could instead work as a ceiling on the defendant's liability (provided he is merely a viewer) in the context of criminal restitution. Adopting this version would nod towards the (mistaken, in our view) understanding of criminal restitution as reflecting also penal considerations.<sup>213</sup> However, a maximum award might sooth the concern that "arbitrary is not good enough for the criminal law"<sup>214</sup> while preserving flexibility in the amount awarded to reflect notions of proportionality.

In any event, the minimum, maximum or fixed amount should be higher for producers and major distributors than for viewers and minor distributors, as provided

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210. Cf. S. 377E of Israel's Penal Code 1977 and Penal Regulation (Managing the Special Fund Handling Confiscated Property and Fines Imposed in Human Trafficking and Enslavement Cases) 2009, KT 6759 (Israel) (establishing an earmarked fund to which confiscated profits from human trafficking are put to be used to compensate victims of trafficking with unsatisfied judgments). At least where the compensation fund is funded from confiscation of the profits of crime, determining the identity of those eligible to claim against the escrow raises some distributional difficulties discussed in Tsachi Keren-Paz, *Moral and Legal Obligations of the State to Victims of Sex Trafficking: Vulnerability and Beyond*, in REGULATING THE INTERNATIONAL MOVEMENT OF WOMEN: FROM PROTECTION TO CONTROL 175, 179–80 (S. FitzGerald ed., 2011).

211. See *supra* text accompanying notes 23, 174.

212. Protecting Young Victims from Sexual Abuse and Safe Sport Authorization Act of 2017, Pub. L. No. 115–126, 132 Stat. 320. In addition to the re-characterization of the \$150,000 award, the amendment extends the statute of limitations from three to ten years, clarifies that the "cost of the action" includes "reasonable attorney's fees and other litigation costs reasonably incurred," and authorizes "punitive damages and such other preliminary and equitable relief as the court determines to be appropriate."

213. See *supra* section IV.B.2.

214. *Paroline*, 572 U.S. at 463 (Roberts, C.J., dissenting).



in bills passed by the Senate in 2015 and 2018. We prefer the ratio of minimum restitutionary liabilities specified for possessors, distributors and producers in the 2015 bill (1:6:10 respectively) to the ratio specified for contributions to the reserve fund (in addition to mandated restitution to individual victims) in the 2018 bill of roughly 1:2:3. The 2015 bill, which died in the House, mandated restitution orders holding each offender jointly and severally liable, with a right of contribution from other offenders, for either the full amount of the victim's losses or at least \$25,000 for possessors, \$150,000 for distributors, and \$250,000 for producers, but no more than the full amount of the victim's losses.<sup>215</sup> The 2018 bill mandates full liability for the victim's losses in a restitution order against a producer but reduces the liability for traffickers (distributors and possessors) to a minimum of \$3000 (limited to the full amount of the victim's losses) up to a maximum of one percent of the full amount of the victim's losses. It also sets up a Child Pornography Victims' Reserve fund, funded by assessments against each offender of up to \$17,000 for possessors, \$35,000 for distributors, and \$50,000 for producers and additional amounts up to \$10,000,000 total from available amounts in the Crime Victims fund. Victims of producers would be able to obtain a one-time payment of \$35,000, indexed to inflation, from this fund, which is deducted from the full amount of the victim's losses for purposes of a restitution order. Any remaining funds would be used to satisfy required restitution of victims of any child pornography production offense that the defendant committed and then, if any funds are left (which is unlikely) victims of any trafficking in child pornography offense. Both bills define "full amount of the victim's losses" for the purpose of calculating traffickers' liability as including all losses incurred or reasonably projected to be incurred by the victim as the result of all trafficking in images of her abuse.<sup>216</sup> By comparison to the one percent ceiling in the 2018 bill, Keren-Paz has suggested that the award against clients of VoTs should be in the range of four percent.<sup>217</sup>

Our proposed liability rules can usefully be contrasted with those proposed by Isra Bhatti. She would eliminate individually determined restitution orders in favor of sole reliance on a victim reimbursement fund that would provide full reimbursement to victims regardless of their participation in the justice system, funded by assessments against all convicted offenders. Her assessment scheme employs

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215. Amy and Vicky Child Pornography Victim Restitution Improvement Act of 2015, S. 295, 114th Cong. (2015).

216. Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2017, S. 2152, 115th Cong. (2018). As this article was in the final stage of production, both the U.S. House of Representatives and the U.S. Senate unanimously passed a substitute version of S. 2152, the Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, which for the most part is a copy of the original Senate version, but which holds each trafficker liable for restitution of "an amount that reflects the defendant's relative role in the causal process that underlies the victim's losses," but not less than \$3000, and provides for potential payments from the reserve fund to victims of all traffickers rather than only victims of producers of child pornography. See <https://www.congress.gov/bill/115th-congress/senate-bill/2152>. For proper analysis of each defendant's "relative role in the causal process that underlies the victim's losses," see *supra* text following note 162.

