

CAUSATION AND ATTENUATION IN THE SLAVERY REPARATIONS DEBATE

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Recent discussions of reparations have noted the difficulty reparations advocates have in showing causation. 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 modern disadvantages cannot be connected to slavery.

This Article examines 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. They have important strategic consequences, and operate together to create a formidable obstacle for reparations.

This Article then discusses how ideas on causation from the mass tort context can address legal problems of attenuation in reparations. Mass tort cases have developed novel methods of showing causation, such as statistical evidence, and these tools can be used in the reparations context. By using the tools of mass torts, it is possible for reparations advocates to show causation.

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The case for slavery reparations is failing. Scholars continue to write about reparations,¹ but they increasingly seem 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 Reparations claims have failed in the courts,⁴ and

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) [hereinafter Brophy, Reparations Talk]; 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), at the University of Memphis, see Symposium, 33 U. Mem. L. Rev. 245 (2003), and at Boston University, see Symposium, __ B.U. L. Rev. __ (forthcoming 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. 1181, 1182-85 (discussing statistics) [hereinafter Brophy, Cultural War]; see also Lee A. Harris, "Reparations" as a Dirty Word: The Norm Against Slavery

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proposed legislation has failed to advance in the legislature.⁵ A disjunct exists between scholarly writing and the real world.⁶ One source of this disjunct is the difficulty reparations advocates have in establishing causation. This Article will address the unique problems of causation and attenuation that arise in the reparations context.

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, the attenuated nature of the harm makes it difficult to show proximate cause.⁹

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 *See* Cato v. United States, 70 F.3d 1103, 1108-10 (9th Cir. 1995); *In re African-American Slave Descendants Litigation*, 304 F. Supp. 2d 1027 (N.D. Ill. 2004).

⁵ 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).

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

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

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Attenuation is diminished or failed causation. It is a failure of closeness, which can be created by distance, time, or the intervening

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.*

The problem of attenuation, and its relation to causation, can be illustrated by a quick example. In a scenario where Martha shoots John in the chest, and he immediately dies, we may say that there is likely to be a causal chain between her shot and his death. However, imagine another scenario, where Martha shoots John in the chest, and he walks away. He then plays basketball the next day; he goes sky diving and scuba diving; he gets into a car accident. Five days later, John dies. In the second scenario, the causal chain is far more attenuated. Perhaps we can infer that Martha's shot caused John's eventual death, but there could have been other factors involved: physical exertion, other trauma, natural causes. The number of intermediate steps between the initial act and the manifestation of the harm create attenuation. 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).

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actions of others.¹⁰ Attenuation is a conceptual separation between two actors or events, a dilution or weakening of any connection that they may have. And because it weakens the connection between two actors or events, attenuation can sever conceptual but-for causation from 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. Attenuation comes in three types, which I identify and label 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 modern injury to Blacks is unrelated to the harms of slavery.¹²

In every reparations discussion, the idea of attenuation — often inchoate, but always present — is a major barrier. Reparations opponents use the different forms of attenuation in different ways. And attenuation has important strategic effects. The problem of attenuation is a serious obstacle for reparations advocates because it threatens the progress of the litigation and legislation.¹³ To achieve

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.”).

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

¹³ See *infra* Part I.A. (describing and analyzing various versions of attenuation); *see also* Eric J. Miller, *Reconceiving Reparations: Multiple Strategies in the*

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any success, reparationists must advance both legal and moral claims.¹⁴ Attenuation threatens both of these fronts.

After defining and examining attenuation, I set out to address it.¹⁵ This is done in part by using tools developed in the mass tort context. This Article provides the tools to help reparations advocates approach attenuation. Part I discusses and analyzes different types of attenuation arguments that arise in the reparations debate. Part II discusses strategic consequences of attenuation and what reparations advocates must do to move past this obstacle. Part III discusses how to incorporate ideas of causation from the mass tort context to address legal attenuation arguments. The conclusion will review strategic considerations, and offers a few ideas for further addressing attenuation.

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 address some major legal concerns, and will also set out a framework for analyzing and addressing other attenuation problems, giving

Reparations Debate, 24 B.C. Third World 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).

¹⁴ See *infra* Part II.A.

¹⁵ 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. 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).

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reparations advocates analytical tools for more effectively addressing other types of attenuation.¹⁶

I. Arguments About Reparations, Causation, and Attenuation

The first step in discussing attenuation is to examine the attenuation arguments that reparations opponents use. As now constituted, the literature does not recognize the different arguments in play. In this part I break down the attenuation arguments used by reparations opponents. These include both moral and legal arguments. Much of this Part is descriptive, setting out various attenuation arguments as they have been used. This Part is also classificatory, in

¹⁶ A brief word is necessary on the tone of this Article. The tone of an article typically reflects much of the author's own worldview. An article may be preaching to the choir, or it may seek a tone that is more appropriate for a broader audience. Article tone is particularly important within the reparations literature. Reparations critics often frame their arguments in carefully neutral ways. In contrast, many reparations advocates have employed a "within the movement" tone. *See also* Forde-Mazrui, *supra* note 8, at 689-90 (noting that "arguments advanced on both sides of this controversy often conflate concepts that should be kept distinct" and providing examples of this problem).

The resulting differences in tone — compare critics like Posner and Vermeule, *supra* note 13, or Jeremy Waldron, *Superceding Historic Injustice*, 103 *Ethics* 4 (1992), with advocates such as Robinson, *supra* note 1, or Matsuda, *supra* note 1 — can create the harmful perception that reparations advocates are only speaking to the converted, and that neutral scholars are skeptical of the idea of reparations. *Cf.* Forde-Mazrui, *supra* note 8, at 689 ("Although much has been written on the subject, particularly in the context of affirmative action and reparations, the literature tends to be dominated by extreme positions incapable of taking competing claims seriously."). That perception, in turn, makes reparations arguments easier to marginalize or ignore. *Id.* at 685 ("Although much has been written on the subject, the scholarship too often sheds more heat than light, and tends to be dominated by extreme positions incapable of taking opposing claims seriously.").

