

CAUSATION AND ATTENUATION IN THE SLAVERY REPARATIONS DEBATE

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The success or failure of slavery reparations will depend on causation. Many criticisms of reparations have focused on the attenuated nature of the harm, suggesting that modern claimants are not connected to slaves, that modern payers are not connected to slave owners, and that harms suffered by modern Blacks cannot be connected to slavery. This Article examines these attenuation concerns and finds that they come in three related but distinct varieties: Victim attenuation, wrongdoer attenuation, and act attenuation. These three components, defined in this Article, show themselves in a number of interrelated legal and moral arguments.

The Article then discusses how ideas about causation from the mass tort context can help address the problems of attenuation in slavery reparations. Mass tort cases have developed novel methods of showing causation, such as statistical evidence and market share liability, and these tools can be used in the reparations context. These concepts, if used within the reparations context, could help overcome attenuation.

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The case for slavery reparations is failing. Scholars continue to write about reparations,¹ but they seem increasingly to be the only ones on the bandwagon. The media is sometimes ambivalent and occasionally hostile.² The lukewarm media reception mirrors societal feelings in general.³ Proposed legislation has failed to advance in

¹ See generally Kaimipono David Wenger, Slavery as a Takings Clause Violation, 53 Am. U. L. Rev. 191, 193 nn. 4-5 (collecting legal scholarship addressing reparations); Alfred L. Brophy, Reparations Talk: Reparations for Slavery and the Tort Law Analogy, 24 B.C. Third World L.J. 81, 82-84 (2003) (noting advances in reparations discussion); Alfred Brophy, Some Conceptual and Legal Problems in Reparations for Slavery, 58 NYU Ann. Surv. Am. L. 497, 505 (2002) (discussing development of reparations theory) [hereinafter Brophy, Some Problems].

Some of the major reparations pieces in recent years include Randall Robinson, *The Debt: What America Owes to Blacks* (1999); *Should America Pay?: Slavery and the Raging Debate on Reparations* (Raymond A. Winbush ed., 2003) [hereinafter *Should America Pay?*]; Mari J. Matsuda, Looking to the Bottom: Critical Legal Studies and Reparations, 22 Harv. C.R.-C.L. L. Rev. 323 (1987); and reparations symposia at New York University, see Symposium, *A Dream Deferred: Comparative and Practical Considerations for the Black Reparations Movement*, 58 N.Y.U. Ann. Surv. Am. L. 447 (2002), the University of Memphis, see Symposium, 33 U. Mem. L. Rev. 245 (2003), Boston College, see Symposium, 24 B.C. Third World L.J. 1 (2004), Boston University, see Symposium, *The Jurisprudence of Slavery Reparations*, 84 B.U. L. Rev. 1135 (2004), Harvard, see Symposium, 20 Harv. BlackLetter L.J. 17, and Boalt Hall, see Symposium, 6 Afr.-Am. L. & Pol'y Rep. 1 (2004). Modern legal reparations literature is generally acknowledged to have begun with professor Boris Bittker's work. See Boris Bittker, *The Case for Black Reparations* (Beacon Press 2003) (1973).

² See, e.g., Kevin Merida, *Did Freedom Alone Pay a Nation's Debt?*; Rep. John Conyers Jr. Has a Question, He's Willing to Wait a Long Time for the Right Answer, Wash. Post, Nov. 23, 1999, at C-01; see also Vincene Verdun, *If the Shoe Fits, Wear It: An Analysis of Reparations to African Americans*, 67 Tul. L. Rev. 597, 607 n.29 (collecting media accounts); Wenger, *supra* note 1, at 195 nn. 6-7 (same).

³ Polls show that overwhelming majorities of whites oppose reparations, while Blacks support reparations. See Michael Kranish, *Blacks Rally on Capital for Slavery Reparations: Farrakhan Seeks Transfer of Land*, Boston Globe, Aug. 18 2002, at A3 (discussing these findings from the CNN/USA Today/Gallup Poll); Alfred Brophy, *The Cultural War Over Reparations for Slavery*, 53 DePaul L. Rev.

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Congress.⁴ Recently, in a closely watched consolidated case, a federal court dismissed reparations claims, a development that could signal the death knell of all slavery reparations litigation.⁵

Why is the theory of reparations so divorced from the reality? It seems that a disjunct exists between scholarly writing on reparations and real world decisions.⁶ One source of this disjunct is the difficult nature of establishing causation in reparations cases. This Article will address the unique problems of causation and attenuation that arise in the reparations context.

1181, 1182-85 (discussing statistics) [hereinafter Brophy, Cultural War]; *see also* Lee A. Harris, "Reparations" as a Dirty Word: The Norm Against Slavery Reparations, 33 U. Mem. L. Rev. 409, 410 n.9 (discussing these and other poll results). *See generally* Taunya Lovell Banks, Exploring White Resistance to Racial Reconciliation in the United States, 55 Rutgers L. Rev. 903, 915-19 (2003) (discussing demographics of Americans opposed to reparations).

⁴ Representative John Conyers (D. Mich.) first introduced a bill in 1989 that would have established a commission to study the effects of slavery and recommend appropriate remedies. The bill died in committee, and has been reintroduced (and repeatedly killed) every Congress since then. *See* H.R. 3745, 101st Cong. (1989); H.R. 1684, 102d Cong. (1991); H.R. 40, 103d Cong. (1993); H.R. 891, 104th Cong. (1995); H.R. 40, 105th Cong. (1997); H.R. 40, 106th Cong. (1999); H.R. 40, 107th Cong. (2001); H.R. 40, 108th Cong. (2003). Representative Conyers has stated, "I have re-introduced H.R. 40 every Congress since 1989, and will continue to do so until it's passed into law." John Conyers, Jr., Major Issues—Reparations: The Commission to Study Reparations Proposals for African Americans Act, at http://www.house.gov/conyers/news_reparations.htm. *See also* Verdun, *supra* note 2, at 606-07 & n. 28 (discussing proposed legislation); Wenger, *supra* note 1, at 194 n.6 (same).

⁵ *In re African-American Slaves Descendants Litigation*, 375 F. Supp. 2d 721 (N.D. Ill. 2005). The *Slave Descendants* case was particularly important because it was the first major reparations case in federal court in ten years. Previously, in the only opinion by an appellate court dealing with reparations, claims against the government were dismissed. *See Cato v. United States*, 70 F.3d 1103 (9th Cir. 1995). *Slave Descendants* took a different tack, seeking compensation from private rather than governmental actors. Both *Cato* and *Slave Descendants* are discussed in more detail *infra*.

⁶ *Cf.* Brophy, Reparations Talk, *supra* note 1, at 83-86.

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Causation is a familiar concept to legal scholars. Tort liability requires a showing of proximate causation.⁷ Claimants must show not only conceptual “but-for” causation — that “but for” a party’s actions, the harm would not have occurred — but must also establish legally actionable “proximate cause.”⁸ In reparations cases, the attenuated nature of the harm makes it difficult to show proximate cause.⁹

⁷ See, e.g., Guido Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. Chi. L. Rev. 69, 69-72 (1975); Richard W. Wright, *Causation in Tort Law*, 73 Cal. L. Rev. 1735, 1737-39 (1985).

⁸ See Elizabeth C. Price, *Toward A Unified Theory of Products Liability: Reviving the Causative Concept of Legal Fault*, 61 Tenn. L. Rev. 1277, 1347 (1994) (“‘Cause-in-fact,’ ‘factual cause,’ or ‘but for’ causation, as every first-year law student knows, is generally an indispensable requisite to recovery in tort. It is the first head of the two-headed hydra of causation. The other head . . . is ‘proximate’ or ‘legal’ cause, a policy tool designed to cut off liability for acts perceived as too remote, attenuated, or mere conditions.”); Kim Forde-Mazrui, *Taking Conservatives Seriously: A Moral Justification for Affirmative Action and Reparations*, 92 Cal. L. Rev. 683, 727 (2003) (“Actual causation is but a starting point for establishing responsibility, making the causal agent ‘eligible’ for responsibility.”). W. Page Keeton *et al.*, *Prosser and Keeton on the Law of Torts* 264 (1984) (“As a practical matter, legal responsibility must be limited to those causes which are so closely connected with the result and of such significance that the law is justified in imposing liability.”). Thus, the law generally treats as actionable those “consequences which follow in unbroken sequence, without an intervening efficient cause, from the original negligent act.” See 57A Am. Jur. 2d *Negligence* § 491. “For such consequences the original wrongdoer is responsible, even though he or she could not have foreseen the particular results which did follow or results of a similar nature.” *Id.* See also Keeton *et al.*, *supra*, at 301-08 (discussing intervening causes); Oscar S. Gray, *The Law of Torts* 86-87 (1986) (discussing proximate cause).

⁹ In the words of one critic, reparations advocates point to an injury which is not “fairly traceable to slavery through a chain that contains no links of independent causation.” Calvin Massey, *Some Thoughts on the Law and Politics of Reparations for Slavery*, 24 B.C. Third World L.J. 157, 166 (2004); see also *id.* (“I am contending only that the nexus between slavery and the present forces that produce the sense of injustice felt by black Americans today is too attenuated to merit a judicial award of damages based on restitution.”); see *infra* § I.B. (discussing attenuation in reparations literature). For other examples of the attenuation discussion in reparations literature, see, e.g., Eric J. Miller, *Reconceiving Reparations: Multiple Strategies in the Reparations Debate*, 24 B.C. Third World

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Attenuation is diminished or failed causation.¹⁰ Attenuation is typically created by a conceptual separation between two actors or events, or a dilution or weakening of the conceptual connection between the two. As such, attenuation severs theoretical “but-for” causation from legally actionable proximate cause.

In this Article, I turn an analytical eye to attenuation arguments used in the reparations debate, defining and examining different types of attenuation arguments that arise in the literature. Attenuation arguments as used in the reparations debate come in three types, which I identify and classify for the first time: victim attenuation, wrongdoer attenuation, and act attenuation. Victim attenuation is found in the argument that modern Blacks¹¹ have no direct connection to slaves; wrongdoer attenuation, that modern Americans tend to lack specific individual connections to slave holders; and act attenuation, that

L.J. 45, 52 (2003) (noting the problem of attenuation); Art Alcausin Hall, There is a Lot to be Repaired Before We Get to Reparations: A Critique of the Underlying Issues of Race That Impact the Fate of African American Reparations, 2 Scholar 1, 27-32 (2003) (noting recurrence of the attenuation defense); Eric Posner & Adrian Vermeule, Reparations for Slavery and Other Historical Injustices, 103 Colum. L. Rev. 689, 708 (2003) (noting difficulty in connecting past wrongs to present harm); James R. Hackney Jr., Ideological Conflict, African American Reparations, Tort Causation and the Case for Social Welfare Transformation, 84 B.U. L. Rev. 1193 (2004) (noting causation problems in reparations context).

¹⁰ “The longer the interval between the protected activity and the adverse employment action, the more attenuated becomes the evidence of the requisite causation.” *Spadola v. New York City Transit Authority*, 242 F. Supp. 2d 284, 294 (S.D.N.Y. 2003); *see generally* 57A Am. Jur. 2d Negligence §§ 465, 491 (1989 & Supp. 2000) (discussing how temporal factor and an intervening circumstance affect remoteness and causation analysis).

¹¹ Throughout this Article I will use the term “Black” rather than “black” or “African-American.” *Cf.* Kimberle W. Crenshaw, Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law, 101 Harv. L. Rev. 1331, 1332 n.2 (1988) (“I shall use ‘African-American’ and ‘Black’ interchangeably. When using ‘Black,’ I shall use an upper-case ‘B’ to reflect my view that Blacks, like Asians, Latinos, and other ‘minorities,’ constitute a specific cultural group and, as such, require denotation as a proper noun.”).

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modern injury to Blacks is unrelated to the harms of slavery.¹² After defining terms and examining how attenuation arguments are used in the slave reparations context, I then discuss concepts from mass torts jurisprudence that could apply to the reparations debate.¹³

In the end, I seek to set out a framework for analyzing attenuation, and to work through some of the major legal attenuation problems. This Article will not address all possible attenuation concerns, but will

¹² See *infra* Part I.A. (discussing victim, wrongdoer, and act attenuation).

¹³ Causation and attenuation concerns have thus far received little sustained treatment in the reparations literature. A number of scholars have discussed concepts of causation briefly. See, e.g., Brophy, *Some Problems*, *supra* note 1, at 519; Posner & Vermeule, *supra* note 9, at 739; Matsuda, *supra* note 1, at 735. However, the only direct analysis of causation from the tort standpoint has been James Hackney's short essay, *Ideological Conflict, African American Reparations, Tort Causation and the Case for Social Welfare Transformation*. See Hackney, *supra* note 9.

Hackney's analysis is similar in some ways to the analysis in this Article, and provides a useful jumping off point. Hackney suggests different types of causal problems, which are similar to the types of attenuation analyzed in this Article. However, this Article differs from Hackney's essay in many respects. This Article's classificatory scheme identifies the problems as stemming from attenuation, and classifies them in a way that aids the analysis. This Article also discusses how tort law has dealt with these types of attenuation, and sets out a series of suggested applications that are beyond the treatment in Hackney's essay.

This Article is also limited in its own scope. This article will primarily address attenuation in reparation cases brought for the harm of slavery. Other reparations cases, such as lawsuits brought for the Tulsa riots, present different questions of causation and will not be discussed in any depth herein. See Keith N. Hylton, *A Framework for Reparations Claims*, 24 B.C. Third World L.J. 31, 43 (2004) [hereinafter Hylton, *Framework*] ("When thinking about reparations claims, one should avoid the mistake of viewing them as monolithic, having the same difficulties in terms of identification of plaintiffs, causation, and prescription of legal rights. In fact, reparations claims vary along many legal dimensions, creating a rich array in terms of their consistency with settled law."); see generally Alfred L. Brophy, *Reconstructing the Dreamland: The Tulsa Riot of 1921* (2002) (giving background of Tulsa riots). I will focus on individual reparations claims, rather than on claims that might be brought by African nations seeking compensation for loss of citizens. Finally, I will focus on claims derived from the harm of slavery itself, rather than claims based on post-emancipation acts such as racism or segregation.

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address some major legal concerns, and will also set out a framework for analyzing concerns.

I. Background

A. Types of Reparations Claims

Claims for slavery reparations encompass a number different of legal theories, but the two major strands are tort and unjust enrichment.¹⁴ The most straightforward type of claims are *tort claims*. Slaves suffered many deprivations that could potentially trigger tort liability.¹⁵ They routinely suffered harms including physical injury, loss of property, lost wages, loss of liberty, loss of family relations, loss of consortium, and mental anguish.¹⁶ Their descendants suffer today from residual racism, a consequence of slavery.¹⁷

¹⁴ This is generally recognized in the literature. *See, e.g.*, Brophy, Some Problems, *supra* note 1, at 516 (“As to substantive basis, the most commonly cited bases are unjust enrichment and tort.”).

Other theories are possibilities. Some commenters have suggested bringing human rights claims. For example, in provocative language the evokes the possibility of a human rights claim, Randall Robinson suggests that slavery was “[a] massive crime against humanity . . . an American holocaust.” Robinson, *supra* note 1, at 33. And in another paper, I have argued that slave descendants could seek recompense under the takings clause for taken self-ownership. Wenger, *supra* note 1. Despite these and other intimations, the two dominant approaches in reparations thus far are tort and unjust enrichment.