217. STPLR, *supra* note 10, at 239.

baseline amounts of a few thousand dollars and specified multipliers based on offenders' intentions, the foreseeable consequences of their distribution methods and, for producers only, estimates of known possessors.<sup>218</sup> Our proposed liability rules are similarly aimed at providing guidance for non-arbitrary, case-specific results, but are based on significantly different factors. Like the U.S. Congress and even the *Paroline* Court (despite its discussion of supposed punitive goals), we focus, as is usual in civil actions, on the defendant's contribution to the harms suffered by his victims,<sup>219</sup> while Bhatti focuses on the culpability of the defendant's conduct, which is of primary importance in criminal actions.

Of crucial importance is the following realization: to be acceptable, practically and theoretically, an individual assessment of liability has to be understood as a *sui generis* rule which cannot be equated with a purely proportionate approach based on relative causal contribution, as specified in *Paroline*. To reflect the complex nature of the overdetermined injury in situations involving mass sexual abuse, the amount payable by each defendant has to be significantly higher than what would have to be paid under a proportionate liability rule based on relative causal contribution, however such contribution is measured (number of images viewed, amount paid, number of viewers, etc.).<sup>220</sup>

#### CONCLUSION

Situations involving mass sexual abuse pose serious challenges to legislatures and courts attempting to provide just compensation to the victims of such abuse along with just liability for the wrongful contributors to such abuse. While legislators can duck those challenges and pass them on to the courts by unelaborated references to "(proximate) causation" and ambiguous liability provisions, the courts must try to make sense of the legislated provisions in a hopefully consistent way to determine just individual legal liability. Unfortunately, the great majority of judges as well as legislators have continued to demonstrate their lack of understanding of the basic causation, injury, attribution of legal responsibility, and allocation of liability issues that are raised by even simple causally overdetermined situations. The lack of understanding is especially evident and serious in the context of mass sexual abuse, as exemplified by the three very different analyses presented by the Justices in *Paroline*. We have attempted to distinguish and clarify the relevant issues. We emphasize three of them in this Conclusion.

The first issue is the failure of the courts and most academics, especially in criminal law, to understand the concept of actual causation in its basic laws-of-nature sense. The test of actual causation traditionally taught in law schools and employed

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218. Bhatti, *supra* note 14, at 52–56.

219. *See supra* text following note 198.

220. Chief Justice Roberts and Justice Sotomayor both referred to Amy's counsel's calculation that proportionate liability would result in a liability award against each viewer of only \$47. *Paroline*, 572 U.S. at 471 (Roberts, C.J., dissenting); *id.* 488 (Sotomayor, J., dissenting); *see* Cassell & Marsh, *supra* note 12, at 23–24.

by the courts, which was relied upon by the Court in *Burrage* and by Chief Justice Roberts in his dissenting opinion in *Paroline*, requires for a condition to have been a cause of some result that it was necessary in the particular circumstances for the occurrence of the result. (Chief Justice Roberts additionally argued that it must have been the sole cause, which is never true.) However, this necessary condition (“but-for”) test fails when there is overdetermined causation, most obviously with respect to conditions which were neither necessary nor independently sufficient, as is the case for all but a few of the hundreds or thousands of offenders contributing to each victim’s injuries in situations involving mass sexual abuse. To correctly identify causes in overdetermined causation situations, one needs to employ the NESS (necessary element of a sufficient set) criterion. The Court in *Paroline* for the first time considered the NESS criterion and applied it to support a finding of causation by Paroline. However, all of the Justices (and the lawyers involved in the case) failed to distinguish it from the deficient “aggregate but-for” test, and the Court described both tests as “legal fictions” to avoid the statutorily mandated full compensation in each restitution order. The NESS criterion, properly understood, rather than being a legal fiction, captures the meaning of causation in its basic laws-of-nature sense and thus enables proper identification of actual causes in all situations. The but-for and independently sufficient condition tests are mere corollaries of the NESS criterion, which work only in some situations and depend for their proper application on the analysis specified by the NESS criterion.

The second issue is the proper allocation of liability among the multiple legally responsible causes of an indivisible injury. The traditional rule has been “joint and several” liability of each legally responsible individual, which enables a victim to obtain full (but no more than full in the aggregate) compensation for an injury from any one or several of the legally responsible causes of that injury, who have a right to contribution from each other based on comparative legal responsibility. This traditional rule seems appropriate for those individuals, such as sex traffickers and the producers and major distributors of child pornography, whose actions were necessary or independently sufficient for, or otherwise played a major causal role in, a victim’s injury, with due consideration being given to equitable compensation of each of their victims. However, full individual liability for the injury, especially when the liability would be extensive, is excessive for those, such as individual viewers of child pornography or clients of victims of trafficking, whose actions were neither necessary nor independently sufficient and instead played a lesser role in producing a specific injury, such as the indivisible emotional distress suffered by a victim of child pornography or sex trafficking. This has been recognized by the courts in private nuisance cases and was understood by all of the Justices in *Paroline*.