This Article is intended to advance the idea of reparations. However, throughout this Article — following the lead of some other recent articles by reparations advocates, *see, e.g.*, Brophy, *Some Problems*, *supra* note 1, Forde-Mazrui, *supra* note 8, I will employ a neutral tone. This Article has at least two distinct audiences, reparations advocates and the general public. In adopting a tone more suitable for a general audience, I hope to make my argument more effective.

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that it will place specific statements into one or more categories. Following that classification, this Part will review some counter-arguments that reparations advocates have used. By examining and classifying reparations arguments, this Part will give us the tools we need to discuss strategy, and how reparations advocates must deal with attenuation.

Section A will briefly discuss causation and attenuation. Section B will identify and define three types of attenuation that come up: Victim, wrongdoer, and act attenuation. Section C will give examples of attenuation critiques, and section D will discuss responses that reparations advocates have offered. Section E recaps.

A. *But-For Cause, Proximate Cause, and Attenuation*

Attenuation is a well-known theme in tort law. Every first-year law student learns that a claimant must show causation in order to establish liability.¹⁷ And while any number of factors may be considered a “but-for” or “factual” cause of a harm,¹⁸ only some of those will be considered legally actionable — those which the law deems “proximate.”¹⁹ Attenuation is an attack on the move from but-for to proximate cause. Attenuation provides a distance between actors. Courts may find that, because of attenuation, proximate cause

¹⁷ See Keeton et al., *supra* note 8, at 263-67.

¹⁸ Keeton et al., *supra* note 8, at 266 (“Many courts have devised a rule, 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).

¹⁹ Keeton et al., *supra* note 8, at 263 (“An essential element of the plaintiff’s cause of action for negligence, or 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).

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is not established.²⁰ Attenuation is thus a major theme in discussions of reparations.²¹

B. Types of Attenuation Arguments that Arise in Reparations

Slaves suffered many deprivations that could trigger tort liability. They routinely suffered physical injury, loss of property, lost wages, loss of liberty, loss of family relations, loss of consortium, and mental anguish.²² Their descendants suffer today from residual racism, a consequence of slavery. It is clear that slavery was “[a] massive crime against humanity . . . an American holocaust”.²³ The tort compensability of slavery is not negated by its legality at the time.²⁴

²⁰ See *id.* at 264; Gray, *supra* note 8, at 86-91.

²¹ 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 13, 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).

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).

²² See Keith N. Hylton, Slavery and Tort Law 4-34 (Boston Univ. Sch. of Law, Working Paper No. 03-02, 2003 Soc. Science Research Network Elec. Paper Collection), at http://www.bu.edu/law/faculty/papers/pdf_files/HyltonK012803.pdf [hereinafter Hylton, Slavery] (discussing different torts which arise from slavery).

²³ Robinson, *supra* note 1, at 33; 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 white slaveholders, and the psychological abuses in failing to acknowledge and respect African personhood, to name only a few, were horrible and unfathomable.”).

²⁴ 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.

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The tort case for slave reparations is strong, but is subject to defenses of attenuation.

Attenuation arguments often come disguised or combined with other arguments. Attenuation arguments in the reparations context have three major thematic strands. These are *victim attenuation*, *wrongdoer attenuation*, and *act attenuation*. These 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.²⁵ They are interrelated but distinct components of the broader attenuation argument.

²⁵ 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 13, 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

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The first concern, victim attenuation, is that Blacks today are not sufficiently linked to slaves, and are thus undeserving of any recompense for slavery.²⁶ The basic idea underlying this concern is intuitive. Blacks living today were not directly subject to the harms of slavery.²⁷ Many Blacks may be slave descendants, but many others are more recent arrivals who lack that connection as well.²⁸ This lack of connection creates victim attenuation. Victim attenuation is a problem that is unique to intergenerational claims, where the claimant is not the same person as an original victim.²⁹ Since the present claimant is not an original victim, and may have a relatively low proportion of descent, she may be subject to victim attenuation

committed by individuals who have been dead for years. African Americans today were never slaves, and are not entitled to wages for slave labor performed over one hundred years ago.”); Hylton, Framework, *supra* note 15, at 39-40 (discussing different types of claims and distinguishing them based on whether injurers and victims are identifiable).

Surprisingly, none of the existing scholarship discusses the significance, of these different variants of attenuation. Nor does it classify and analyze these divisions, as I do in this Article.

²⁶ 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).

²⁷ “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 13, at 30; *see also* Brophy, Some Problems, *supra* note 1, at 518-20; Miller, *supra* note 13, 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.

²⁸ *See* Brophy, Some Problems, *supra* note 1, at 519; Posner & Vermeule, *supra* note 13, 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 13, at 712 (same).

²⁹ As such, victim attenuation arguments are limited to instances such as Black reparations, Native American reparations, and similar intergenerational justice cases.

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arguments. Victim attenuation can be presented as a demand for statistics. There is no reason that modern Blacks should be connected to slaves, this argument goes.

The second type of attenuation is wrongdoer attenuation. Wrongdoer attenuation exists because present-day citizens and governments do not seem to be closely connected to slave owners, suggesting that perhaps they should be required to pay for harms caused by slavery.³⁰ Many modern non-Blacks are not descendants of slave owners, and have no apparent direct connections to them.³¹ All

³⁰ 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 13, 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 13, 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.”).

³¹ 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 13, 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

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living citizens are a generation or more removed from slave owners. In addition, many slave owner descendants are partial descendants only — or even mixed descendants, with ancestry traceable both to slaves and to slave owners.³² 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.³³

of the Confederacy. Reparations opponents may be more connected to the past, and in 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).

³² See Posner & Vermeule, *supra* note 13, 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.”).