¹⁵ “Against the proper defendants, the idea of some kind of legal action designed to punish and secure compensation seems not only sensible, but compelling.” Anthony J. Sebok, Two Concepts of Injustice in Restitution for Slavery, 84 B.U. L. Rev. 1405, 1417 (2004) [hereinafter Sebok, Two Concepts].

¹⁶ *See* Keith N. Hylton, Slavery and Tort Law, 84. B.U. L. Rev. 1209, 1213-37; [hereinafter Hylton, Slavery] (discussing types of harms arising from slavery); Sebok, Two Concepts, *supra* note 15, at 1417; *see also* Kevin Hopkins, Forgive U.S. Our Debts?, Righting the Wrongs of Slavery, 89 Geo. L.J. 2531, 2534 (2001) (“The wrongs done to African slaves during slavery, such as the physical capture and exploitation of Africans for labor, the inhumane treatment and abuse of slaves by

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There are also some important conceptual obstacles to any tort claim arising from slavery. For one thing, it is unclear whether slave owners owed a legal duty to slaves. It is also unclear whether they owed any duty to slave descendants.¹⁸ However, a colorable argument can be made that either slave owners indeed owed a duty to slaves or their descendants, or that they should have been aware that the regime of slavery was legally dubious in a way that they should not be surprised to be held to have owed a duty to slaves or their descendants.¹⁹ For purposes of this Article, in order to focus on causation issues, we will assume that slave owners either owed a duty either to slaves or to their descendants, and that tort compensability of slavery is not negated by its legality at the time.²⁰

In addition to tort theories, reparations claims have been brought under *unjust enrichment* theories. Unjust enrichment claims differ from tort claims in significant ways. While a tort claim is a claim at law arising from a breach of duty and a negligent or intentional harm, an unjust enrichment claim is a hybrid claim in law and equity, and it requires a claimant to show only that a defendant unjustly obtained

white slaveholders, and the psychological abuses in failing to acknowledge and respect African personhood, to name only a few, were horrible and unfathomable.”)

¹⁷ See, e.g., Wenger, *supra* note 1, at 224-26.

¹⁸ If there was no duty owed to either slaves or to future generations (or to some other party harmed under slavery), then there is no tort claim. See Keeton et al, *supra* note 8, at 301-20 (noting need to establish duty). In addition, if the duty owed to a party is particularly weak, it could be viewed as affecting other aspects of tort liability such as causation. See generally Brophy, Some Problems, *supra* note 1, at 516 nn. 84-85 (discussing conceptual problems with tort liability for slavery).

¹⁹ Hylton, Slavery, *supra* note 16, at 1212 (arguing that slavery was a lawless regime, and that “applying today’s law to [slavery] should be viewed as bringing law to a regime from which it had been entirely displaced”).

²⁰ Tort law routinely compensates victims of harm cause by acts which were legal when performed, such as use of asbestos or Agent Orange, or provision of tobacco or DES. See also Hylton, Slavery, *supra* note 16, at 1212 (suggesting that the legality of slavery undermines the legitimacy of the legal system of the time).

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some benefit from the claimant, which benefit should be refunded.²¹ The measure of damages is the amount of unjust gain.²² Unjust enrichment claims provide certain tactical advantages in mass compensation litigation and have been successfully used in Holocaust and tobacco cases; they also may create particular tactical disadvantages.²³ Unjust enrichment claims have been brought in the slave reparations context, though academics are divided as to whether

²¹ “The minimum requirements for a claim of unjust enrichment based on quantum meruit are: (1) A benefit conferred upon the defendant by the plaintiff; (2) an appreciation or knowledge of the benefit by the defendant; and (3) the acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without payment of its value.” Sebok, Two Concepts, *supra* note 15, at 1427; *see also* Anthony Sebok, Reparations, Unjust Enrichment, and the Importance of Knowing the Difference Between the Two, 58 NYU Ann. Surv. Am. L. 651, 654-55 (2003) [hereinafter Sebok, Knowing the Difference] (further discussing unjust enrichment); Brophy, Some Problems, *supra* note 1, at 521 (discussing arguments in favor of unjust enrichment reparations compensation).

²² *See* Anthony Sebok, Prosaic Justice, 2002 Legal Aff. 51, 52 [hereinafter Sebok, Prosaic Justice]; Emily Sherwin, Reparations and Unjust Enrichment, 84 B.U. L. Rev. 1443, 1447-49 (2004).

²³ Unjust enrichment claims are less susceptible to statute of limitations defenses. *See* Sebok, Knowing the Difference, *supra* note 21, at 653; *see also* Sebok, Two Concepts, *supra* note 15, at 1418 (noting that states in the tobacco litigation used unjust enrichment claims, since these are less susceptible to affirmative defenses). They may have other tactical advantages. Sherwin, *supra* note 22, at 1449-51.

Unjust enrichment was included in the Holocaust cases through a circuitous route -- the case was originally a replevin claim, and restitution was later added as an additional effective tool. Sebok, Two Concepts, *supra* note 15, at 1407. The restitution claims ended up being central in the Holocaust settlement. *See id.*; *see also* Sebok, Prosaic Justice, *supra* note 22, at 52. Unjust enrichment claims, however, are uniquely susceptible to equitable defenses. Sebok, Knowing the Difference, *supra* note 21, at 655. In addition, they may be less morally compelling than conventional tort claims. *Id.* at 657; Sebok, Prosaic Justice, *supra* note 22, at 52-53.

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they are appropriate in this area.²⁴ Some scholars have suggested that economic loss should be treated as non-descendible.²⁵ This view is contested, with others suggesting that economic loss claims ought to be viewed as descendible.²⁶ In any event, they are seen as practically important; one commenter has argued that unjust enrichment is “the only viable strategy remaining” for reparations advocates.²⁷

In addition to the divide between tort and unjust enrichment approaches, there is also a division in reparations between *ancestor-based* theories and *descendant-based* theories. That is, it is possible to bring a claim focused on the harms done to the initial slaves (ancestor-based theories). It is also possible to bring claims focused on the harms which slave descendants continue to suffer today (descendant-based theories). (Of course, any particular litigant may seek to raise both ancestor- and descendant-based claims.)

The two different focal points bring their own advantages and disadvantages. An ancestor-based approach will have no problem in showing harm -- it is undisputed that slaves were harmed, and a strong case can be made for restitution to them.²⁸ However, since no slaves are presently alive, an ancestor-based approach encounters difficulties

²⁴ Compare Sebok, Two Concepts, *supra* note 15, at 1440-42 (suggesting that restitution for deceased persons such as slaves is not conceptually coherent and should be avoided), and Sherwin, *supra* note 22, at 1454-65 (arguing that unjust enrichment reparations claims are inappropriate because they rely on resentment and retaliation) with Hanoch Dagan, Restitution and Slavery: On Incomplete Commodification, Intergenerational Justice, and Legal Transitions, 84 B.U. L. Rev. 1139, 1158-63 (arguing that restitution claims are descendible and appropriate in the reparations context).

²⁵ Sebok, Two Concepts, *supra* note 15, at 1431-41.

²⁶ Dagan, *supra* note 24, at 1158-64. One way to elaborate on Dagan’s theory is to suggest that unjust enrichment claims brought for property loss, rather than tort-like claims, could be viewed as more easily passed from one generation to the next.

²⁷ Sebok, Prosaic Justice, *supra* note 22, at 52.

²⁸ See also Andrew Kull, Restitution in Favor of Former Slaves, 84 B.U. L. Rev. 1277 (2004) (discussing cases of restitution to slaves found to have been wrongfully enslaved).

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on remedies: Should a slave descendant receive remedies for harms done to an ancestor?

A descendant-based approach elides that difficulty but runs into the opposite problem. Descendants will not have a problem establishing that they are the proper recipient of a remedy -- *if* they can first establish a harm done to them. But the descendant-based theory suffers from difficult questions in establishing harm -- how are modern slave descendants harmed by slavery?

Ultimately, each theory depends on the resolution of the same difficult questions of causation, such as how slaves can be connected to modern claimants.

B. General Principles of Causation

It is black letter law that a tort claimant must show causation in order to establish liability against a defendant.²⁹ However, the idea of causation is often difficult to apply in particular cases. Well-known conceptual problems may complicate any attempt to assign liability for an act to a preceding “cause”³⁰-- while an infinite number of factors may be considered “but-for” or “factual” causes of a harm,³¹ only some of those will be considered legally actionable causes, those

²⁹ See Keeton et al., *supra* note 8, at 263-67.

³⁰ Every effect has multiple causes. Wex S. Malone, Ruminations on Cause-in-Fact, 9 Stan. L. Rev. 60, 62 (1956); *see also* Wright, *supra* note 7, at 1737 (noting that there are innumerable causes for each injury); *id.* at 1780-85 (discussing tort scholarship about multiple causes); Glen O. Robinson, Multiple Causation in Tort Law: Reflections on the DES Cases, 68 Va. L. Rev. 713, 713-14 (causation is vague and manipulable, more than a simple question of fact, and actual cause involves policy questions just as proximate cause does).

³¹ Hart & Honoré, Causation in the Law 10-11 (1967); Keeton et al., *supra* note 8, at 266 (“Many courts have devised a ruled, commonly known as the ‘but-for’ or ‘sine qua non’ rule, which may be stated as follows: The defendant’s conduct is a cause of the event if the event would not have occurred but for that conduct; conversely, the defendant’s conduct is not a cause of the event, if the event would have occurred without it.”); Gray, *supra* note 8, at 90-91 (discussing but-for cause).

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which the law deems “proximate.”³² The determination of legal causation depends in part on whether an initial event is *necessary*, *sufficient*, or *both*, in the causing a second event.

In the most simple causative scenario, an initial event is both necessary and sufficient to cause a second event. For example, David might run into Louise with his car, causing her leg to be broken. The causative event -- David’s collision with Louise -- is both necessary and sufficient to cause Louise’s broken leg.

When a causative event is either not necessary or not sufficient to create a second event, causation becomes more complicated. If an initial event is not *necessary*, we say that causation is *overdetermined*. In the classic example, two negligently set fires merge, and a property is destroyed by the joint fire.³³ Either fire, on its own, would have destroyed the property, and so neither fire, taken individually, was necessary to cause the end result. If Fire A had never been set, Fire B would still have led to the result.

In contrast, if an initial event is not *sufficient* to bring about a second event, we say that causation is *underdetermined*.³⁴ Thus, in the well-known case of *Palsgraf v. Long Island Railroad*, the initial event

³² Keeton et al., *supra* note 8, at 263 (“An essential element of the plaintiff’s cause of action for negligence, of for that matter for any other tort, is that there be some reasonable connection between the act or omission of the defendant and the damages that the plaintiff has suffered. This connection is usually dealt with by the courts in terms of what is called ‘proximate cause’ or ‘legal cause.’”); *see also* Gray, *supra* note 8, at 85-91 (discussing proximate and but-for cause); Calabresi, *supra* note 7, at 72-76 (discussing this difference).

³³ Hart & Honoré, *supra* note 31, at 10-15.

³⁴ *See* Aaron Twerski & Anthony J. Sebok, Liability Without Cause? Further Ruminations on Cause-In-Fact as Applied to Handgun Liability, 32 Conn. L. Rev. 1379, 1380 (2000) (“The problem was one of underdetermination. The reason we don’t know if the defendant’s breach of duty caused the injury is because we don’t know whether the victim was in a position to benefit from the increase in safety that the duty was supposed to guarantee.”); *see also* Malone, *supra* note 30, at 65 (stating that the process of determining causation is often “basically conjecture”); *see generally* Michael Dummett, Frege: Philosophy of Language (1981) (discussing the conceptual idea of underdetermination).

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(negligent handling a box) led to a chain of future events. The box was dropped (a second necessary condition); the box contained fireworks (a third necessary condition) which exploded; the explosion toppled a set of scales (a fourth necessary condition), and finally the plaintiff was harmed.³⁵ We would say that normally dropping a box is not sufficient to cause such a chain of events. Causation was found to be underdetermined in *Palsgraf*, leading to a finding of no liability.³⁶ Similarly, if a sailor falls off of a ship and drowns, and the ship did not maintain adequate safeguards, it may be impossible to know if the safety measures would have saved the sailor.³⁷ The sailor may have been swept overboard despite the precautions; the cause of his death is underdetermined.³⁸

Both underdetermined and overdetermined causation are commonly found in the mass tort context. A defendant's product may not be necessary to cause a particular harm, making individual cases overdetermined. Where the harm manifests in a physical disease that can have many causes showing conventional causation can be difficult.³⁹ As Margaret Berger notes, harms for which plaintiffs seek compensation may be "found in others who have not been exposed to the substance or product in question." Thus, "it is impossible to tell whether an individual plaintiff's injury is attributable to the product or whether it would have manifested itself anyhow."⁴⁰ This difficulty

³⁵ *Palsgraf v. Long Island R. Co.*, 248 N.Y. 339, 340 (1928).

³⁶ *Id.*

³⁷ Malone, *supra* note 30, at 76.

³⁸ Malone, *supra* note 30, at 76; Twerski & Sebok, *supra* note 34, at 1379-82.

³⁹ See Margaret A. Berger, Eliminating General Causation: Notes Towards a New Theory of Justice and Toxic Torts, 97 Colum. L. Rev. 2117, 2123 (1997) ("None of these categories of evidence is capable, however, of proving conclusively a cause and effect relationship . . . Evidence of this kind is inherently subject to considerable uncertainty and inconclusiveness."); Steve Gold, Note, Causation in Toxic Torts: Burdens of Proof, Standards of Persuasion, and Statistical Evidence, 96 Yale L.J. 376, 380 (1986).

⁴⁰ *Id.* at 2121-22; see also Gold, *supra* note 39, at 376 ("Proving the cause of injuries that remain latent for years, are associated with diverse risk factors, and

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results from the number of causes that can contribute to a disease; as another commentator notes, “rarely is any particular toxic agent the exclusive source of a given disease. Insidious diseases generally have several sources, each of which may be sufficient to bring about the condition.”⁴¹ Underdetermination is also a concern, since a defendant’s product may lead to disease only through interaction with other acts or circumstances.⁴² Finally, mass torts typically involve a large number of plaintiffs harmed by a defendant’s product. Some of their cases may involve simple causation, while others may have underdetermined or overdetermined causative chains.

With this brief background in causation, we can now turn to the specific case of reparations for slavery.

II. Three Types of Attenuation in Reparations

In the reparations context, many different types of arguments are often raised to challenge the idea of causation. Such arguments use the language of attenuation. These attenuation arguments can be divided up in a way that helps us analyze them. Some of these arguments impact directly on the causation analysis, while others are less directly related.

In this part I examine these attenuation arguments that arise in discussions of reparations. Much of this Part is descriptive, setting out various attenuation arguments as they have been used by others. This Part is also classificatory, in that it will place specific statements into

occur at background levels even without any apparent cause, is the central problem for toxic tort plaintiffs.”).

⁴¹ David Rosenberg, *The Causal Connection in Mass Exposure Cases: A Public Law Vision of the Tort System*, 97 *Harv. L. Rev.* 849, 856; *see also* Jack B. Weinstein, *Individual Justice in Mass Tort Litigation* 148-55 (1995) (discussing this problem); Robinson, *supra* note 30, at 759 (stating that a deterministic causation approach that assumes a clean relation between an act and the injury is not useful in indeterminate cases which require probabilistic evidence).