Justice Sotomayor noted sections of the relevant criminal restitution provisions which, she argued, could be used to prevent excessive individual liability while still complying with the statutory mandate that each restitution order provide full compensation for those victims included in the restitution order. The Court ignored

those sections and instead justified less than full individual liability by describing its finding of causation, based on the NESS criterion, as a “legal fiction.” It stated that a court “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,” which, “would not, however, be a token or nominal amount.”<sup>221</sup> The vague and contradictory nature of this allocation rule was repeated in the Court’s discussion of a number of subsidiary factors. Although the Court stated that “[t]hese factors need not be converted into a rigid formula, especially if doing so would result in trivial restitution orders,”<sup>222</sup> its repeated statements that a defendant’s liability should be based on “its relative role in the causal process” and its focus on quantitative factors such as the total number of offenders, images possessed, etc., result in a proportionate liability rule based on relative causal contribution, which, as all the Justices recognized, would result, contrary to the Court’s qualifier, in only “token or nominal” liability.

Measuring a defendant’s relative contribution to a victim’s injury against, e.g., the total number of possessors of the images of her abuse or the total number of clients she serviced as a victim of trafficking, or even against any other individual contributor, misunderstands the nature of the underlying causal relationships in the mass sexual abuse context. Unlike the usual similar nuisance situation, in which the defendant’s contribution by itself usually would have caused no injury, a single individual’s viewing of the images of the victim’s childhood sexual abuse or a single client’s sexual interaction with a victim of trafficking is sufficient by itself to cause the victim substantial emotional distress, as well as being a substantial dignitary injury. It is erroneous and arbitrary to treat any viewer or client as making only a trivial or minor contribution to the victim’s emotional trauma because he is only one of the hundreds or thousands of viewers or clients, rather than treating him as one whose actions alone were sufficient to cause substantial emotional distress and as one of the much more limited number sufficient to produce severe emotional distress.

Individual full liability by each viewer of child pornography (or each knowing client of a victim of trafficking) for the indivisible emotional injuries suffered by their victims is inappropriate considering equitable allocation of liability among the multiple contributing defendants to each victim’s injuries and, more importantly, equitable compensation of all of the victims of each defendant. Proportionate liability based on relative causal contribution is also inapt, since it would result in trivial liability and fail to adequately take account of the defendant’s actual causal role. We need, instead, an appropriately tailored intermediate equitable remedy, which we argue should be either damages at large, the size of which is determined based on estimation by the court of what is just and equitable in the circumstances considering the discussion in the prior paragraph, or a

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221. *Paroline*, 572 U.S. at 459.

222. *Id.* at 460.

conventional (flat) award paid by each defendant at least equal to the estimated average amount paid under the first, more individualized approach.

In either case, in the criminal restitution context, every convicted offender should be subjected to a mandatory restitution order as part of the Government's prosecution of the offender, without any *required* claim by, involvement of, or litigation expenses paid by the victim, as is literally required now but ignored in practice by the Department of Justice. Liability awards that would result in more than full recovery by a specific victim should be put into a legislatively established fund to ensure full compensation (to the extent possible) of other victims. The amount to be paid by a defendant to each of its victims should be set at a level which would be sufficient to compensate, in the particular case or on average, at least for the emotional distress and related pecuniary costs that would have been suffered by the victim solely as a result of the defendant's offense or, preferably, the defendant's offense combined with only a few other offenders' similar offenses. In addition, the award needs to compensate for any discrete dignitary and physical losses suffered by the victim as a result of the defendant's conduct. Finally, it also ought to be sufficient to implement, under the relevant federal statutes, the U.S. Congress's intention to achieve full compensation for each victim, while also reflecting the usually minor role of an individual viewer or client in comparison to the relevant producer and distributors or traffickers.

The third issue is the Court's ill-considered and unwise suggestion in *Paroline* that imposing anything other than proportionate liability in the statutory criminal restitution order might violate the Excessive Fines Clause in the U.S. Constitution if the liability ordered might serve a punitive purpose, such as rehabilitation or deterrence, in addition to its admitted primary compensatory purpose. The Court turned Congress's intent on its head by claiming, despite Congress's insistence that each order of restitution encompass the full amount of the victim's losses, that "Congress has not promised victims full and swift restitution at all costs" and that the Congressional purposes underlying the relevant criminal restitution provisions are better served by stretching restitution out into small amounts over decades so that "more [offenders] are made aware, through the concrete mechanism of restitution, of the impact of child-pornography possession on victims."<sup>223</sup> The Court's brief arguments are not supported by the precedents that it cites and, if taken seriously, would make all compensatory awards, in civil as well as criminal cases, subject to the constitutional restrictions on punishment. As long as the restitution order simply compensates the victim for her actual losses, without any additional extra-compensatory element added for penal purposes, it should not give rise to any constitutional or other issues regarding appropriate punishment, despite the possible deterrent and perhaps rehabilitative effects of the restitution order.

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223. *Id.* at 462.