³³ 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 descended from Irish and German immigrants who didn’t arrive on Ellis Island until

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Wrongdoer attenuation is a concern because reparations is often presented as a demand for justice.³⁴ The criticism may be presented through 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.³⁵ While victim attenuation may evoke the possibility of an unjustified windfall, wrongdoer attenuation brings the image of an unjustified penalty.³⁶ That is a strongly negative image to overcome in a society which places high value, at least rhetorically, on the protection of the innocent.³⁷ As Posner and Vermeule note, “a strong tradition in the United States holds that individuals are not blameworthy for acts over which they have no control.”³⁸

well after the Civil War.”) (statement of Peggy Sakagawa); Massey, *supra* note 9, at 162.

³⁴ Reparations advocates may be inadvertently encouraging this critique, by the use of the language of culpability in reparations literature. See Miller, *supra* note 13 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).

³⁵ See Horowitz, *supra* note 27, at 3-4.

³⁶ See Waldron, *supra* note 16, 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 13, at 730-31 (noting this argument); Horowitz, *supra* note 27, at 9.

³⁷ Verdun, *supra* note 2, at 620-22.

³⁸ Posner & Vermeule, *supra* note 13, at 699; Daryl Levinson, Collective Sanctions, 56 Stan. L. Rev. 345, 347-48 (2003). In instances where group sanctions

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Finally, the third prong of attenuation — act attenuation — is that there is no direct connection between past wrongdoing and present harm. One critic notes, “another problematic consideration is 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.”³⁹ This objection is also 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.⁴⁰ Some individuals appear to have integrated smoothly into society, while others have not.⁴¹ The difficulty of unraveling potential contributing (or ameliorating) causes leads to act attenuation.

Act attenuation is important because the legal system generally requires that victims and wrongdoers establish a direct connection between a wrongful act and a claimant’s injury.⁴² Attenuation is a

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).

³⁹ Massey, *supra* note 9, at 162-63.

⁴⁰ 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).

⁴¹ 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.

⁴² *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

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factor in standing inquiry. The Supreme Court notes that a relevant question in deciding standing is, “Is the line of causation between the illegal conduct and injury too attenuated?”⁴³ As a challenge to the connection between an initial act and a harm, act attenuation may be viewed as an attack on the very idea of statistical proof. As Al Brophy writes, “[f]ormulating a legal claim requires linking past perpetrators with people who currently exist. It also involves linking past victims with people who are making a claim in the present—or what one might call present victims of past discrimination.”⁴⁴ The difference between victim and act attenuation is subtle. While victim attenuation says “you are not a person who may bring a claim,” act attenuation says, “you have not suffered any harm.” When combined with the doctrine of standing, act attenuation—“you have not suffered any harm” — can lead to victim attenuation—“you are not a person who may bring a claim.”

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 can potentially apply in most or all reparations-type actions.⁴⁵

C. *Examples of the Attenuation Critique*

The problem of attenuation arises in three major areas: the legislature, the courts, and the media and popular opinion. Each of these areas is affected differently by attenuation arguments.

1. *Legislature*

The effect of attenuation arguments in the legislature is to undermine the legitimacy of proposed reparations legislation. In

(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).

⁴³ *Allen v. Wright*, 468 U.S. 737, 757-58 (1984) (quoting *Warth v. Seldin*, 422 U.S. 490, 504 (1975)).

⁴⁴ Brophy, *Some Problems*, *supra* note 1, at 504.

⁴⁵ *See Matsuda, supra* note 1, at 372 (discussing attenuation defense in connection with reparations claims by Native Hawaiians); *see also* Posner & Vermeule, *supra* note 13, at 699-711 (noting these types of objections to reparations generally).

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particular, wrongdoer attenuation comes into play. 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.”⁴⁶ These sorts of attenuation arguments are often both moral and political.⁴⁷

2. Courts

The attenuation problem also appears in court cases, generally as part of the analysis of standing, where victim attenuation is raised. 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.⁴⁸

⁴⁶ 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).

⁴⁷ 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).

⁴⁸ 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.*

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Similarly, the district court in the *In re African-American Slave Descendants Litigation* dismissed a number of consolidated claims in related cases brought against corporations.⁴⁹ 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.⁵⁰ The court wrote that:

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.⁵¹

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.⁵² 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."⁵³ In addition, the court ruled that the plaintiffs did not meet the

⁴⁹ *In re African-American Slave Descendants Litigation*, 304 F. Supp. 2d 1027 (N.D. Ill. 2004).

⁵⁰ The case was dismissed in part because of standing and attenuation issues, and in part because of the statute of limitations. *See id.* at 1065-75 (discussing statutes of limitation); *id.* at 1070-75 (discussing exceptions to the statute of limitations); *see generally* Robinson, *supra* note 25, at 366-68 (discussing statutes of limitations); Wenger, *supra* note 1, at 244-48 (same).

⁵¹ *Id.* at 1047, 1051.

⁵² *Id.* at 1048.

⁵³ *Id.* at 1048.

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requirements for third party standing: “Plaintiffs have not alleged a legally sufficient relation to their ancestors. All that Plaintiffs allege is a genealogical relationship, and more is required under the law in order to confer third-party standing.”⁵⁴

These conclusions show the difficulty courts have in dealing with attenuation. 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”⁵⁵ — 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.”⁵⁶ In particular, the *Slave Descendants* court, like the *Cato* court, focused on victim attenuation — “Plaintiffs cannot establish a personal injury sufficient to confer standing”.⁵⁷

Thus, the problems of victim, wrongdoer, and act attenuation certainly have been decisive in reparations suits in the courts.⁵⁸

⁵⁴ *Id.* at 1053. 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 1052-53.

⁵⁵ *Id.* at 1048 (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 1041.

⁵⁶ *Id.* at 1049-50.

⁵⁷ *Id.* at 1051; *see id.* at 1048; *see also id.* at 1064 (“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.”).

⁵⁸ 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).

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3. *Media and Literature*

Every type of attenuation has been discussed in the media. The idea of wrongdoer attenuation has been raised by many prominent critics of reparations. For example, Armstrong Williams criticizes the reparations movement for “seek[ing] to penalize our current government for what white slave holders did centuries ago.”⁵⁹ 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.”⁶⁰ 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.⁶¹ 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.”⁶² And other critics of reparations have voiced similar opinions.⁶³

⁵⁹ 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)

⁶⁰ John McWhorter, Against Reparations, *in* Should America Pay?, *supra* note 1, at 191.