⁴² *See, e.g.*, Robinson, *supra* note 30, at 759-60; Rosenberg, *supra* note 41, at 850-56; Berger, *supra* note 39, at 2123-30.

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one or more categories. Section A will discuss act attenuation, Section B will discuss victim attenuation, and Section C will examine wrongdoer attenuation.

Attenuation arguments in reparations have three major thematic strands. These are *victim attenuation*, *wrongdoer attenuation*, and *act attenuation*. These interrelated but distinct components correspond to a perceived lack of connection between deceased slaves and present claimants (victim attenuation); between slave beneficiaries (slave holders and governments) and modern citizens or governments (wrongdoer attenuation); and between harmful acts of slavery and any present injury.⁴³

⁴³ Some other writers have noted the presence of some of these general themes in reparations. See Brophy, *Some Problems*, *supra* note 1, at 505 (“There are, then, several distinct problems between connecting past and present. There are problems in connecting the past wrongdoers with their successors (who would be the present defendants); problems in connecting past victims with their successors (who would be the present plaintiffs); and connections between past wrongs and present claims.”); *see also id.* at 503-04 (“The claims are hard to fit into a traditional framework for two reasons. First, the victims are making claims against people who are not themselves wrongdoers. Furthermore, that defendant class may not have any current benefit from the harm. In that case, there will be a claim asserted against a discrete group of innocent people. . . . Often the perpetrators cannot be identified with specificity or are no longer alive.”); Alfreda Robinson, *Corporate Social Responsibility and African American Reparations: Jubilee*, 55 *Rutgers L. Rev.* 309, 365 (2003) (noting that opponents of reparations focus on specific difficulties including “the absence of directly harmed individuals,” “the absence of individual perpetrators,” and “the lack of direct causation”); Posner & Vermeule, *supra* note 9, at 698 (“Reparations claims thus involve three relationships: (1) the relationship between the original wrongdoer and the original victim; (2) the relationship between the original wrongdoer and the possible payer of reparations; and (3) the relationship between the original victim and the possible claimant or beneficiary of reparations. The claimant must show that each relationship is of the proper type.”); *id.* at 699 (“Compensatory justice requires a relationship of identity between the wrongdoer and payer and a relationship of identity between the victim and claimant.”); Verdun, *supra* note 2, at 628-30 (“Opponents of reparations to African Americans argue that living whites have not injured living African Americans; the wrongs of slavery were committed by individuals who have been dead for years. African Americans to day were never slaves, and are not entitled to wages for slave labor performed over one

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A. Act Attenuation

The first type of attenuation argument that arises in reparations is a standard kind of attenuation which I will here call act attenuation — the idea that there is no direct connection between past wrongdoing and present harm. Act attenuation is not unique to reparations, but is a common theme in much of tort litigation. For example, *Palsgraf*, with its unique chain of events leading to the ultimate injury, gives an example of act attenuation.⁴⁴ Act attenuation may be created by overdetermined or underdetermined causation. Act attenuation is an attack on the move from conceptual cause to proximate cause.⁴⁵

Act attenuation is also a common objection to slavery reparations.⁴⁶ One critic notes that a “problematic consideration is

hundred years ago.”); Hylton, Framework, *supra* note 13, at 39-40 (discussing different types of claims and distinguishing them based on whether injurers and victims are identifiable).

Little of the existing scholarship discusses the significance of these different variants of attenuation, or seeks to classify and analyze these divisions, as I do in this Article. The closest analogue is James Hackney’s analysis in his recent essay. *See* Hackney, *supra* note 9, at 1195-97 (discussing “identification, boundary, and source” causation issues). However, Hackney’s analysis, which is briefer than the discussion and analysis in this Article, differs from my analysis in several respects. Hackney’s essay uses a preliminary discussion of some causation issues to frame an analysis that focuses on social welfare discussions. In contrast, this Article focuses on the causation concerns themselves, and how they could be addressed by using conceptual tools from the mass torts context.

⁴⁴ *Palsgraf v. Long Island R. Co.*, 248 N.Y. 339 (1928).

⁴⁵ *See generally* Keeton et al., *supra* note 8, at 266.

⁴⁶ *See, e.g.*, Bittker, *supra* note 1, at 9; Brophy, Some Problems, *supra* note 1, at 518-19. Attenuation not a special or uniquely high hurdle to forestall reparations claims, though they may be unusually susceptible to this defense. Posner & Vermeule, *supra* note 9, at 711. Attenuation is a familiar bugbear for civil rights advocates. *See* Maria L. Marcus, Learning Together: Justice Marshall’s Desegregation Opinions, 61 *Fordham L. Rev.* 69, 90-95 (1992) (noting Supreme Court use of attenuation to rule against desegregation claims).

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causation, which invokes the question of whether the injury presently complained of was a foreseeable product of the defendant's conduct. . . . it is necessary to wrestle with the issue of whether that past conduct has caused injury to a contemporary plaintiff."⁴⁷ This objection is easy to understand. It can be difficult, after all, to connect the harms of slavery to specific disadvantages of Blacks today. Indeed, it is not easy to characterize Blacks as a cohesive economic group at all. There are vast differences in wealth, status, and class among individual Blacks.⁴⁸ Some individuals appear to have integrated smoothly into society, while others have not.⁴⁹

The difficulty of unraveling potential contributing or ameliorating causes leads to act attenuation. Thus, a "lack of sufficient connection between past wrong and present claim" is an argument that Matsuda calls one of the "standard doctrinal objections to reparations."⁵⁰ Similarly, media and pundit statements discuss act attenuation.⁵¹ A

There is certainly no agreement by reparations advocates that proximate cause is not satisfied. Brophy, *Some Problems*, *supra* note 1, at 123-25; Forde-Mazrui, *supra* note 8, at 728-33 (arguing that chain of proximate causation has not been broken by actions of slave descendants).

⁴⁷ Massey, *supra* note 9, at 162-63.

⁴⁸ Matsuda, *supra* note 1, at 375. Of course, despite these differences, Blacks are overwhelmingly less well-off than whites. *See generally* Robert Westley, *Many Billions Gone, Is it Time to Reconsider the Case for Black Reparations?*, 40 B.C. L. Rev. 429, 471-72 (1998) (same).

⁴⁹ As Mari Matsuda notes, "Not all members of the victim group are similarly situated. Some are rich, some poor. Some feel betrayed, others do not. Some are easily identifiable as group members, others have weak claims to membership." Matsuda, *supra* note 1, at 375.

⁵⁰ Matsuda, *supra* note 1, at 373-74. Matsuda's other standard objections are "factual objections and excuse or justification for illegal acts; difficult identification of perpetrator and victim groups; [and] difficulty of calculation of damages." *Id.*; *see also id.* at 374 ("The problem of specific identification of wrongdoers and victims is a common objection to reparations.").

⁵¹ Horowitz writes that reparations is "based on the unfounded claim that all African-American descendants of slaves suffer from the economic consequences of slavery and discrimination" and that "no evidence-based attempt has been made to

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number of critics suggest that shortcomings of Blacks, individually or as a group, are responsible for any present injury.⁵²

Act attenuation relates affects the cases not only at trial or motion stage, where it affects a showing of tort causation. Act attenuation also has important indirect effects on claimants' very right to press a claim. Courts only allow claims by those who can show standing -- that is, a direct connection between a wrongful act and a claimant's injury.⁵³ Act attenuation is a factor in standing inquiry; as the Supreme Court has stated, a relevant question in deciding standing is, "Is the line of causation between the illegal conduct and injury too attenuated?"⁵⁴

Act attenuation is a normal obstacle that arises in many cases, not just those involving reparations. Many claimants bring cases where causation is either overdetermined or underdetermined. In particular, those kinds of issues often arise in mass compensation cases, where a connection between initial acts and resulting harms may not always be clear.

Some conceptual tools exist to deal with the problem of act attenuation. For example, unjust enrichment claims may elude act attenuation, because unjust enrichment depends only on a showing that a defendant was unjustly enriched.⁵⁵ In addition, some scholars

prove that living individuals have been adversely affected by a slave system that was ended over 150 years ago." Horowitz, *supra* note 58, at 6.

⁵² See Forde-Mazrui, *supra* note 8, at 728-33 (discussing these arguments); see also Hylton, Framework, *supra* note 13, at 35-37 (discussing differences in Black and white family structure).

⁵³ See *id.* at 380-81 ("The linkage of victims and perpetrators for acts occurring in the immediate past is another trait of standard legal claims."); see also Brophy, Some Problems, *supra* note 1, at 505 ("Closely related to the difficulty of identification of victims and wrongdoers is the requirement that there be a close connection between past wrong and present claim."); Verdun, *supra* note 2, at 624 (noting this requirement in affirmative action). This is a common theme in tort law. See, e.g., F.R.C.P. 23 (setting out commonality requirement in class action lawsuits).

⁵⁴ Allen v. Wright, 468 U.S. 737, 757-58 (1984) (quoting Warth v. Seldin, 422 U.S. 490, 504 (1975)).

⁵⁵ See Sebok, Two Concepts, *supra* note 15, at 1416-17.

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suggest that courts are likely to overlook act attenuation concerns in certain cases, such as those involving personal injuries.⁵⁶ However, the general route for overcoming act attenuation is a factual one, and claimants generally overcome the problem by showing evidence of causal links.

Act attenuation is an important theme in any discussion of reparations. In addition to the standard act attenuation concerns that arise in reparations, intergenerational mass harm claims such as slave reparations involve two more specialized variants of the lack of causation argument which I will address in turn.

B. Victim Attenuation

The first of the two more specialized concerns is what I will call victim attenuation. Victim attenuation is the idea that modern claimants are insufficiently linked to original harmed parties. This lack of connection creates victim attenuation, a concern which is typically present only in intergenerational claims. Victim attenuation concerns arise not only in slavery reparations cases, but in others that seek compensation for intergenerational harms, including cases involving harms to Native Americans, Holocaust victims, and Japanese internees.

In the slavery context, victim attenuation manifests in the argument that Blacks today are not sufficiently linked to slaves, and are thus undeserving of any recompense for slavery.⁵⁷ The basic idea underlying this concern is intuitive. Blacks living today were not directly subject to the harms of slavery.⁵⁸ Many Blacks may be slave

⁵⁶ *Id.* at 1439-41.

⁵⁷ A related concern is that slave descendants today would not exist but for slavery, and therefore are not entitled to recompense. *See, e.g.*, Stephen Kershnar, *The Inheritance-Based Claim to Reparations*, 8 *Legal Theory* 243, 247-51 (2002).

⁵⁸ “Opponents also argue that African Americans today were never slaves and did not directly experience the injustices of slavery and its effects and thus are not entitled to any form of reparations.” Hall, *supra* note 9, at 30; *see also* Brophy, *Some*

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descendants, but many others are more recent arrivals who lack that connection as well.⁵⁹ Present claimants are not original victims, and may have a relatively low proportion of descent.

This concern appears in the literature on reparations. Stephen Kershnar argues that modern Blacks have only “token” rights of reparations because they are not sufficiently connected to slaves.⁶⁰ Keith Hylton suggests that reparations claims must be treated as derivative claims under tort law, which means that as a practical matter they will most likely fail.⁶¹ Al Brophy notes that “[f]ormulating a legal claim . . . involves linking past victims with people who are making a claim in the present—or what one might call present victims of past discrimination.”⁶² And media critics of reparations for slavery also emphasize victim attenuation.⁶³

Problems, *supra* note 1, at 518-20; Miller, *supra* note 9, at 52; David Horowitz, Ten Reasons Why Reparations for Blacks is a Bad Idea for Blacks - and Racist Too, *Front Page Magazine*, January 3, 2001.

⁵⁹ See Brophy, *Some Problems*, *supra* note 1, at 519; Posner & Vermeule, *supra* note 9, at 739; Graham Hughes, *Reparations for Blacks?*, 43 *N.Y.U. L. Rev.* 1063, 1064 (1968) (noting difficulties in identifying plaintiffs); *see also* Linda Chavez, *Promoting Racial Harmony*, in *The Affirmative Action Debate* 314, 314-22 (George E. Curry ed., 1996) (noting victim attenuation concerns relating to affirmative action); Verdun, *supra* note 2, at 623 (discussing victim attenuation in affirmative action); Posner & Vermeule, *supra* note 9, at 712 (same).

⁶⁰ Kershnar, *supra* note 57, at 251-58; *see also* Janna Thompson, *Historical Injustice and Reparation: Justifying Claims of Descendants*, 112 *Ethics* 114, 116-21 (2001) (suggesting that the passage of time precludes reparations).

⁶¹ Hylton, *Slavery*, *supra* note 16, at 38-45.

⁶² Brophy, *Some Problems*, *supra* note 1, at 504.

⁶³ For example, one critic argues that “it is obscene to think of this modern generation of black Americans profiting from the blood money drawn nearly 140 years ago from the exploitation of slaves.” Juan Williams, *Slavery Isn’t the Issue*, *Wall Street Journal*, April 14, 2002. *See also* Adolph Reed, *On Reparations*, *The Progressive*, December 2000 (noting difficulty of connecting modern victims with slave ancestors); Merida, *supra* note 2, at C-01. Merida notes that “Opponents say there is no precedent for paying people who are dead, that reparations are usually awarded to survivors.” Merida, *supra* note 2, at C-01.

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Victim attenuation concerns have been paramount in judicial decisions on reparations. Victim attenuation directly affects the legal analysis of a claimant's standing. Thus, the Ninth Circuit Court of Appeals, in *Cato v. United States*, dismissed reparations claims brought against the government, stating that:

Cato proceeds on a generalized, class-based grievance; she neither alleges, nor suggests that she might claim, any conduct on the part of any specific official or as a result of any specific program that has run afoul of a constitutional or statutory right and caused her a discrete injury. Without a concrete, personal injury that is not abstract and that is fairly traceable to the government conduct that she challenges as unconstitutional, Cato lacks standing.⁶⁴

Similarly, the district court in the recent *In re African-American Slave Descendants Litigation* decision dismissed a number of consolidated claims in related cases brought against corporations.⁶⁵ The court wrote that:

⁶⁴ 70 F.3d at 1109-110. The court elaborated, “she does not trace the presence of discrimination and its harm to the United States rather than to other persons or institutions. Accordingly, Cato lacks standing to bring a suit setting forth the claims she suggests.” *Id.*

⁶⁵ *In re African-American Slave Descendants Litigation*, 375 F. Supp. 2d 721 (N.D. Ill. 2005). That consolidated case proceeded under a different theory than *Cato*; it was brought not against the government but against corporations whose predecessor entities had benefited from slavery. Despite this difference, the issue of standing again proved decisive. The court initially dismissed claims in January 2004, giving leave to replead. *See In re African-American Slaves Descendants Litigation*, 304 F. Supp. 2d 1027 (N.D. Ill. 2004). In July 2005, the amended complaint was dismissed, in a substantially similar opinion. 375 F. Supp. 2d 721; *see* Anthony Sebok, “The Lawsuit Brought by African-Americans Seeking Compensation from Corporations for the Wrongs of Slavery: Why the Opinion Dismissing the Suit is Unpersuasive,” Findlaw (August 8, 2005) [hereinafter Sebok, *The Lawsuit*] (available online at <http://writ.news.findlaw.com/sebok/20050808.html>) (noting similarity between the

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Plaintiffs' alleged injury is derivative of the injury inflicted upon enslaved African-Americans over a century ago. . . . This is insufficient to establish standing, and contrary to centuries of well-settled legal principles requiring that a litigant demonstrate a personal stake in an alleged dispute. . . . Plaintiffs cannot establish a personal injury sufficient to confer standing by merely alleging some genealogical relationship to African-Americans held in slavery over one- hundred, two-hundred, or three-hundred years ago.⁶⁶

Plaintiffs had sought to establish standing by arguing that they were slave descendants, and claiming that, as the rightful heirs of their ancestors' assets, they suffered injury because their ancestors were not compensated for their labor.⁶⁷ The court disagreed: "Plaintiffs' claim to the economic wealth of their ancestors' labor is conjectural. While most would like to assume that they will be the beneficiaries of their ancestors' wealth upon their demise, this is a mere assumption."⁶⁸ In addition, the court ruled that the plaintiffs did not meet the requirements for third party standing: "Plaintiffs have not alleged a legally sufficient relation to their ancestors. All that Plaintiffs allege is

2004 decision dismissing the original complaint and the 2005 decision dismissing the amended complaint).