⁶¹ Horowitz, *supra* note 27, at 1. This article was widely distributed and received nationwide attention. *See* Brophy, Cultural War, *supra* note 3, at 1201.

⁶² Michelle Malkin, Get Out Your Reparations Calculator, TownHall.com, August 15, 2002, available online at <http://www.townhall.com/columnists/michellemalkin/mm20020815.shtml>.

⁶³ *See, e.g.*, CNN, Crossfire, August 20, 2002, available online at <http://www.cnn.com/2002/ALLPOLITICS/08/20/cf.crossfire/index.html> (statement of Tucker Carlson) (“You are not responsible for what your ancestors did. Given that, isn’t it against the idea of justice in this country, maybe even immoral, to take money from people as punishment for a deed they didn’t commit?”); Jonah Goldberg, National Review, March 19, 2001 (“Most of ‘white’ America — which includes many Hispanics — does not consist of the descendents of slave owners or even beneficiaries of slavery. The folks from my father’s side of the family, for

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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?"⁶⁴

Media and literature critics of reparations also emphasize victim attenuation. 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."⁶⁵ Merida notes that "Opponents say there is no precedent for paying people who are dead, that reparations are usually awarded to survivors."⁶⁶ Stephen Kershner argues that modern Blacks have only "token" rights of reparations because they are not sufficiently connected to slaves.⁶⁷ And Keith Hylton has argued that reparations claims must be treated as derivative claims under tort law, which means that as a practical matter they will fail.⁶⁸

Similarly, media and pundit statements discuss act attenuation. Horowitz writes that reparations is "based on the unfounded claim that all African-American descendants of slaves suffer from the economic

example, didn't arrive in the country until the Civil War — and they showed up poor. My mom's family is from Boston. So I don't feel any particular ancestral guilt. . . . And remember, 14% of Americans today are either immigrants or the children of immigrants. That's a lot of newcomers to blame for something done by old-timers.").

⁶⁴ Merida, *supra* note 2, at C-01.

⁶⁵ 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.

⁶⁶ Merida, *supra* note 2, at C-01.

⁶⁷ Kershner, *supra* note 26, 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).

⁶⁸ Hylton, Slavery, *supra* note 22, at 38-45.

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consequences of slavery and discrimination” and that “no evidence-based attempt has been made to prove that living individuals have been adversely affected by a slave system that was ended over 150 years ago.”⁶⁹ A number of critics suggest that shortcomings of Blacks, individually or as a group, are responsible for any present injury.⁷⁰ 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.”⁷¹

D. Responses by Reparations Advocates

Reparations advocates understand that attenuation is a serious concern. They have suggested various defenses to the attenuation critiques. These include the idea of group harm and group benefit, a focus on corporate identity (either of corporations or of the nation as a whole), and fairness and equity concerns. For the reasons set out below, none of the current responses has fully succeeded in addressing the attenuation problem.⁷²

⁶⁹ Horowitz, *supra* note 27, at 6.

⁷⁰ See Forde-Mazrui, *supra* note 8, at 728-33 (discussing these arguments); see also Hylton, Framework, *supra* note 15, at 35-37 (discussing differences in Black and white family structure).

⁷¹ 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.”).

⁷² Other strategic moves by reparations advocates have not affected the attenuation issue. For example, some advocates have suggested bringing claims under a theory of unjust enrichment. Unjust enrichment is perceived to have certain advantages, such as possible advantages in dealing with statutes of limitation. See Anthony Sebok, Reparations, Unjust Enrichment, and the Importance of Knowing the Difference Between the Two, 58 NYU Ann. Surv. Am. L. 651, 653 (2003). It was a legal theory that was successfully employed in the Holocaust litigation. See *id.*; see also Anthony Sebok, Prosaic Justice, 2002 Legal Aff. 51, 52. This approach offers some benefits with regard to attenuation as well; it depends only on a showing that a payer was unjustly enriched, and so it may lessen the difficulty of overcoming

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1. *Group Harm and Group Benefit*

One response to attenuation concerns, articulated by advocates such as Mari Matsuda, has been to argue that reparations should be based on an idea of group harm and group benefit.⁷³ Thus, addressing ideas of wrongdoer attenuation, Matsuda writes:

A horizontal connection exists as well within the perpetrator group. Members of the dominant class continue to benefit from the wrongs of the past and the presumptions of inferiority imposed upon victims. They may decry this legacy, and harbor no racist thoughts of their own, but they cannot avoid their privileged status.⁷⁴

This group benefit approach has also been advocated by other reparations advocates. Christopher Hitchens notes that slaves benefited even non-slaveholders, while immigrants benefited from the legacy of slavery.⁷⁵

Similarly, Matsuda addresses victim attenuation through the idea of group harm. “The continuing group damage engendered by past wrongs ties victim group members together, satisfying the horizontal unity sought by the legal mind,” writes Matsuda.⁷⁶ Among the group

act attenuation. However, unjust enrichment has serious drawbacks. It is uniquely susceptible to equitable defenses. Sebok, *supra*, at 655. It also may be a less morally compelling argument. *Id.* at 657; Sebok, *supra*, at 52-53. In addition, the *Slave Descendants* court rejected unjust enrichment claims, along with other claims. *See In re African-American Slave Descendants Litigation*, 304 F. Supp. 2d 1027, 1068, 1075-76 (N.D. Ill. 2004).

⁷³ Matsuda, *supra* note 1, at 377. Matsuda labels her approach “looking to the bottom.” *Id.*

⁷⁴ *Id.* at 377-379.

⁷⁵ Christopher Hitchens, *Debt of Honor, in Should America Pay?*, *supra* note 1, at 172, 176-77.

⁷⁶ Matsuda, *supra* note 1, at 377.