The case was dismissed in part because of standing and attenuation issues, and in part because of the statute of limitations. 375 F. Supp. 2d at 770-80 (discussing statutes of limitation); *id.* at 775-80 (discussing exceptions to the statute of limitations); *see generally* Robinson, *supra* note 43, at 366-68 (discussing statutes of limitations); Wenger, *supra* note 1, at 244-48 (same).

⁶⁶ *Id.* at 748, 751.

⁶⁷ *Id.* at 748.

⁶⁸ *Id.*

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a genealogical relationship, and more is required under the law in order to confer third-party standing.”⁶⁹

The difference between victim and act attenuation is subtle. While act attenuation is an assertion that a claimant has suffered no legally cognizable harm, victim attenuation is an assertion that the claimant is a person who should not bring a claim at all. In the context of descendant-based reparations suits, victim attenuation asserts that modern claimants are insufficiently linked to harmed parties, thus relying on act attenuation -- the lack of a connection between a tort inflicted on a slave and any perceived present day harm. In the context of slave based reparations, victim attenuation is not dependent on act attenuation but rather on the intergenerational gap itself and on the idea that modern claimants are not good representatives of slaves, who may have themselves once had colorable claims. Thus, concerns of victim and act attenuation are interrelated. Victim attenuation problems of standing exist because courts are unsure that current claimants can show a harm to them. The same perceived inability to show harm would inevitably create act attenuation concerns at any trial. (However, a weaker connection between victims and harm may satisfy the victim attenuation standing concerns, while a stronger connection might eventually need to be shown to establish causation at trial.)

Victim attenuation defenses potentially apply to both tort and unjust enrichment claims. Victim attenuation has arisen in both sides of the *Slave Descendants* litigation, for example. And both types of claims have foundered in court, due at least in part to victim attenuation. (Conceptually, to the extent that victim attenuation is an outgrowth in part of act attenuation, then unjust enrichment claims -- some of which are less subject to act attenuation -- may also be less susceptible to victim attenuation defenses.)

⁶⁹ *Id.* at 753. As the court noted, the requirement is that the party asserting third party standing show some injury in fact, and that that party also show that prudential considerations weigh in its favor. *Id.* at 752-53.

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C. Wrongdoer Attenuation

The third type of attenuation argument is wrongdoer attenuation. Wrongdoer attenuation exists because present-day citizens and governments may not be closely connected to slave owners, suggesting that perhaps they should not be required to pay for harms caused by slavery.⁷⁰ Many modern non-Blacks are not descendants of slave owners, and have no apparent direct connections to them.⁷¹ All living

⁷⁰ See Brophy, *Some Problems*, *supra* note 1, at 519 (“The people who perpetrated the crimes of slavery are gone and their estates are (mostly) distributed. A few corporations survive and some of the money made from slavery is traceable to currently existing bank accounts. However, there are significant problems in imposing the liability of past generations of private actors on the current generation.”); see also Matsuda, *supra* note 1, at 375 (“Of those taxpayers who must pay the reparations, some are direct descendants of perpetrators while others are merely guilty by association. Under a reparations doctrine, the working class whites whose ancestors never harbored any prejudice or ill-will toward the victim group are taxed equally with the perpetrators’ direct descendants for the sins of the past.”); Posner & Vermeule, *supra* note 9, at 736 (“Reparations are rarely paid by the original wrongdoers, that is, the individuals who performed the wrongful acts, whether or not on behalf of a state or corporate body. Substantive moral considerations must explain why nonwrongdoers—usually taxpayers or shareholders—should pay reparations; when these considerations fail, prudential considerations must be invoked.”); Hall, *supra* note 9, at 30 (“White America today attempts to distance itself from both the ‘sins of slavery’ and of its forefathers, in an effort to deny responsibility for the past and present problems associated with race. Opponents of African American reparations contend that slavery and past injustices by White Americans were not conducted by individuals living today, but rather by individuals long dead.”).

⁷¹ This is recognized in the reparations literature. See, e.g., Brophy, *Some Problems*, *supra* note 1, at 519; Verdun, *supra* note 2, at 629-30; Miller, *supra* note 9, at 52. And many modern Americans may not feel any sort of link to slave owners. However, based on casual observation, there seems to be at least some degree of connection that many white southerners feel for former slaveholders. This can be seen, for instance, in the detailed civil war role-playing activities; the continued prevalence of statues of confederate generals; the politically popular use of the confederate flag; and the resurgence of historical societies such as the Daughters of the Confederacy. Reparations opponents may be more connected to the past, and in

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defendants are a generation or more removed from slave owners.⁷² In addition, it is likely that most or all slave owner descendants have at least some ancestors that were nonslaveholders – and many are mixed descendants who have ancestry traceable both to slaveowners and to slaves themselves.⁷³ All of this serves to greatly complicate the task of apportioning blame to living defendants. Thus, Vincene Verdun sums up the concepts underlying wrongdoer attenuation as follows:

From the dominant perspective, it would be patently unfair to make all white people or society pay for slavery because that would necessarily include people who did not participate in the wrong. These people include whites who are descendants of abolitionists and nonslaveholders, and immigrants, or descendants of immigrants, who came to this country after slavery was abolished; post slavery immigrants cannot be connected with a wrong associated with slavery.⁷⁴

particular to the slave-owning past, than they tend to admit in discussions about liability. See Jason Zengerle, *Lost Cause*, *The New Republic*, August 2, 2004, at 14 (discussing popularity of Confederate reenactment and historical groups); see also Carter Davis, *Race and Reparations*, *Alabama City magazine*, April 24, 2004, available online at <http://www.al.com/news/citymagazine/index.ssf?/base/news/1082801701197890.xml>, at 5 (noting concerns raised by opponents about the “legacy” of the University of Alabama when professor Al Brophy suggested the university investigate its slave owning past).

⁷² Sebok, *Two Concepts*, *supra* note 15, at 1419-20.

⁷³ See Posner & Vermeule, *supra* note 9, at 740 (“The more difficult problem exists when the wrongdoing occurs on a large scale, and the wrongdoers and victims miscegenate, or their descendants miscegenate. A descendant of a victim might therefore also be the descendant of a wrongdoer. With sufficient mixing, reparations become pointless. It makes no sense for a person to pay reparations from one pocket to the other. Even with more limited mixing, one must grapple with the question whether to treat people differently on the basis of how many ancestors belong to the class of victims and how many belong to the class of wrongdoers.”).

⁷⁴ Verdun, *supra* note 2, at 630; see also *The Conversation*, *Wash. Post*, July 23, 2000, at F1 (“As a white woman, I am tired of being blamed for slavery because—and only because—I am white, when the fact of the matter is I am

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Wrongdoer attenuation undercuts the moral force of reparations arguments, which are often presented as a demand for justice.⁷⁵ Wrongdoer attenuation arguments may take the form of statistics, such as noting the number of people who have arrived in the country since 1865, the percent of the populace descendant from post-bellum immigrants, and so forth.⁷⁶

While victim attenuation may evoke the possibility of an unjustified windfall, wrongdoer attenuation brings the image of an unjustified penalty.⁷⁷ That is a strongly negative image to overcome in a society which places high value, at least rhetorically, on the protection of the innocent.⁷⁸ As Eric Posner and Adrian Vermeule

descended from Irish and German immigrants who didn't arrive on Ellis Island until well after the Civil War.") (statement of Peggy Sakagawa); Massey, *supra* note 9, at 162. Brophy notes that legal liability "requires linking past perpetrators with people who currently exist." Brophy, *Some Problems*, *supra* note 1, at 504.

⁷⁵ Reparations advocates often use the language of culpability in reparations literature, though there has been some recent movement towards a less confrontational tone. See Miller, *supra* note 9, at 49-52 (arguing that reparations advocates have created problems by being unnecessarily confrontational); see also Brophy, *Some Problems*, *supra* note 1, at 519 n.94 ("My point is that in talking about reparations for slavery and Jim Crow, one must be careful in talking about claims of victims against perpetrators, when many of the people against whom claims are being asserted are not perpetrators."); Alfred Brophy, *Taking Reparations Seriously*, (Unpublished Manuscript), at 16 ("For many reparationists, the focus is upon past harm as a way of arguing for reparations. Among others there seems to be little interest in reconciliation. But those voices are not the leaders in the field. They do not represent the most thoughtful reparationists."). See generally Lee A. Harris, *Political Autonomy as a Form of Reparations*, 29 *Southern L. Rev.* 25 (2001); Lee A. Harris, "Reparations" as a Dirty Word: The Norm Against Slavery Reparations, 33 *U. Memphis L. Rev.* 409 (2003).

⁷⁶ See Horowitz, *supra* note 58, at 3-4.

⁷⁷ See Jeremy Waldron, *Superceding Historic Injustice*, 103 *Ethics* 4 (1992), at 26-27 (noting these concerns). In addition, reparations opponents sometimes suggest that past acts, such as the civil war, constitute sufficient payments for slavery. See, e.g., Posner & Vermeule, *supra* note 9, at 730-31 (noting this argument); Horowitz, *supra* note 58, at 9.

⁷⁸ Verdun, *supra* note 2, at 620-22.

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note, “a strong tradition in the United States holds that individuals are not blameworthy for acts over which they have no control.”⁷⁹ Group sanctions are an exception.⁸⁰

Wrongdoer attenuation has played a part in derailing proposed reparations legislation. Representative Henry Hyde, then-chair of the House Judiciary Committee, argued that “the notion of collective guilt for what people did [200-plus] years ago, that this generation should pay a debt for that generation, is an idea whose time has gone. I never owned a slave. I never oppressed anybody. I don’t know that I should have to pay for someone who did [own slaves] generations before I was born.”⁸¹ The political wrongdoer attenuation argument is couched in the moral language of wrong and right, rather than in legal language.⁸² Similar moral-inflected arguments are used by many prominent media critics of reparations.⁸³

⁷⁹ Posner & Vermeule, *supra* note 9, at 699; Daryl Levinson, Collective Sanctions, 56 Stan. L. Rev. 345, 347-48 (2003); Brophy, Some Problems, *supra* note 1, at 548 (noting that American law typically ties legal liability to moral culpability).

⁸⁰ In instances where group sanctions are tolerated, it is often as a form of deterrence, *see id.* at 348-49, and such consequentialist justification would not apply to the case of reparations for slavery. *See Massey, supra* note 9, at 165 (noting that reparations have no deterrent value); *see also* Levinson, *supra*, at 347-48 (noting that Blacks have been subjected to collective sanctions in the past).

⁸¹ *See* Merida, *supra* note 2, at C-01; *see also* 136 Cong. Rec. S1312-03, Statement of Sen. Bumpers (Feb. 21, 1990) (stating that “I am a son of the South. But I never owned a slave. My father never owned a slave” in arguing that modern Turkey should not be blamed for the Armenian genocide).

⁸² *See* Eric Yamamoto, Racial Reparations: Japanese American Redress and African American Claims, 40 B.C. L. Rev. 477, 496-97 (1998) (discussing political component of reparations arguments).

⁸³ For example, Armstrong Williams criticizes the reparations movement for “seek[ing] to penalize our current government for what white slave holders did centuries ago.” Armstrong Williams, Presumed Victims, *in* Should America Pay?, *supra* note 1, at 165, 167; *see also id.* at 170 (noting conceptual difficulty in assessing reparations against post-bellum immigrants). John McWhorter argues that some “obvious retorts” to the idea of reparations include “that many whites in America today arrived after emancipation [and] that many whites owned no slaves.” John McWhorter, Against Reparations, *in* Should America Pay?, *supra* note 1, at

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Like victim attenuation, wrongdoer attenuation is not strictly a causation argument. Rather, it is an attack on the identity of the party against whom a claim is made. And like victim attenuation, it may be used in tandem with more traditional act attenuation arguments. However, unlike victim attenuation, it is not limited to cases of intergenerational harm. “You got the wrong guy, judge,” is a standard line of defense in many cases. And wrongdoer attenuation intersects with other kinds of attenuation, including act attenuation, in various ways.⁸⁴

191. David Horowitz has stated that reparations are inappropriate because “only a tiny minority of white Americans ever owned slaves” and “most [modern] Americans have no connection (direct or indirect) to slavery,” among other reasons. Horowitz, *supra* note 58, at 1. This article was widely distributed and received nationwide attention. See Brophy, Cultural War, *supra* note 3, at 1201. Michelle Malkin writes that reparations advocates seek payments from “the U.S. government, which means American taxpayers, which means tens of millions of people who had nothing remotely whatsoever to do with inflicting such injustice on anyone.” Michelle Malkin, Get Out Your Reparations Calculator, TownHall.com, August 15, 2002, available online at <http://www.townhall.com/columnists/michellemalkin/mm20020815.shtml>.

Other, less oppositional voices have also wondered about these concerns. Kevin Merida, a relatively sympathetic Washington Post reporter, frames the potential issue as: “Why should American taxpayers who never owned slaves pay for the sins of ancestors they don’t even know? And what about those whose ancestors arrived here long after slavery ended?” Merida, *supra* note 2, at C-01.

⁸⁴ One strain of wrongdoer attenuation argument is similar to the idea of overdetermination. That is, modern parties can assert the wrongdoer attenuation argument that “Even if my ancestor *had* decided to pay his slaves, the generalized harm to slave descendants would have taken place anyway.”

This is an overdetermination argument, similar to saying that “since a hundred other people also poisoned the well, my own act of poisoning the well should not be viewed as causative of decedent’s death.” Thus, it is similar to the legal doctrine of substantial factor (that is, that a defendant is not liable unless her acts were a substantial factor in causing a harm). See *infra* Part IV.B.4 (discussing substantial factor). This kind of argument, while internally consistent, lacks the moral force of most wrongdoer attenuation arguments.