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harms cited are racism, stereotyping, demographic disadvantages, and physical attacks on group members.⁷⁷

Thus, group harm addresses victim attenuation, while group benefit addresses wrongdoer attenuation.⁷⁸ Both victim and wrongdoer can have acts ascribed to them based on their membership in the group.

However, group harm and benefit are of limited utility precisely because they do not fit within the existing tort paradigm. They are thus easy for courts and critics to reject outright. As one critic notes, “many advocates of reparations enthusiastically embrace the notion of collective rights and collective liability, but they have the burden of proving why it is that we should displace our fundamental notions of individual rights and responsibilities with a collectivist version of rights and responsibilities.”⁷⁹ Because group harm and benefits arguments fail to address critics on their own terms, they are not an effective response to legal attenuation arguments.⁸⁰ To the extent that

⁷⁷ *Id.*

⁷⁸ *Cf.* Posner & Vermeule, *supra* note 13, at 699 (“If the wrongdoer and victim must be individuals—the premise of ethical individualism—then compensatory justice will rarely justify a reparations scheme. The reason is that as we define reparations either the wrongdoer-payer or the victim-claimant relationship must not be one of identity. But if the wrongdoer and victim can be groups, then payers or claimants will sometimes be individuals who are not the original wrongdoers or victims—rather, they derive their rights or obligations from their membership in the group.”).

⁷⁹ Massey, *supra* note 9, at 166.

⁸⁰ Matsuda, *supra* note 1, at 380-88; Hylton, *Slavery*, *supra* note 22, at 47-48 (stating that any legal decision is likely to follow current tort law doctrines); Posner & Vermeule, *supra* note 13, at 715-21; *see also* Brophy, *Some Problems*, *supra* note 1, at 519 (noting “some problems” with the group harm formulation).

In addition, group harm and benefit arguments create some special problems. In particular, under current constitutional jurisprudence, a reparations scheme based on group harm might be likely to be invalidated as unconstitutional. “Nonblacks may sue to enjoin the program on the straightforward claim that they suffer both economic and stigmatic injuries by virtue of the government’s provision of a race-based benefit.” Posner & Vermeule, *supra* note 13, at 716; *see also* Brophy, *Some Problems*, *supra* note 1, at 529 (noting that in cases seeking a remedy based on racial

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they are accepted at all, they will be viewed as a moral response, while the major victim attenuation problem is a legal obstacle.

2. *Corporate Identity*

A second response has been to argue that corporations, due to their legal nature, are still the same entities that oppressed the slaves. Alfreda Robinson has made this argument. She notes that:

The corporate benefits derived from Forced Labor were undoubtedly a substantial factor in the success of these companies. Accordingly, these present day companies continue to be unjustly enriched as a result of the past. Private inheritances linked to the wealth of these companies also unjustly obtained the benefits of these Americans who were forced to labor under slave conditions for no reason.⁸¹

This approach solves the problem of wrongdoer attenuation. The corporations cannot claim that they are not the same as the wrongdoer entity. However, this approach does little to remedy victim or act attenuation. Such a strategy has been used by reparations advocates,

classification “the court wants a close connection between the past discrimination and the remedy being sought . . . the court seems unwilling—or at least reluctant—to look further into the past”); Posner & Vermeule, *supra* note 13, at 712-14 (noting current legal requirements for affirmative action programs). *But cf. id.* at 720 (“If affirmative action can ever survive the narrow tailoring inquiry, reparations should survive a fortiori.”).

⁸¹ Robinson, *supra* note 25, at 358-61. As Robinson notes, “successor corporations are liable for the debts of the predecessor corporations” where certain conditions are met. *Id.*; *see also id.* at 369 (“In the case of Corporate Reparations, there are very likely direct victims or heirs of the same who can demonstrate specific injury by a specific corporation. Accordingly, the standing doctrine is not an impossible legal obstacle in the Corporate Reparations context.”). On jurors’ willingness to assess damages against corporations, *see generally* David A. Hoffman & Michael P. O’Shea, Can Law and Economics Be Both Practical and Principled?, 53 Ala. L. Rev. 335, 395-98 (2002).

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such as in the *Slave Descendants* litigation.⁸² But the suit was dismissed, precisely because it could not overcome the hurdles of victim and act attenuation.⁸³ This approach is also open to the criticism that it is arbitrary.⁸⁴

In addition, this response is a legal maneuver to address what is at root a moral concern. While legal requirements may be satisfied by finding payers with long legal lives, who owned slaves in their past, popular opinion will still demand a moral answer for the question of why a corporation's shareholders, or a government's citizens, are ultimately paying for harms that they are generations removed from.

A related argument is that the country as a whole, with its corporate identity, is liable for the harms caused by slavery.⁸⁵ Robert Fullinwider argues that "the real issues are corporate responsibility-the responsibility of the nation as a whole-and civic responsibility-the responsibility of each citizen to do his fair part in honoring the nation's obligations."⁸⁶ Kim Forde-Mazrui writes in a similar vein, "America as a nation was responsible for protecting slavery and discrimination, a responsibility that belongs to the nation as a nation and therefore continues over time despite changeover in the American citizenry."⁸⁷

⁸² See Complaint and Jury Trial Demand, *Farmer-Paellmann et al. v. FleetBoston et al.*, No. CV-02-1862 (E.D.N.Y., Complaint filed Mar. 26, 2002) (available online at <http://www.nyed.uscourts.gov/02cv1862cmp.pdf>) (seeking reparations from corporations which benefited from slavery).

⁸³ See *supra* notes 49-57 and accompanying text.

⁸⁴ See Hylton, Framework, *supra* note 15, at 37-38 (arguing that corporate successor liability is morally problematic because it is "a matter of chance that some corporations have been identified as successors").

⁸⁵ "The argument for reparations fits comfortably enough within the traditional paradigm when we make sure the focus is on corporate liability, for the corporate actor in question, the United States, is an "individual" under law. Indeed, precisely because it is an "individual" that doesn't die, it can acquire and retain debts over many generations, though individual Americans come and go." Robert Fullinwider, *The Case for Reparations*, 20 *Phil. & Pub. Pol'y Q.* 213, 215 (2000).