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The strength of wrongdoer attenuation arguments will vary with a number of factors, primarily the party against whom a claim is asserted. Thus, this line of defense can be partially avoided through smart lawyering. Many reparations claims are brought against corporations, and these corporate entities may in fact be the same legal entity as that which originally harmed slaves. Because this step avoids wrongdoer attenuation, many reparations cases involve such long-lived entities.⁸⁵ But that move, while lessening wrongdoer attenuation, can increase act attenuation, since the particular corporate entity against whom suit is brought may be removed from direct participation in harmful acts. (There are exceptions to this general trend. For example, Holocaust litigants bringing suit against Ford Motor Company for its use of slave labor avoided both wrongdoer attenuation – the company was the same entity – and act attenuation, since the link between the act and the harm was clear).⁸⁶

Like victim attenuation, wrongdoer attenuation may be a less compelling defense against claims of unjust enrichment. This is because unjust enrichment claims are not based on the guilt of a particular defendant, only on a showing that he has been enriched. Despite this theoretical advantage, wrongdoer attenuation concerns were voiced by the *Slave Descendants* court as it dismissed reparations claims, noting that “the allegations of Plaintiff’s Complaint do not link these Defendants to the alleged harm”⁸⁷ and that the “Complaint is devoid of any allegations that connect the specifically named

⁸⁵ There are conceptual questions about the validity of corporate punishment over time, since the burden falls on shareholders who were not owners of the corporation at the time the wrong occurred. See generally John C. Coffee, No Soul to Damn: No Body to Kick: An Unscandalized Enquiry into the Problem of Corporate Punishment, 79 Michigan Law Review 386 (1981) (discussing theoretical problems with punishing corporate entities).

⁸⁶ See generally Michael Bazylar, Nuremberg in America: Litigating the Holocaust in United States Courts, 34 U. Rich. L. Rev. 1, 204-06 (2000) (discussing Ford litigation)

⁸⁷ *Id.* at 749 (emphasis added).

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Defendants or their predecessors and any of the Plaintiffs or their ancestors.”⁸⁸

D. Recap

These three types of attenuation are used, often together, to suggest that reparations for slavery would not be appropriate. These critiques are not unique to the case of Black slavery, and similar arguments apply in most or all reparations-type actions.⁸⁹

The problem of attenuation arises repeatedly in the literature. Many commenters suggest that attenuation fatally undercuts the case for reparations. Such an assessment reflects judicial reality at present. The *Slave Descendants* court based parts of its opinion on all three types of attenuation. It mentioned wrongdoer attenuation — “the allegations of Plaintiff’s Complaint do not link *these Defendants* to the alleged harm”⁹⁰ — and act attenuation — “Plaintiffs’ complaint is devoid of any allegations that any specific conduct of the Defendants was a cause of the continuing injuries of which Plaintiffs complain.”⁹¹ In particular, the *Slave Descendants* court, like the *Cato* court, focused on victim attenuation — “Plaintiffs cannot establish a personal injury sufficient to confer standing”.⁹² Thus, the problems of victim,

⁸⁸ *Id.* at 740.

⁸⁹ See Matsuda, *supra* note 1, at 372 (discussing attenuation defense in connection with reparations claims by Native Hawaiians); see also Posner & Vermeule, *supra* note 9, at 699-711 (noting these types of objections to reparations generally).

⁹⁰ *Id.* at 749 (emphasis added). The Court also wrote that the “Complaint is devoid of any allegations that connect the specifically named Defendants or their predecessors and any of the Plaintiffs or their ancestors,” wrote the court. *Id.* at 740.

⁹¹ *Id.* at 750.

⁹² *Id.* at 748-51; see also *id.* at 1067-68 (“Plaintiffs’ Complaint fails to connect any alleged injury of any one of the Plaintiffs or their ancestors to alleged conduct by any one of the Defendants or their predecessors. . . . [T]he allegations in a complaint must be those relating to the plaintiff, not those of someone else.”).

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wrongdoer, and act attenuation certainly have been decisive in derailing reparations suits in court.⁹³

III. Effects

The presence of all three kinds of attenuation creates a particularly difficult hurdle for reparations. Attenuation concerns operate in legal and moral arenas to create doubts about the viability of any judicial or legislative progress towards a reparations settlement.⁹⁴

⁹³ Other reparations cases in the courts have largely followed the reasoning of *Cato* without further discussion. See *Bell v. United States*, No. Civ. A. 301CV0338D, 2001 WL 1041792, at *2 (N.D.Tex. Aug.31, 2001) (citing *Cato* in holding that plaintiff lacked standing); *Bey v. United States Department of Justice*, No. 95 CIV 10401, 1996 WL 413684, at *1 (S.D.N.Y. July 24, 1996) (same); *Langley v. United States*, No. C 95-4227, 1995 WL 714378, at *2 (N.D.Cal. Nov.30, 1995) (same); see also *Himiya v. United States*, No. 94 C 4065, 1994 WL 376850, *2 (N.D.Ill. July 15, 1994) (citing *Cato* in dismissing on sovereign immunity grounds).

⁹⁴ Attenuation concerns are manifested in two different spheres. First, attenuation comes up in the moral sphere, with concerns that it is somehow wrong for reparations to be paid by those who are not connected to slavery. Cf. Forde-Mazrui, *supra* note 8, at 685 (discussing moral arguments about reparations and affirmative action). Second, attenuation arises in the legal sphere, with objections that reparations cannot for legal reasons be paid to plaintiffs who lack standing, or a more direct connection to the slaves who were harmed. See, e.g. *supra* sections II.A through II.D (discussing the legal effects of attenuation).

These are opposite sides of the same coin. Massey, *supra* note 9, at 157 (“When grappling with providing reparations for slavery, two distinct categories of issues emerge: legal and political.”). And just as the idea of reparations is based on a joint legal and moral argument, attenuation provides a joint legal and moral counter-argument. See Miller, *supra* note 9, at 50 (“Reparations, on this account, involves a demand for restoration of the ill-gotten gains of slavery to the group that was wronged. In so doing, it suggests both a legal strategy and an emotionally compelling moral argument. The legal strategy requires us to identify the various ways that blacks were harmed by whites who profited from slavery and then to sue for the repayment of those profits either to individuals or into some central fund for more general disbursement. The moral argument asserts that whites as a group were, and continue to be, responsible for the ills of the African American community. It is the

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It is often suggested in the reparations literature suggests that successful resolution of slave reparations litigation may be a natural extension of other successful mass litigation, such as restitution to Holocaust victims or Japanese internees.⁹⁵ However, it is significant that *there is no major success story in mass litigation that has overcome the presence of all three kinds of attenuation.*

In particular, the Holocaust victim cases did not involve the level of victim attenuation present in slave reparations. As Bert Neuborne, who helped lead the Holocaust restitution effort, writes, “the Holocaust cases dealt with a first-generation effort” to return “identifiable property from the unjustly enriched owner of the property to its true owner or a close relative.”⁹⁶ Thus, the Holocaust lawsuits did not suffer from the same levels of victim attenuation that plague slavery reparations suits. The settlement provided limited recovery for heirs of very recently deceased class members, but nothing nearly on the level that slave reparations would require.⁹⁷ The Holocaust

power and simplicity of that moral claim that makes reparations at once so compelling an argument and so difficult for the vast majority of whites to endorse.”); *cf.* Yamamoto, *supra* note 82, at 518 (“Those seeking reparations need to draw on the moral force of their claims (and not frame it legally out of existence) while simultaneously radically recasting reparations in a way that both materially benefits those harmed and generally furthers some larger interests of mainstream America.”).

⁹⁵ See, e.g., Brophy, *Some Problems*, *supra* note 1, at 499-500 (“A second factor leading to the reinvigoration of talk about reparations for slavery and Jim Crow laws are the models of reparations that other groups -- Native Americans, Holocaust victims, Japanese Americans interned during World War II, South Africans -- have obtained.”).

⁹⁶ Bert Neuborne, *Holocaust Reparations Litigation, Lessons for the Slavery Reparations Movement*, 58 NYU Ann. Surv. Am. L. 615, 621 (2003); Brophy, *Some Problems*, *supra* note 1, at 512 (noting that Holocaust recompense claims differ from slave reparations because “there are quite specific claims for identifiable property or specific torts.”).

⁹⁷ See Madeline Doms, *Compensation for Survivors of Slave and Forced Labor: The Swiss Bank Settlement and the German Foundation Provide Options for Recovery for Holocaust Survivors*, 14 Transnat'l Law. 171, 199 n.204 (2001) (noting provision for distribution to heirs of class members who are deceased, but only for those who die after the settlement date).

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litigation also avoided wrongdoer attenuation by focusing on existing governments and corporate entities.⁹⁸ Thus, the litigation arguably only suffered from one type of attenuation, act attenuation.

Neuborne notes this difference, writing that largely due to attenuation problems, “the lines of identity have become so blurred” in slave reparations, “today’s remedy may be more political than legal.”⁹⁹ That assessment alone does not mean that reparations litigation is fruitless. The reparations movement, like the Holocaust compensation movement before it, is composed of “an untidy mixture of law, politics, and raw emotion.”¹⁰⁰ In the Holocaust cases, legal claims did not prevail *qua* legal claims, but rather allowed advocates to keep the public eye on the issue until defendants chose to settle.¹⁰¹ Nevertheless, it is instructive to note that the Holocaust litigation, which many advocates see as a model for slave reparations, differs significantly in its vulnerability to attenuation arguments.

Other successful mass restitution cases are no more encouraging. The claims brought on behalf of Japanese internees did not suffer from victim attenuation. The claimants were the same people who had been interned.¹⁰² Similarly, the massive tobacco litigation, which resulted in a settlement, did not suffer from the same attenuation problems.¹⁰³ The tobacco companies were the original harming parties, and the claimants were the original victims. Significantly, in some strands of related tobacco litigation that did introduce victim attenuation concerns, the cases were dismissed. For example, *qui-tam*-like claims

⁹⁸ See generally Sebok, Two Concepts, *supra* note 15, at 1406-10 (discussing the litigation history of the Holocaust cases).

⁹⁹ Neuborne, *supra* note 96, at 621.

¹⁰⁰ *Id.* at 619.

¹⁰¹ *Id.* (“The litigation was as much about politics as it was about law Law provided the roadmap [for settlement], but did not necessarily provide the fuel.”).

¹⁰² See Hylton, Framework, *supra* note 13, at 32-33; Dale Minami, Japanese-American Redress, 6 *Afr.-Am. L. & Pol’y Rep.* 27 (2004).

¹⁰³ Some reparations advocates have suggested that the use of restitution theory to extract a settlement in the tobacco cases is a possible model for reparations. See Sebok, Two Concepts, *supra* note 15, at 1406.

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under the Medicare Secondary Payer Act, which suffered from conceptual separation similar to victim attenuation, were eventually dismissed.¹⁰⁴

Indeed, the cases that *have* manifested all three kinds of attenuation are most striking for their failure to achieve a satisfactory resolution. Cases involving claims brought on behalf of Native Americans are similar to reparations cases, in that they involve victim attenuation, act attenuation, and wrongdoer attenuation. These cases have not generally been successful.¹⁰⁵ No generalized tort- or human-rights-based action for crimes against Native Americans has succeeded. Where Native American redress claims have succeeded, it has been on the basis of treaties signed with individual tribes. (Of course, no such treaties exist in the slave context). Indeed, it is not overstatement to say that *no case which suffered from all three kinds of attenuation has successfully proceeded to a successful resolution through trial or settlement*. This is a dire diagnosis for reparations.

It is questionable exactly how many types of attenuation can be present in a case before the case collapses. Obviously, one type alone can be fatal in some cases. But can a case ever succeed if it faces three types of attenuation? This is unclear. It may be possible to address one or more kinds, such as through efforts by reparations advocates to address wrongdoer attenuation by bringing suit against corporate entities. But as noted in that discussion, that solution only increased act attenuation. Is it possible to deal with all three types at once? That is the challenge that reparations advocates face, and it is a primary reason that reparations claims are failing today. Because of the presence of all three kinds of attenuation, it is not clear that reparations

¹⁰⁴ Claims under the Medicare Secondary Payer Act were brought to collect for tobacco-related expenses of patients paid by Medicare. *See Mason v. American Tobacco Co.*, 212 F. Supp.2d 88 (E.D.N.Y. 2002) (dismissing these claims).

¹⁰⁵ *See generally* Lindsay Glauner, *The Need for Accountability and Reparation: 1830-1976 The United States Government's Role in the Promotion, Implementation, and Execution of the Crime of Genocide Against Native Americans*, 51 DePaul L. Rev. 911 (2002).

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litigation can ever succeed. If it does, it will be a trailblazer, the first case to succeed facing all three kinds of attenuation. It is sobering to note that only by overcoming attenuation in a truly unprecedented manner could reparations cases succeed in court.

Ultimately, however, reparations cases may not be best suited for success in court.¹⁰⁶ Most of the major cases that reparations advocates often seek to emulate, including the Holocaust litigation, tobacco litigation, and suits for Americans of Japanese Ancestry, succeeded not through judicial fiat but through negotiated settlement.¹⁰⁷ Successful emulation of that model means keeping a court case alive, in order to keep up consistent legal pressure while moral and political arguments are brought to bear. However, that court case need not ultimately be a legal winner itself. The key for reparations at this juncture is to continue to advance ideas, particularly ideas that could counter the thorny problems created by attenuation.

IV. Using the Tools of Mass Torts to Address Attenuation in the Courts

It is very surprising that, despite the profound analogy between attenuation and similar concerns that come up in mass tort, there has been very little discussion thus far of how to apply mass tort concepts in the reparations context.¹⁰⁸ Courts and scholars have addressed

¹⁰⁶ Many reparations advocates candidly admit that reparations are unlikely to be awarded at trial, and that the most fruitful route is legislative act or some sort of settlement. Westley, *supra* note 48, at 436 (arguing that it is Congress, and possibly state legislatures, that must be persuaded to enact reparations); Brophy, *Some Problems*, *supra* note 1, at 534-39 (noting need for development of dialogue and scholarship to address the possibility of settlement); Miller, *supra* note 9, at 51-57 (suggesting that settlement is more likely to be successful than litigation); Wenger, *supra* note 1, at 256-58 (same).

¹⁰⁷ See Sebok, *Two Concepts*, *supra* note 15, at 1405-16 (noting history of tobacco and Holocaust litigation).

¹⁰⁸ The major exception is Hackney, *supra* note 9, which briefly discusses some of these concepts.

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complicated issues of causation in the mass tort context. Indeed, slavery itself can be viewed as one of the earliest mass torts.

In this Part, I will explore the analogy between reparations and mass torts. I do this as follows: Section A will discuss some of the issues of causation that arise in the mass tort context, and Section B will examine similarities between causation issues in mass torts and in reparations.

A. Similarities Between Reparations Concerns and Mass Tort Concerns.

Using the terminology developed in Part II of this Article, we can see how attenuation relates to the previously examined categories of attenuation. It is evident that the problems of attenuation that affect mass torts have much in common with those that plague reparations lawsuits. Mass torts present the same concerns of victim, wrongdoer and act attenuation.

In both cases the real problem is the same. There is a potential connection between claimants and payers, but it is of undeterminable strength. It is hard to match the victim to the wrongdoer, and to match the parties to the harm.

In fact, many mass tort issues could be reframed, using the categories of attenuation we have previously discussed. For example, the problems of tracing a particular cancer to a defendant's product are created by act attenuation. The problem of identifying a culpable defendant from among a pool who have manufactured fungible products in a large market is a problem of wrongdoer attenuation. And the problem of connecting a harm to children and grandchildren of the originally harmed party — the so-called “DES granddaughters” — are problems of victim attenuation. In addition, the causation problem related to the victim attenuation concern of standing.

For example, the different types of attenuation are visible in the litigation surrounding the drug diethylstilbestrol, better known as

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DES.¹⁰⁹ DES was a drug commonly given to pregnant women over a period of time, and it ultimately proved to have deleterious effects on many of the children of those women.¹¹⁰ Litigants in the many strands of DES litigation faced victim attenuation defenses, since the daughters and granddaughters of women who took DES brought claims for harms done to them. (Ultimately, the litigants with the biggest victim attenuation problem, DES granddaughters, did not have great success in court). Litigants also faced wrongdoer attenuation problems as in some cases it was difficult to trace DES pills to a particular manufacturer. Finally, litigants faced act attenuation concerns as they sought to link their harms to the drug (though for DES litigants, act attenuation was not a big hurdle as causation was established early for some harms). The mass tort issues as mapped onto an attenuation grid would follow along these lines: Wrongdoer attenuation is similar to difficulties in tracing harm to a specific tortfeasor¹¹¹; victim attenuation is similar to tracing harm to later victims, particularly in cases such as the DES granddaughters; and act attenuation is similar to the problem of linking harm to a defendant's actions.

As in the mass tort context, the harm to modern slave descendants caused by of slavery is of underdetermined causation. Like the case of ships and safeguards, like in the case of DES granddaughters or Agent Orange veterans, we cannot know if a defendant's alternate choice not to enslave would have resulted in greater assets being given to any particular slave descendant. Since reparations presents a problem

¹⁰⁹ See Richard M. Russell, Note, The Causation Requirement: Guardian of Fairness or Obstacle to Justice? Making Sense of a Decade of DES Litigation, 25 Suffolk U. L. Rev. 1071, 1071-81 (1991) (discussing DES litigation).

¹¹⁰ *Id.* (collecting sources).

¹¹¹ Also, issues of wrongdoer attenuation may arise in addressing successor liability for damages. See generally Michael D. Green, Successor Liability: The Superiority of Statutory Reform to Protect Products Liability Claimants, 72 Cornell L. Rev. 17 (1986) (discussing theoretical successor liability issues).

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analogous to mass torts, it is helpful to see how courts have addressed these issues in the mass torts context.

B. Addressing Attenuation in Mass Torts

Tort law in general, and mass torts in particular, has developed means of dealing with underdetermination. While uattenuation ed causation may complicates the legal inquiry, it does not altogether rule out a finding of legal causation. This Section will discuss how tort law has dealt with attenuation. Loss of chance will be discussed in Section 1, burden shifting in Section 2, market share liability in Section 3 and substantial factor in Section 4. Finally, Section 5 will focus on the use of statistical evidence.

1. Loss of Chance

The tort system allows recovery in some underdetermined cases.¹¹² A useful example is the imposition of liability for those ships that did not adequately protect against being washed overboard. In a well-known law review article, Wex Malone studied these cases and found that courts moved from a policy of not imposing liability to a policy of imposing liability nearly all of the time.¹¹³ Significantly, courts were willing to impose liability despite the conceptual difficulty of not knowing whether the victim would have been in a position to benefit from the increase in safety.¹¹⁴ “It would be futile for the courts to recognize a duty to provide emergency equipment and to impose an obligation to proceed promptly to the rescue if the defendant could always seize upon the uncertainty which nearly always attends the

¹¹² See Twerski & Sebok, *supra* note 34, at 1381; Malone, *supra* note 30, at 72-73.

¹¹³ Malone, *supra* note 30, at 75-77.

¹¹⁴ Twerski & Sebok, *supra* note 34, at 1380; Gray, *supra* note 8, at 97-100 & n.18 (discussing cases).

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rescue operation as a reason for dismissing the claim,” noted Malone.¹¹⁵

Tort scholars have suggested various theoretical approaches explaining why courts should allow liability even where causation is underdetermined. Wex Malone refers to many of these cases as involving the loss of a “gambler’s chance.”¹¹⁶ In such cases, a defendant facilitates the realization of an independently created risk.¹¹⁷ Courts are not always willing to find liability in gambler’s chance cases, however, and are most willing to find liability in cases where a defendant had notice of a potential harm.¹¹⁸ Similarly, courts are more willing to find liability where defendants violated a rule “designed to protect” against the harm that in fact occurred.¹¹⁹ The gambler’s chance lost by slave descendants is likely to be quite substantial.¹²⁰

2. Burden Shifting

Burden shifting is also efficient, in many cases where it is impossible to show either causation or non-causation.¹²¹ *Summers v. Tice* is the classic case involving a hunting accident where it was impossible to determine which of two negligent shooters had caused the injury.¹²² The court held that “practical justice” allowed the

¹¹⁵ Malone, *supra* note 30, at 75-77.

¹¹⁶ *Id.* at 80; *see also* Twerski & Sebok, *supra* note 34, at 1381. The loss of the gambler’s chance can be a significant loss; in many instances, without a defendant’s actions, “some value would have been preserved.” Malone, *supra* note 30, at 80.

¹¹⁷ Twerski & Sebok, *supra* note 34, at 1383. *See also id.* at 1383-84 (giving examples); Robert L. Rabin, Enabling Torts, 49 DePaul L. Rev. 435, 439-48 (1999).

¹¹⁸ Twerski & Sebok, *supra* note 34, at 1385-86.

¹¹⁹ Malone, *supra* note 30, at 72.

¹²⁰ Hylton, Slavery, *supra* note 16, at 39, suggests that descendants might have an approximately forty percent chance of inheriting excess wealth from four generations removed. *Id.* at 39.

¹²¹ Robinson, *supra* note 30, at 721-26; Gray, *supra* note 8, at 117-18 (discussing burden shifting).

¹²² *Id.* at 715; 33 Cal. 2d 80, 86-88 (1948). The court ruled that both hunters could be held liable. *Id.*; *see also* Malone, *supra* note 30, at 83 (stating that the court

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burden to shift to defendants, to establish that they were not the cause of harm.¹²³

A similar approach appears in some mass tort cases. The court in *Bichler v. Eli Lilly*, a DES case, noted:

There have been several approaches in tort law available to a plaintiff confronted with more than one actor who could be the causation in fact. In such instances where each such party acted independently but tortiously and it is proved that injury has been caused to plaintiff by only one of them, but there is uncertainty as to which one caused it, and where each can be joined as a defendant in the case, some courts have shifted the burden of proof of causation in fact to the defendants.¹²⁴

That court also found that since defendants had acted in a similar manner, and were aware of the possibility of harm, they could be held liable, even if the harm could not be directly traced to one particular defendant.¹²⁵ Other DES courts have also adopted some version of group liability.¹²⁶ This is similar to the idea of “enterprise liability,”

was unwilling to let “two wrongdoers pass the ball”); Keeton et al., *supra* note 8, at 271 (“It seems a very desirable solution where negligence on the part of both defendants is very clear, and it is only the issue of causation which is in doubt, so that the choice must be made between letting the loss due to failure of proof fall on the innocent plaintiff or the culpable defendants.”); Gray, *supra* note 8, at 102-04 (same).

¹²³ 33 Cal. 2d 80, 86-88 (1948).

¹²⁴ *Bichler v. Eli Lilly and Co.*, 79 A.D.2d 317, 324-25 (N.Y. App. Div. 1981).

¹²⁵ *Id.* at 325-26.

¹²⁶ *See, e.g.*, *Collins v. Eli Lilly & Co.*, 116 Wis. 2d 166 (1984); *see generally* Robert A. Baruch Bush, *Between Two Worlds: The Shift from Individual to Group Responsibility in the Law of Causation of Injury*, 33 UCLA L. Rev. 1473, 1483-97 (1986) (discussing several DES cases). This development was also rejected by some courts. *See, e.g.*, *Payton v. Abbott Laboratories*, 386, Mass. 540 (1982).

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which was applied in other mass tort settings to find that all actors in an industry are liable for foreseeable harms.¹²⁷

On DES granddaughters, courts have divided in those cases, with some courts allowing DES granddaughters to pursue claims against the DES manufacturers, and other courts barring these claims.¹²⁸ The burden shifting used by some DES courts is dispositive, since typically defendants are as unable to disprove causation as plaintiffs are unable to prove it.¹²⁹

Scholars have suggested that courts are most likely to shift burdens, either explicitly or implicitly, and find liability in underdetermined causation cases where certain other factors are present. For example, courts are more willing to find liability if the tort is an intentional tort, or if its harm is easily foreseeable.¹³⁰ Courts may reject cases where the chance of harm is particularly low.¹³¹ And

¹²⁷ See, e.g., *Hall v. E. I. Du Pont De Nemours & Co., Inc.*, 345 F. Supp. 353 (E.D.N.Y. 1972).

¹²⁸ See *id.* at 251-61 (discussing cases); *DeMayo v. Schmitt*, No. 625, 1989 Phila. Cty. Rptr. LEXIS 73, at *1 (C.P. Philadelphia County Dec. 28, 1989) (allowing claim for negligence to be stated); *Enright v. Eli Lilly & Co.*, 570 N.E. 2d 198 (N.Y. 1991) (claim could not proceed because of preconception tort doctrine); *McMahon v. Eli Lilly & Co.*, 774 F.2d 830 (7th Cir. 1985) (permitting third generation claim); *Bowe v. Abbott Laboratories*, 608 N.E. 2d 223 (Ill. App. 1992); *Grover v. Eli Lilly & Co.*, 591 N.E. 2d 696 (Ohio 1992) (denying recovery); see generally Julie A. Greenberg, *Reconceptualizing Preconception Torts*, 64 *Tenn. L. Rev.* 315, 320-28 (discussing the cases).

¹²⁹ *Robinson*, *supra* note 30, at 729.

¹³⁰ *Twerski & Sebok*, *supra* note 34, at 1381; *Malone*, *supra* note 30, at 73, 85-87.

¹³¹ See *Twerski & Sebok*, *supra* note 34, at 1387 (noting that the lower the probability that defendant's act was not a cause, the higher the probability of a court imposing liability); see also *id.* at 1387-90 (discussing the difficulty of dealing with low probabilities in a world of full compensation). The conceptual problem is that a court may be faced with two unpleasant choices: either to overdeter, or to allow defendants to escape liability entirely. *Id.*

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they may be likely to find liability where a party engaged in particularly noxious acts.¹³²

3. Market Share Liability

Market share liability is a unique application of burden shifting. *Sindell v. Abbott Laboratories* used burden shifting, holding defendant DES manufacturers liable unless they could show that they did not cause plaintiffs' harm.¹³³ The court held that since multiple actors contributed to the harm, and causation was not individually traceable, all of the potential contributors could be held responsible.¹³⁴ *Sindell* has been called "modified *Summers*" case because it allowed defendants to pay in proportion to the harm they caused.¹³⁵ The court adopted reasoning similar to *Summers*, noting that "as between an innocent plaintiff and negligent defendants, the latter should bear the cost of the injury."¹³⁶

4. Substantial Factor

Courts may apply the "substantial factor" test, allowing liability in cases where a defendant's actions were a substantial factor leading to the plaintiff's harm.¹³⁷ A defendant's actions will be considered a substantial factor in causing a harm if they "satisf[y] the but-for test

¹³² See *id.* at 1386 (suggesting that the very production of handguns carries culpability); Rabin, *supra* note 117, at 453 (noting that handguns are designed for a dangerous purpose).

¹³³ *Id.* at 717; see 26 Cal. 3d 588, *cert. denied*, 449 U.S. 912 (1980). The court opted to make the DES manufacturers show that they did not cause the injury, rather than making the victims show causation. Robinson, *supra* note 30, at 714-15. The court adopted this position in part because it was easier for defendants to maintain the kind of data that could be used to either show, or disprove, causation. *Id.* at 734.

¹³⁴ *Id.* at 729.

¹³⁵ Gray, *supra* note 8, at 105-06.

¹³⁶ 26 Cal. 3d at 610-11.

¹³⁷ Malone, *supra* note 30, at 89-95 (discussing the substantial factor test).

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(with an exception for simultaneous independent sufficient causes) [and are] an appreciable and continuously effective or efficient factor in producing the harm, up to the time of occurrence of the harm.”¹³⁸ The substantial factor test allows courts to decide whether there is close enough affinity for the law to intervene and label a defendant’s conduct “wrong.”¹³⁹

Another useful analysis of substantial factor causation can be found in the district court opinion in *Hamilton v. Accu-Tek*, which dealt with a class action suit against handgun manufacturers for the harms caused by negligent distribution of handguns.¹⁴⁰ The court asks whether a defendant’s conduct was a “significant contributing factor in the development” of a harm or “a substantial factor . . . increasing the probability” of plaintiffs’ harm.¹⁴¹ The underlying inquiry, as suggested by commentators, was “if defendants had behaved differently, how many fewer plaintiffs would have been harmed?”¹⁴²

¹³⁸ Wright, *supra* note 7, at 1781-82; *see also* Robinson, *supra* note 30, at 751 (noting that the substantial factor test is similar to the but-for test). One benefit of the substantial factor test is that it prevents minor causes from creating liability. *Id.* at 715-16.

¹³⁹ Malone, *supra* note 30, at 72.

¹⁴⁰ *Hamilton v. Accu-Tek*, 62 F.Supp.2d 802 (E.D.N.Y. 1999), *rev’d* on other grounds, 264 F.3d 21 (2d Cir. 2001).

¹⁴¹ 62 F.Supp.2d at 838.

¹⁴² Twerski & Sebok, *supra* note 34, at 1403-04. The judge noted that the defendant’s conduct was a “significant contributing factor in the development” of the ultimate harm. 62 F.Supp.2d at 838. The evidence, wrote the court, was sufficient to permit a reasonable jury to conclude that the negligent marketing and distribution of handguns by manufacturers was a substantial factor in the promotion and development of an underground illegal market supplying New York criminals, and thus increasing the probability of death or serious injury [to plaintiffs].

Id. On the jury’s role in assessing punishment, *see generally* Kaimipono David Wenger & David A. Hoffman, Nullificatory Juries, 2003 Wisc. L. Rev. 1115, 1148-56.

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The substantial factor test can be a useful tool to allocate liability in cases involving overdetermined causation. Where a number of factors could each have created a harm, substantial factor analysis can be used to differentiate which factors should be held legally liable.

5. Statistical Evidence

Faced with a variety of difficulties in showing causation in mass tort cases, advocates, scholars, and courts have developed methods for showing causation through statistical evidence. Scholars have argued that a “probabilistic approach to causation” is proper in cases where a large number of plaintiffs have been harmed by a group of defendants, and where intervening causation is possible, resulting in inability to definitely trace any individual plaintiff’s injury to an individual defendant’s actions.¹⁴³ In these cases, scholars suggest that the amount recovered should be based on a “probability of causation” for a defendant.¹⁴⁴

In *Agent Orange*, Judge Weinstein suggested that plaintiffs would divide any recovery to reflect the statistical increase in likelihood of harm they suffered. To address a complex problem of underdetermination, Judge Weinstein applied statistical causation,

¹⁴³ Robinson, *supra* note 30, at 759-60; Gold, *supra* note 39, at 384 (noting that mass tort cases rarely involve particularistic evidence); Wendy Wagner, Note, Trans-Science in Torts, 96 Yale L.J. 428, 433 n.28 (collecting cases); Mario J. Rizzo & Frank S. Arnold, Causal Apportionment in the Law of Torts: An Economic Theory, 80 Colum. L. Rev. 1399 (1980) (advocating the use of probabilistic causation in multiple cause cases).