⁸⁶ Fullinwider, *supra* note 85, at 215-16.

⁸⁷ Forde-Mazrui, *supra* note 8, at 686.

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This means critiquing not the individual slave owners, but the government that allowed them to inflict their harm. Al Brophy writes, “the proper understanding may not be class of victims against class of perpetrators. It may be more correct to think of reparations in terms of a class of victims against the government’s obligation to assist victims. Phrased in that way, reparations for slavery and Jim Crow fit comfortably alongside dozens [instances where] the government used its power to assist those who needed help.”⁸⁸ Brophy has advanced such targeted reparations claims himself, seeking an apology from the University of Alabama for its participation in slavery.⁸⁹ And reparations advocates can similarly seek reparations from governments that held slaves directly and that thus have directly benefited from slavery, while directly inflicting harm on slaves as well.⁹⁰

This approach also solves the problem of wrongdoer attenuation, but does not address victim or act attenuation. This, it is unclear that this strategy would be successful in moving the litigation beyond its

⁸⁸ Brophy, *Some Problems*, *supra* note 1, at 519-20; *see also* Fullinwider, *supra* note 85, at 218 (“The real issues are corporate responsibility – the responsibility of the nation as a whole – and civic responsibility – the responsibility of each citizen to do his fair part in honoring the nation’s obligations. . . . The chief wrongs done to African Americans, thus, were not simply the sum of many individual oppressions added together but were the corporate acts of a nation. . . . And so it is that Americans not as individuals but as citizens owe support for the nation’s debt.”); *id.* at 220 (“When Congress passed the Civil Liberties Act of 1988 [granting reparations to Japanese Americans interned during World War II], no one assumed that individual Americans were being held accountable for personal wrongdoing. The interning of Japanese Americans was an act of the United States government and its agents. . . . [each citizen] contributed a small portion, not because he had any personal responsibility for the internment but because as a citizen he is required to bear his share of the government’s necessary expenditures.”); Hall, *supra* note 13, at 30 (“However, this argument, proponents of African American reparations assert, does not comport with other comparative issues, including the national debt, for which all Americans must continue to pay despite its partial creation by other generations.”).

⁸⁹ Davis, *supra* note 31, at 5.

⁹⁰ *See* Wenger, *supra* note 1, at 239-40 (noting direct governmental involvement in slavery).

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current position. In addition, it needs to be developed further, along moral lines, to show the propriety of paying reparations. Finally, this strategy is limited because it potentially (to the extent it targets government entities) runs afoul of sovereign immunity.⁹¹ This is no small concern; *Cato* was dismissed in part on sovereign immunity grounds.⁹²

3. *Establishing Connections to Harm*

Some reparations advocates cite to scholarly work showing the connections between past slavery and present Black poverty.⁹³ For example, Tuneen Chisolm argues that “inequality has been structured over many generations through . . . systematic barriers” for Blacks.⁹⁴ Verdun notes that “comparative statistics on unemployment, income, mortality rates, substandard housing, and education” reflect “the effects of over 300 years of oppression.”⁹⁵ Robert Westley notes the continuing legacy of slavery as evidenced in the Black underclass.⁹⁶ This work can potentially be used to defuse victim and act attenuation, though it may need further development.

In particular, it will be important to develop and to increase social awareness of research documenting the effects of slavery itself, and controlling for other variables including general economic problems suffered by minorities. Otherwise, this response — that Blacks are poorer, less educated, shorter-lived, and so on — will beg the question

⁹¹ See generally Wenger, *supra* note 1, at 248-49 (discussing sovereign immunity in reparations).

⁹² *Cato v. United States*, 70 F.3d 1103, 1107-11 (9th Cir. 1995).

⁹³ See Wenger, *supra* note 1, at 222-25 (noting sources).

⁹⁴ Tuneen E. Chisolm, Sweep Around Your Own Front Door: Examining the Argument for Legislative African American Reparations, 147 U. Pa. L. Rev. 677, 687 (1999); see also *id.* at 688-90 (noting disparities in crime rate, poverty level, home ownership, education, and income).

⁹⁵ Verdun, *supra* note 2, at 664; see also Forde-Mazrui, *supra* note 8, at 695-99 (discussing social disadvantages suffered by Blacks and linking them to discrimination and slavery).

⁹⁶ Westley, *supra* note 40, at 441-44.

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of how much of the disparity can be traced to slavery.⁹⁷ The relevant question is whether slave descendants are poorer than non-slave descendant Blacks; whether slave descendants are less educated than non-slave descendant Blacks, and so forth. Disparate data points, such as questions on family structure, must be addressed.⁹⁸ Anecdotal evidence suggests that slave descendants may suffer harm not shared by other Blacks.⁹⁹ But further quantification of the results of social research that answers this question — and further publication of data that shows this — is required. It is not enough simply to say that Blacks are poorer than whites.¹⁰⁰

4. *Fairness and Equity*

Finally, reparations advocates have argued that victim and act attenuation should be discounted because of fairness or equity considerations. Matsuda has argued that the magnitude of the harm justifies treating reparations as a special case: “the proximate cause question is essentially political. . . more egregious wrongs, such as intentional torts, justify reaching across wider gulfs of time and space

⁹⁷ Cf. Brophy, *Taking Reparations Seriously*, *supra* note 34, at 24-25 (noting uncertainty of harm created by slavery); Hylton, *Framework*, *supra* note 15, at 34-36 (suggesting other potential contributing causes); Massey, *supra* note 9, at 163 (“Racism can and does exist where slavery never did, and racism is surely just one among a number of contributors to this deplorable state of affairs.”).

⁹⁸ For example, Keith Hylton has argued that “most of the difference between white and black family poverty rates can be explained by family structure—specifically, the low rate of marriage of black families below the poverty line.” Hylton, *Framework*, *supra* note 15, at 34-35.