¹⁴⁴ *Id.* at 749-66; *see also* Bush, *supra* note 126, at 1490-92; Jack B. Weinstein and Robert Kushen, Scientific Evidence in Complex Litigation, C-607 ALI-ABA Course of Study, July 24, 1991, at 709, 724 (“Statistical data may . . . permit combinations of anecdotal and valid statistical data to prove guilt or establish some material proposition of fact.”); *but cf.* Wright, *supra* note 7, at 1827 (suggesting that such devices may result in the tort system becoming more of a wealth redistribution system and less of a corrective justice system, and that such a change would be unfortunate).

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using a type of proportional liability in allocating damages.¹⁴⁵ Statistical, pro rata distribution of damages was used because of the problem of indeterminate defendants and indeterminate plaintiffs.¹⁴⁶ Recognizing the relative novelty of this approach, the judge wrote: “We are in a different world of proof than that of the archetypical smoking gun. We must make the best estimates of probability that we can using the help of experts such as statisticians and our own common sense and experience with the real universe.”¹⁴⁷

The court’s analysis is instructive. Judge Weinstein noted that it was quite possible that no particular plaintiff would be able to trace her injuries to a particular defendant, and that only statistics would show any harm at all. He illustrated such a scenario:

Let us assume that there are 10 manufacturers and a population of 10 million persons exposed to their product. Assume that among this population 1,000 cancers of a certain type could be expected, but that 1,100 exist, and

¹⁴⁵ *In re Agent Orange Prods. Liab. Litig.*, 597 F. Supp. 740 (E.D.N.Y. 1984); *see also* Peter H. Schuck, *Agent Orange on Trial* (1986) (describing trial and resolution, including process of arriving at settlement).

¹⁴⁶ *Id.* at 840-43. The court later wrote that causation could not be established to allow liability. *See In re “Agent Orange” Prod. Liab. Litig.*, 611 F. Supp. 1223, 1229 (E.D.N.Y. 1985) (granting summary judgment to defendants against plaintiffs who had opted out of certified class, since plaintiffs could not show a “causal link between exposure to Agent Orange and the various diseases from which they are allegedly suffering”), *aff’d*, 818 F.2d 187 (2d Cir. 1987); *In re “Agent Orange” Prod. Liab. Litig.*, 611 F. Supp. 1267 (E.D.N.Y. 1985) (also granting summary judgment against an opt-out plaintiff), *aff’d*, 818 F.2d 187 (2d Cir. 1987).

¹⁴⁷ *Id.* at 838; *see also In re Joint Eastern & Southern Dist. Asbestos Litigation*, 52 F.3d 1124, 1131 (2d Cir. 1995) (“Causation in toxic torts normally comprises two separate inquiries: whether the epidemiological or other scientific evidence establishes a causal link between c (asbestos exposure) and d (colon cancer), and whether plaintiff is within the class of persons to which inferences from the general causation evidence should be applied.”); Rosenberg, *supra* note 41, at 859-60 (advocating proportional liability for defendants “in proportion to the probability of causation of harm” to the plaintiff class members). *But cf. Wright, supra* note 7, at 1822-23 (arguing that mere statistics, even when based on causal generalizations, cannot adequately show legal causation).

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that this increase is “statistically significant,” permitting a reasonable conclusion that 100 cancers are due to the product of the manufacturers.¹⁴⁸

In such a case, Weinstein recognized, “no plaintiff can show that his or her cancer was caused by any one of the defendants.”¹⁴⁹ The Agent Orange case was a clear instance of the underdetermined causation that is so common in mass torts. Similar concerns have dogged lawsuits seeking compensation for harm caused by products such as tobacco, asbestos, and DES.

These concerns were also particularly acute in the DES litigation.¹⁵⁰ DES was a drug which was used widely over a twenty-four year period, until it was found to cause reproductive illness in children of pregnant women who took the drug.¹⁵¹ DES was manufactured by a variety of companies, and many different types of DES tablets, made by different manufacturers, were interchanged freely.¹⁵² They were fungible products. Not only was it difficult to determine whether plaintiffs’ injury arose from DES; it was also difficult to trace the harm to any particular defendant.¹⁵³ In most cases, claims were brought by daughters of women who ingested DES. In some cases, claims were brought by granddaughters of the women as well.¹⁵⁴ Statistical evidence was employed throughout the DES litigation to show a likelihood of harm to plaintiffs, thus establishing causation.¹⁵⁵ Statistical evidence has been used in a variety of other

¹⁴⁸ In re “Agent Orange” Litig., 597 F. Supp. 740, 837 (E.D.N.Y. 1984).

¹⁴⁹ *Id.*

¹⁵⁰ See Russell, *supra* note 109, at 1080.

¹⁵¹ See generally Robinson, *supra* note 30, at 713-17.

¹⁵² *Id.* at 722-26.

¹⁵³ *Id.*

¹⁵⁴ See generally John B. Maynard, Note, Third-Generation-DES Claims, 27 New Eng. L. Rev. 241, 285 (1992).

¹⁵⁵ Tracey I. Batt, Note, DES Third-Generation Liability: A Proximate Cause, 18 Cardozo L. Rev. 1217, 1219-22 (1996); see also Brook, The Use of Statistical Evidence of Identification in Civil Litigation, 29 St. Louis U. L. J. 293, 327-28 (1985).

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mass restitution contexts. These include litigation related to tobacco, asbestos, Bendectin, and other products.¹⁵⁶

Statistical causation in mass tort cases is generally shown by the use of epidemiological studies.¹⁵⁷ These are used to “determine whether there is a statistical association between defendant’s product and plaintiff’s disease by comparing the incidence of disease in those exposed to defendant’s product with the disease’s background rate.”¹⁵⁸

¹⁵⁶ As summarized by one scholar:

One way the causal link was made in the tobacco cases was the introduction of statistical methods of proof. Plaintiffs in the tobacco litigation were allowed to show that a widely distributed product increased the aggregate number of state residents who contracted a disease; such as lung cancer. In fact, this method of proving causation seems to be widely accepted in cancer-related cases. . . . In toxic-tort cases involving exposure to the drug Bendectin, as well as silicone, herbicides, and asbestos, courts have allowed statistical evidence to demonstrate causation where direct proof of causation was lacking.

See Angela Lipanovich, *Smoke Before Oil*, 35 *Golden Gate U. L. Rev.* 429 463-64 (2005) (citations omitted).

¹⁵⁷ Epidemiology is the branch of medical science that employs integrated use of statistics to “to identify and establish the causes of human diseases.” *See generally* Bert Black & David E. Lilienfeld, *Epidemiologic Proof in Toxic Tort Litigation*, 52 *Fordham L. Rev.* 732, 736 (1984). As one writer notes:

The hallmark of epidemiology is that it is based on the study of populations, not individuals. It seeks to establish associations between alleged causes and effects by one of two methods: either comparing the incidence of disease across exposed and unexposed populations, or comparing the incidence of exposure across sick and healthy populations. With proper scientific interpretation, these correlations lend great weight to an inference of causation.

Gold, *supra* note 37, at 380.

¹⁵⁸ Berger, *supra* note 39, at 2125-26; *see also* Gold, *supra* note 39, at 384 (discussing phenomena of increased risk and enhanced probability of harm).

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V. Application to Attenuation in Reparations

The same tools used in the mass tort context can be used to address legal attenuation concerns in reparations. We will examine each type of attenuation here.

A. Tort Claims

1. Act Attenuation

Overcoming act attenuation requires showing a link between the harm done to slaves and the harm to modern slave descendants. As in the mass tort context, statistical analysis can be one very helpful tool in showing this link. Other tort concepts like substantial factor can also play a role in showing a legal link between slavery and current harms.

Slave descendants could show a link between harm to slaves and later harms suffered by slave descendants, through the use of statistical evidence on the economic effects of slave descent.¹⁵⁹ The alleged harm to slave descendants is economic loss. It should be possible to establish whether slave descendants as a group have a lower rate of economic prosperity than the general populace. (In particular, it would probably be helpful, if statistically possible, to compare prosperity levels of slave descendants against those of control groups, such as the descendants of free Blacks.) A study could show that slave descendants as a group currently enjoy some ascertainable level of prosperity. Applying statistical tools, slave descendants could then seek to show whether, absent slavery, they would have attained a greater level of prosperity. It should be possible to put a number on this difference.

¹⁵⁹ Cf. Twerski & Sebok, *supra* note 34, at 1404, 1409 (suggesting that novel cases particularly benefit from the use of statistical data). Of course, such a study may be complex and difficult to perform. See Berger, *supra* note 39, at 2127-28 (noting the difficulty of conducting epidemiological studies).

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The existence of such a gap seems likely, given the well-known economic disparities between Blacks and members of other races.¹⁶⁰ Statistical evidence could serve to put a number on that gap. Such application would probably involve, to adapt the language previously used by Judge Weinstein in the *Agent Orange* litigation, an examination along these lines:

Let us assume . . . a population of 10 million persons exposed to [slave descent]. Assume that among this population 1,000 [persons below the poverty line] could be expected, but that 1,100 exist, and that this increase is “statistically significant,” permitting a reasonable conclusion that 100 [persons below the poverty line] are due to the [slave descent].¹⁶¹

Similar analysis could be done for various degrees of prosperity, allowing reparations advocates to put a solid number on the question of just how slaves’ lost property and lost wages affect their descendants today.¹⁶² Adapting language from torts, slave descendants could thus show that that slavery was a substantial factor in determining their prosperity level, and that compensation is therefore appropriate.

Reparations advocates can also point to existing cases to suggest that slavery is the type of harm where burden shifting may be an appropriate response to underdetermination. The harms inflicted under slavery were intentional, not negligent, which is one indicator of potential liability.¹⁶³ The harm, against slaves and their children, was also foreseeable, another potential indicator of liability.¹⁶⁴ Negative effects on a victim’s children are a logical result of severe

¹⁶⁰ See *supra* note 48 (noting these statistics).

¹⁶¹ In re “Agent Orange” Litig., 597 F. Supp. 740, 837 (E.D.N.Y. 1984).

¹⁶² It is possible as well that statistics will weaken the case for reparations, for example, by showing that the harm to slave descendants is not as great as envisioned.

¹⁶³ Twerski & Sebok, *supra* note 34, at 1385-86.

¹⁶⁴ *Id.* (foreseeability of harm).

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wrongdoing.¹⁶⁵ The very act of slavery carries an “air of culpability” which some commentators suggest is another indicator of liability.¹⁶⁶ Other factors also weigh in favor of liability: Slaves were subjected to inhuman treatment,¹⁶⁷ and an argument can be made that slavery was a valueless act.¹⁶⁸

2. Victim Attenuation

Tort concepts also address victim attenuation concerns. Loss of a chance doctrine provides a conceptual hook to show harm to plaintiffs. And statistical evidence could be used to demonstrate concrete harm to slave descendants, overcoming the standing hurdle and eventually the causation hurdle.

The conceptual underpinning for overcoming victim attenuation is simple enough. It is certainly true, as the *Slave Descendants* court notes, that any number of eventualities could have deprived plaintiffs of receiving economic benefits from their ancestors. The plaintiffs’

¹⁶⁵ To the extent that slave owners knew that they were harming slaves’ children, note Posner and Vermeule, it may be unreasonable to view victim attenuation as an obstacle, because slave descendants were a knowable victim themselves of slave owner wrongdoing. Posner & Vermeule, *supra* note 9, at 700. See also Rosenberg, *supra* note 41, at 884-85 (“But one could just as easily describe the defendant’s duty in aggregative terms as a duty extending from the defendant to a class — the exposed population. . . . The defendant’s wrongdoing inflicts loss on the exposed population as a whole.”).

¹⁶⁶ *Id.*; see also Wenger, *supra* note 1, at 202 n.34 (noting argument that slavery was a violation of natural law); Randy E. Barnett, Essay, Was Slavery Unconstitutional Before the Thirteenth Amendment?: Lysander Spooner’s Theory of Interpretation, 28 Pac. L.J. 977, 988-1014 (1997).

¹⁶⁷ See Malone, *supra* note 30, at 95 (noting that “inhuman treatment” was a factor in court finding causation).

¹⁶⁸ See *id.* at 86 (noting that courts are more likely to find causation if harmful act is not valuable to society); *but cf.* Wenger, *supra* note 1, at 238-40 (noting the economic value of slavery to the country).

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ancestors may have chosen to spend their wealth on themselves¹⁶⁹ or donate it to charity. They may have chosen to give it to certain favored children, and plaintiffs' particular lines of parentage might have been unrepresented. Even if plaintiffs' ancestors had fully intended to pass on their wealth, they may have been unable to do so. They may have needed assets to deal with daily expenses or emergencies, and had no money to pass on. They may have been poor money managers, losing their assets in unwise investment.¹⁷⁰ They may have been victims of the many financial uncertainties that the country has seen, losing money to market crashes, business competition, changing laws, wars, speculation, financial panics, currency fluctuation, and inflation.¹⁷¹

Every one of these is a possibility. And yet, it is *also* possible that these ancestors, had they been paid for their labor, would have passed down some amount of wealth, which would have eventually come to the plaintiffs.¹⁷² This is not an unrealistic scenario; many Americans

¹⁶⁹ This is a reasonable possibility. There is no indication that plaintiffs intend to pass on parts of any recovery to their descendants, rather than simply consuming it. *See also* Hylton, *Slavery*, *supra* note 16, at 39 (“Precariousness would have given the slave a strong incentive to spend his money on his own desires right away.”).

¹⁷⁰ *See id.* (“The problem that remains is the passage of time, which allows for many opportunities for money to be squandered or used in other ways.”).

¹⁷¹ Sherwin, *supra* note 22, at 1445 (“The passage of time and the countless human acts and choices that have intervened lead to daunting problems in tracing injury to current generations of African Americans, and separating the harm of enslavement from the effects of more recent public and private acts.”).

¹⁷² And, as with other tort cases, the supposed breaks in the causal chain of harm to slave descendants are not particularly debilitating. In particular, the court is concerned that it cannot verify that slave ancestors would have given their assets to their descendants. This concern is overstated, given that bequeathing assets to descendants is the normal course of events. Hylton, *Slavery*, *supra* note 16, at 39 (“In order to avoid reducing damages to descendants for a reason that was not only beyond the slave’s control but a foreseeable consequence of the initial injury, we should assume that if paid, he would have passed the money on at the same rate as parents in conventional families do.”). *But cf.* Waldron, *supra* note 77, at 10 (noting “whimsical” nature of property disposition).