⁹⁹ See Sara Rimer & Karen W. Arenson, *Top Colleges Take More Blacks, but Which Ones?*, *N.Y. Times*, June 24, 2004, at A1 (noting that slave descendants are less likely than other Blacks to be admitted to prestigious colleges).

¹⁰⁰ Cf. Brophy, *Taking Reparations Seriously*, *supra* note 34, at 34 (“When we are talking about even a modest reparations program, we will want to determine with something approaching scientific precision the harm that continues, as well as the benefits that have been conferred.”); see also Forde-Mazrui, *supra* note 8, at 687 & nn. 9-10 (discussing arguments that Black disadvantages are a product of Black culture).

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to connect act and injury.”¹⁰¹ Alfreda Robinson invokes the similar argument that it would be unfair to allow the state to benefit from attenuation caused by its own wrongdoing.

[G]iven the very high mortality rates caused by the deplorable conditions of Forced Labor and the murderous lawlessness and intimidation of the Ku Klux Klan, it is not surprising that the direct victims are dead. . . It is simply unfair to demand that the Reparations advocates produce a specific living direct victim now for every conceivable claim.¹⁰²

Also in this vein, scholars note that negative effects on a victim’s children are a logical result of wrongdoing. 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.¹⁰³ Mari Matsuda makes this argument as well. She notes that, “in determining foreseeability, the classical legal mind typically considers whether a reasonable person contemplating the consequences of a particular act would have imagined the harm that in fact occurred.”¹⁰⁴ Since “what a reasonable

¹⁰¹ Matsuda, *supra* note 1, at 382-83; *see also id.* at 383 (“Proximate cause analysis is typically reduced to consideration of the innocence of the victim, the culpability of the wrongdoer, the foreseeability and magnitude of the harm, and the weight of the broad social goals of fair compensation, deterrence and retribution. . . . It would have required no clairvoyant skill to predict the harm that would befall Hawaiians from the loss of their nation and land, or the harm that would befall Japanese-Americans taken abruptly from their homes to the desert relocation centers. What a reasonable person would have predicted would occur, did in fact occur.”)

¹⁰² Robinson, *supra* note 25, at 353.

¹⁰³ Posner & Vermeule, *supra* note 13, at 700. *See also* David Rosenberg, The Causal Connection in Mass Exposure Cases: A Public Law Vision of the Tort System, 97 Harv. L. Rev. 849, 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.”).

¹⁰⁴ Matsuda, *supra* note 1, at 383.

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person would have predicted did in fact occur,” one classic test for proximate causation is satisfied.¹⁰⁵

The unfairness argument is unique to the concern of victim attenuation. It is of unknown efficacy. One potential concern is that it is a moral and logical argument, while the concerns of standing and victim attenuation are legal concerns. Courts are fickle about accepting fairness arguments. Fairness arguments may also be susceptible to moral counter-arguments that also sound in fairness, such as the fairness of requiring innocent citizens to bear the burden of reparations.

E. Recap

This Part has examined expressed attenuation concerns to determine their nature. Attenuation concerns can be broadly broken into three main components: Victim attenuation, wrongdoer attenuation, and act attenuation. These components are important in different contexts. Victim attenuation is especially important in the legal arena, while wrongdoer attenuation is important in the public and legislative arenas.

Both individually, and as a group, the existing responses to attenuation have failed. Attenuation continues to be a fatal problem for reparations litigation, and it continues to be a major problem in advancing public acceptance of reparations. In part, the responses have failed because they have not adequately considered the types of attenuation that they are addressing, and because they have not distinguished between legal and moral concerns.

II. Strategic Considerations: What Attenuation Means

This Part will discuss the effect that the attenuation critiques have on reparations. In particular, it will discuss the interplay between political and legal arguments about attenuation, and will examine how

¹⁰⁵ See Calabresi, *supra* note 7, at 81 (discussing foreseeability as an element of proximate cause).

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these components work together to create an obstacle for reparations. It will delineate some ideas for addressing these different types of attenuation and their differing effects.

A. *Breakdown of Sub-Types of Attenuation*

Stepping back from what courts and politicians have done, we can discern some broad patterns and themes. The attenuation defense is 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.¹⁰⁶ 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. These are opposite sides of the same coin.¹⁰⁷ Just as the idea of reparations is based on a joint legal and moral argument,¹⁰⁸ attenuation provides a joint legal and moral counter-argument.

Different types of attenuation have different roles in this interplay. Wrongdoer attenuation is a major component of the moral objection to

¹⁰⁶ Cf. Forde-Mazrui, *supra* note 8, at 685 (discussing moral arguments about reparations and affirmative action).

¹⁰⁷ Massey, *supra* note 9, at 157 (“When grappling with providing reparations for slavery, two distinct categories of issues emerge: legal and political.”).

¹⁰⁸ Miller, *supra* note 13, 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 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 47, 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.”).

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reparations. Act attenuation is an important part of the legal objection. Victim attenuation raises major concerns that are both legal and moral. The different roles that different types of attenuation play is set out in the following chart:

Chart 1: Types of Attenuation

	Legal Objection	Moral Objection
Wrongdoer Attenuation	Lack of culpability	Whites shouldn't have to pay
Victim Attenuation	Standing	Blacks shouldn't be compensated
Act Attenuation	Causation	Lack of entitlement

As the chart sets out, there are six different sub-types of the attenuation argument. And as a result of the different types of attenuation and the different spheres where they are used (moral or legal), reparations advocates must address them each of these concerns. Legal concerns impact reparations lawsuits, while moral concerns undermine legislative attempts to seek reparations.¹⁰⁹

These sub-types are related to each other. In particular, in the reparations context, legal 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. Thus, at least within the legal sphere in reparations, victim attenuation and act attenuation have a similar

¹⁰⁹ The repeated use of attenuation saps the moral strength of reparations arguments, weakening the case for reparations in the public eye. See Brophy, *Reparations Talk*, *supra* note 1, at 86 (“The future of the movement undoubtedly will be determined in large part by our success in making a compelling moral argument for reparations that gains political support.”).

Moral concerns may also have indirect effects on legal outcomes. See Forde-Mazrui, *supra* note 8, at 691.