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enjoy some measure of inherited wealth.¹⁷³ It is unrealistic to suggest that *none* of the slave descendants would have received inherited wealth. And therein lies the kicker – slave descendants can indeed show that they suffered a concrete harm, namely the loss of a chance. While they cannot show that they would ultimately have been the recipients of assets, this inability exists only because they never got the chance to receive assets in the first place. The lost chance suffered by slave descendants is a real and concrete harm. Showing the statistical likelihood of inheritance answers the recurring critique that the amount of compensation is not calculable.¹⁷⁴

Statistical evidence can be used to show just how great of a chance slave descendants lost. Slave descendants will need to show the statistical likelihood of present claimants receiving wealth from slave ancestors, as well as the likely amount of any inheritance. This number should be calculable. Armed with such a number, slave descendants can assert to a judge that they are not merely showing a genealogical relationship; by depriving their ancestors of compensation, slave owners deprived the slaves' descendants of a statistically measurable sum.¹⁷⁵ Despite the possibility of intervening

¹⁷³ See generally Thomas M. Shapiro, *The Hidden Cost of Being African-American: How Wealth Perpetuates Inequality* (2004) (discussing transfer of wealth between generations); Westley, *supra* note 48, at 440-45 (discussing economic disparities between Blacks and whites).

¹⁷⁴ See Richard Epstein, *The Case Against Black Reparations*, 84 B.U. L. Rev. 1177, 1184 (2004) (“We have no idea of how much of that profit (assuming that it could be calibrated) actually descended to the next generation. The ordinary business will reinvest some share of its profits, but will declare some as dividends and pay some out in salaries to its employees. Any dividends and wages do not descend to the next generation.”); Massey, *supra* note 9, at 164-65 (“It is impossible to know how much better off today’s black Americans would be, if at all. It is even more speculative to try pinning a number on the loss suffered by any given contemporary individual descendant of American slavery.”).

¹⁷⁵ This number may be smaller than commentators assume. Indeed, economic studies suggest that, absent the presence of legal regimes to preserve wealth, it is difficult to keep fortunes together. See generally John F. Hart, “A Less Proportion of Idle Proprietors”: Madison, Property Rights, and the Abolition of Fee Tail, 58 Wash.

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causes, plaintiffs have some statistically measurable, non-negligible chance of being the recipients of their ancestors' wealth.¹⁷⁶ (And it is almost certain that reparations defendants could not establish that they were not the cause of plaintiffs' injuries.)

Even incomplete or preliminary statistical evidence should be enough to overcome the standing issue that proved fatal in *Slave Descendants*. The but-for connection between slavery and eventual harm to slave descendants is not in doubt; the only question is exactly how much worse slave descendants have fared compared to control groups. A court could apply loss of a chance doctrine, taking judicial notice that but for slavery, slave descendants today would enjoy greater prosperity. That admission, coupled with basic statistical evidence, could be used to show the level of harm required for standing.

The standing analysis reflected in the current *Slave Descendants* opinion is questionable and should be reconsidered.¹⁷⁷ The court's standing analysis imposed on plaintiffs an unnecessarily high hurdle.¹⁷⁸ Even reparations critics found the court's standing analysis

& Lee L. Rev. 167 (2001) (discussing the effect of fee tail and primogeniture in preserving wealth between generations). Ironically, Blacks missed out on many of the devices, such as fee tail and primogeniture, designed to maintain wealth. Thus, principles of corrective justice suggest that they should be given the benefit of every doubt on whether they would have kept wealth and passed it on to future generations.

¹⁷⁶ Of course, the question might be complicated by the potential need for a Daubert-approved statistical model in order to show standing.

¹⁷⁷ See Sebok, *The Lawsuit*, *supra* note 65, at 1-2; Epstein, *supra* note 174, at 1179-81; Eric J. Miller, *Representing the Race: Standing to Sue in Reparations Lawsuits*, 20 Harv. Blackletter L.J. 91, 93 (2004).

¹⁷⁸ In particular, the court may be requiring a showing of proximate cause, when all that is really required is a showing of but-for cause. See Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on The Jurisprudence of Lyons*, 59 N.Y.U. L. Rev. 1, 17-18 (1984); Calabresi, *supra* note 7, at 71-73 (discussing the difference between "three conceptions of 'cause': 'causal link,' 'but for cause,' and 'proximate cause'"); see also Aaron D. Twerski & Neil B. Cohen, *Informed Decision Making and the Law of Torts: The Myth of Justiciable*

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flawed; the court's decision is "little more than a disguised ruling on the merits," suggested one critic.¹⁷⁹ The *Slave Descendants* court suggested that proximate causation must be fully established to show standing. That idea, however, goes against the law and the literature in this area.¹⁸⁰

Causation, 1988 U. Ill. L. Rev. 607 (suggesting that courts generally insist on too high a burden of causation).

Prior to *Lujan*, standing could sometimes be established under rather attenuated theories of causation. "The [Supreme] Court has not . . . required a showing of strict tort causation in the sense that the complained of conduct be the but-for cause of the plaintiff's harm. To the contrary, the Court has been willing to accept quite attenuated theories of causation, at least at the pleading stage." Karl S. Coplan, Refracting the Spectrum of Clean Water Act Standing in Light of *Lujan v. Defenders of Wildlife*, 22 Colum. J. Envtl. L. 169, 185 (1997).

Lujan applied a less forgiving eye to the standing requirement. However, *Lujan* did not alter the basic inquiry. 504 U.S. at 560-61. In addition, *Lujan* sets forth a factual requirement to establish standing at the summary judgment stage, see *Lujan*, 504 U.S. at 561. *Lujan* stated that "at the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim." *Id.*

¹⁷⁹ Epstein, *supra* note 174, at 1179-81. Courts are often accused of using standing to dodge serious issues. See, e.g., Cass R. Sunstein, What's Standing After *Lujan*? Of Citizen Suits, "Injuries," and Article III, 91 Mich. L. Rev. 163, 166 (1992); John A. Ferejohn & Larry D. Kramer, Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint, 77 N.Y.U. L. Rev. 962, 1009 (2002); Edward A. Hartnett, The Standing of the United States: How Criminal Prosecutions Show that Standing Doctrine is Looking for Answers in All the Wrong Places, 97 Mich. L. Rev. 2239, 2251-52 & n.63 (1999).

¹⁸⁰ Standing requires showing three elements: injury in fact, causal connection to a defendant, and redressability. 504 U.S. at 560-61. This is a lesser burden than causation. As Richard Fallon argues, "the causation requirement of personal interest standing is not that of proximate cause. It seems instead to replicate the tort law concept of 'cause in fact' or 'but for' causation." Fallon, *supra* note 178, at 17; see also Epstein, *supra* note 174.

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Of course, more detailed causal connection would ultimately be needed to establish liability.¹⁸¹ This would likely depend on a showing that slave descendants are statistically less prosperous than appropriate control groups. In any event, statistical tools would be invaluable in showing causation, both the basic causation level required to show standing, and the more rigorous showing that would be needed to establish liability. Other tort doctrines will also be useful at the liability stage. For example, it might make sense for a court to use a substantial factor test to determine liability. Statistics would probably play a major role in that inquiry as well, to show whether slave descent is indeed a substantial factor in determining the prosperity of slave descendants.

3. Wrongdoer Attenuation

Finally, the framework for apportioning liability set out in *Sindell* and other DES cases may provide a means of overcoming wrongdoer attenuation. In *Sindell*, the court found that DES manufacturers could be held liable despite the inability of plaintiffs to connect directly the manufacturers to the plaintiffs' harm. That court noted, "as between an innocent plaintiff and negligent defendants, the latter should bear the cost of injury."¹⁸² Similar reasoning applies in reparations: Where the choice is between letting harm lie with descendants of innocent slaves, or with the corporate entities who participated in slavery, it makes sense to favor slave descendants. *Sindell* apportioned liability according to the market share of each defendant.¹⁸³ That framework,

¹⁸¹ See Fallon, *supra* note 178, at 17-18 (discussing difference between causation and standing requirements); Mark S. Brodin, The Standard of Causation in the Mixed-Motive Title VII Action: A Social Policy Perspective, 82 Colum. L. Rev. 292, 307 n.70 (1982) (noting this difference); Epstein, *supra* note 174, at 1181 (same).

¹⁸² 26 Cal.3d at 610-11.

¹⁸³ The *Sindell* court used proportional liability, allocating liability between the defendants in proportion to their market share. *Id.* at 612-13.

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if adopted in the reparations context, could potentially resolve many thorny distributional questions.

There are, however, significant conceptual hurdles that could impede application of *Sindell* to reparations. In *Sindell*, the major players in the DES market – who collectively comprised a large majority of the relevant market actors – were all joined in the litigation.¹⁸⁴ Because of this, the *Sindell* apportionment scheme seemed fair in a broad sense – most of the market was represented by the defendants joined in the case, and the only question was how to divide liability between apparently liable parties.

In contrast, market share liability in the reparations context is less compelling, precisely because it is not possible to join individual defendants representing even a majority of the slavery market. Certain long-lived individual corporate slave market participants still exist, and are defendants in reparations litigation. It is all but certain, however, that the majority of the private actor participants in the slave markets is no longer in existence, or cannot be matched with any current defendant. Existing reparations defendants represent only a small percent of the original slavery market. The market coverage of joined defendants in the reparations litigation thus differs drastically from the market coverage present in *Sindell*. Because of that difference, direct application of a *Sindell* framework is not possible without some kind of modification.

Various possibilities exist for adapting *Sindell* to the slavery market. One possibility would be to join government actors as additional defendants. This route has the benefit of seeming to create a somewhat *Sindell*-like level of market coverage. Combined with corporate defendants, government actors could be viewed as comprising much of the slave market. However, any attempt to join government actors runs into a host of problems, starting with

¹⁸⁴ *Id.* at 611-12 (noting that joined defendants comprised 90 percent of the DES market).

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sovereign immunity.¹⁸⁵ In addition, it is not clear that joining government actors would actually result in a *Sindell*-like level of market coverage among the universe of joined defendants. Government and corporate entities played different and often overlapping roles in the slave market. It is not clear that adding government actors would alter the market coverage of joined defendants and make *Sindell* application any easier.

Another possibility would be to hold currently joined reparations defendants liable for the acts of other participants in the market for slavery, who have not been joined in the litigation. This approach is similar to “enterprise liability” theories which hold that any actors in an enterprise can be found liable for harms it causes.¹⁸⁶ Under such a system, individual corporate actors could be held liable not only for their own share of the original market, but also for the market share of the many other actors no longer in existence. This would result in much greater potential monetary recovery for plaintiffs, since no portion of the original market would be written off as judgment proof. However, by imputing to existing defendants the shares of judgment proof former market participants, such a framework raises potentially insuperable questions of fairness.

Finally, *Sindell* could be adapted in a more limited fashion to allow for pro rata recovery according to the market share of existing defendants. Under such a system, each defendant would be liable for its own portion of the original market for slavery, as defendants in *Sindell* were liable for their portions of the DES market. However, those portions of the initial market not represented by current defendants – almost certainly the vast majority of the market for slavery – would simply be written off as uncollectible. Thus if slave descendants can join defendants representing 10% of the slave market,

¹⁸⁵ See generally Wenger, *supra* note 1, at 243-49 (discussing government defenses against reparations claims).

¹⁸⁶ See Hall v. E. I. Du Pont De Nemours & Co., Inc., 345 F. Supp. 353 (E.D.N.Y. 1972); Weinstein, *supra* note 41, at 149-52 (discussing enterprise liability).

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then they can collect damages representing 10% of the economic harm suffered by slave descendants. The remaining 90% would be attributable to non-collectable (perhaps non-existent) entities. This approach would provide a lower level of potential monetary recovery to slave descendants, since the majority of claims would be written off as uncollectible. (Those would be the claims attributed to participants in the original market, who are not joined to the current litigation). However, because this modification would not force any defendant to pay for harm greater than its percent of market share, it is the least problematic route from a fairness standpoint.

B. Unjust Enrichment

Although the foregoing analysis is addressed to torts, much of it would apply to unjust enrichment claims as well. For example, unjust enrichment claimants could use statistical evidence to attack victim attenuation arguments. And *Sindell*-like market share restitution would be a way of avoiding wrongdoer attenuation in unjust enrichment cases, as well as in tort cases.

The possibility of apportioning liability according to market shares is particularly attractive in the unjust enrichment context. Some scholars believe that unjust enrichment claims are the best opportunity for reparations.¹⁸⁷ Unjust enrichment offers significant advantages, including its lower threshold of proof (more likely than not).¹⁸⁸ As others have noted, however, unjust enrichment claims run into difficulty at the remedy stage.¹⁸⁹ The question of how to apportion blame is not at all clear. Thus, while unjust enrichment can answer some of the problems inherent in tort claims, they do not provide a clear avenue for remedy.

Sindell market-share apportionment may be the best way to convert unjust enrichment claims from academic fantasy into legal

¹⁸⁷ See, e.g., Sebok, *Prosaic Justice*, *supra* note 22, at 52.

¹⁸⁸ Sherwin, *supra* note 22, at 1447-53.

¹⁸⁹ Sebok, *Two Concepts*, *supra* note 15, at 1431-40.

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reality. If market share liability provides a solution to the tracing problem, unjust enrichment claims may become more viable. Like the DES case addressed in *Sindell*, unjust enrichment claims run into the problem of tracing. But also like *Sindell*, the harm alleged is largely fungible. Thus, market share liability in unjust enrichment is appropriate. This solution is attractive because it is easy to implement. It skips thorny theory questions at the implementation stage, offering a viable method to calculate each defendant's contribution.

Finally, unjust enrichment claims might also benefit from statistical analysis. Victim and act attenuation problems in unjust enrichment, like in tort, can be addressed through the use of statistical evidence.

C. Recap

This Part has examined the idea of causation. It is apparent that legal attenuation critiques, including the *Slave Descendants* court's analysis, are oversimplified. The question of causation in reparations requires analysis of underdetermined causation, which does not always preclude liability. Reparations advocates should use the tools of mass tort, particularly statistical causation, to establish liability. Statistical tools may be used to show harm to modern claimants, resolving legal concerns of victim and act attenuation and addressing standing concerns. And conceptual tools used in the DES and other cases, including modified *Sindell*-style market share liability, can be used to address wrongdoer attenuation.

VI. Conclusion

Much remains to be done. Reparations advocates must test statistical causation arguments to see if they satisfy courts' lack of harm and standing concerns. The argument should be further developed and refined for use in showing causation at trial, ultimately addressing act attenuation concerns that arise at that stage. And the

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Sindell harm contribution analysis should be employed as needed to address wrongdoer attenuation.

Future steps might include tying these causal tools to particular proposals for asset distribution. It is nearly impossible to discuss reparations today without at least a nod to the many distribution critiques raised by critics.¹⁹⁰ Questions of direct or group compensation – themselves beyond the scope of this Article -- will eventually need to be answered. However, these may also eventually turn out to be questions best answered by examining the mass tort experience, with its models for distribution to victims.¹⁹¹

Despite the work that remains to be done, this Article shows that theoretical tools from the mass tort context may be helpful in addressing attenuation in the reparations debate. Indeed, it turns out that attenuation, like many other concerns about reparations, may provide “grist for the mill of reparations critics, but [is] familiar in law, and the law has developed methods for dealing with (or ignoring) [it].”¹⁹²

¹⁹⁰ See generally Wenger, *supra* note 1, at 253-56 (noting different proposals for distribution of reparations); Kyle D. Logue, Reparations as Redistribution, 84 B.U. L. Rev. 1319, 1354-70 (discussing different models of distribution).

¹⁹¹ See Weinstein, *supra* note 41, at 155-62.

¹⁹² See Posner & Vermeule, *supra* note 9, at 702 (making this statement about potential problems in determining compensation amounts and in making any distribution of restitution).