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cause and are closely linked. (There is some difference between them. In particular, a weaker connection between victims and harm may satisfy the victim attenuation standing concerns, while a stronger connection may eventually need to be shown to establish causation at trial.)

It is generally necessary to address concerns by using arguments of the same legal or moral type. Legal concerns about attenuation must be addressed with legal arguments, and moral concerns with moral arguments. The legal concern of standing (victim attenuation) cannot be adequately addressed by moral arguments alone, despite the fact that some moral arguments on fairness are quite strong. Similarly, strong moral arguments against wrongdoer attenuation — that “innocent” whites should not be forced to pay for slavery — will not be adequately addressed by legal strategies that target governments and corporations that, through their long legal lives, were direct participants in slavery.

The legal and moral dimensions of reparations correspond closely to the different theories of justice that reparations advocates rely upon.¹¹⁰ Reparationists walk a fine line between corrective and distributive justice.¹¹¹ Corrective justice attempts to put people in the position they would have been if the wrongful act had not occurred. Distributive justice is the idea that wealth should be more evenly distributed to the less fortunate.¹¹²

¹¹⁰ See generally Peter Benson, *The Basis of Corrective Justice and its Relation to Distributive Justice*, 77 *Iowa L. Rev.* 515, 515-30 (1992) (discussing differences between corrective and distributive justice ideas); Ernest J. Weinrib, *The Idea of Private Law* (1995) (same); Stephen Perry, *On the Relationship between Corrective and Distributive Justice*, in *Oxford Essays in Jurisprudence*, 4th series (Jeremy Horder, ed., 2000).

¹¹¹ See Hylton, *Framework*, *supra* note 15, at 32 (noting “two distinct and in some ways conflicting policies behind reparations litigation. One approach is driven in large part by social welfare and distributional goals. The other approach is based on a desire to correct historical injustices; simply to ‘do justice.’”).

¹¹² See *id.* at 33 (“At the heart of the FleetBoston [reparations] suit is a belief that reparations litigation will compensate or correct for years and years of

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Some argue that corrective justice requires society to compensate for harms suffered by Blacks.¹¹³ Others advocate ideas that are based on distributive justice.¹¹⁴ Distributive justice ideas do not fit well within the tort system, which is a corrective justice system.¹¹⁵ Attenuation arguments may have different effects depending on the theory of justice one espouses. Wrongdoer attenuation, for instance, may be more important in corrective justice, with the idea that the bilateral nature of corrective justice is not just that the victim receives compensation, but that the guilty party pays.

B. Practical Results of Successful Legal Attenuation Arguments

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.¹¹⁶ Indeed, victories for other groups that have sought reparations have come through settlement, not trial.¹¹⁷ However, one key to settlement is the existence of potentially

inattention, or insufficient attention, to the welfare of African Americans.”). This is similar to the redistributive goal of the tobacco class action litigation. *Id.*; see also Massey, *supra* note 9, at 158-67 (discussing the two different approaches).

¹¹³ Forde-Mazrui, *supra* note 8, at 685, 707-09; David Lyons, Corrective Justice, Equal Opportunity, and the Legacy of Slavery and Jim Crow, Boston University School of Law, Working Paper Series, Public Law & Legal Theory, No. 03-15, available at http://www.bu.edu/law/faculty/papers/pdf_files/LyonsD073003.pdf (2003).

¹¹⁴ See, e.g., Matsuda, *supra* note 1, at 375-80.

¹¹⁵ Lyons, *supra* note 113, at 1-4; Forde-Mazrui, *supra* note 8, at 685, 707-09.

¹¹⁶ Westley, *supra* note 40, 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 13, at 51-57 (suggesting that settlement is more likely to be successful than litigation); Wenger, *supra* note 1, at 256-58 (same).

¹¹⁷ These have included reparations for Holocaust victims and for Americans of Japanese Ancestry imprisoned during World War II. See Posner & Vermeule, *supra* note 13, at 694-98 (noting Holocaust and AJA cases); Brophy, Some Problems,

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valid legal claims, and another key is the exertion of political pressure.¹¹⁸ Any eventual settlement will need to be palatable to the general populace.¹¹⁹ Thus, it is likely that a chronology for reparations success will follow certain stages:

Stage one: Initial claims are presented. Non-colorable claims are unsuccessful in the courts. Politicians do not take claims seriously. This is the current state of reparations litigation.

Stage two: Colorable claims are presented. These result in a plaintiff's victory, at least at the District level. The inevitable appeal forces courts and politicians to reexamine the idea of reparations.

Stage three: Politicians and media figures begin to take reparations claims seriously. There is a public debate and assessment of important issues at the political and public level.

Stage four: If it is deemed politically feasible, a settlement offer may be made.

This timeline follows the general timelines of many mass tort and reparations actions.¹²⁰ It will require that reparations advocates devise

supra note 1, at 499-500; Westley, *supra* note 40, at 449-59; In Re Holocaust Victims Assets Litigation, 105 F. Supp. 2d 139 (E.D.N.Y. 2000) (approving settlement).

¹¹⁸ See Yamamoto, *supra* note 47, at 479-82; 496-97 (discussing political element in reparations advocacy); Brophy, Taking Reparations Seriously, *supra* note 34, at 38-39; Hylton, Framework, *supra* note 15, at 34 ("Proponents of . . . reparations claims believe that significant redistribution towards groups that make up America's underclass will not be achieved through legislative action. Thus, reparations proponents have turned to the courts.").

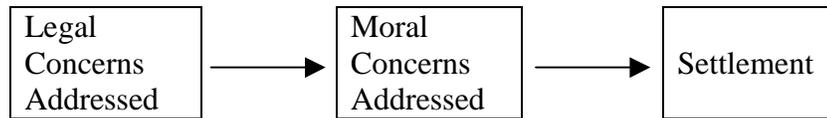
¹¹⁹ See Hopkins, *supra* note 23, at 2539 (noting that any settlement will require support from white voters). Reparations advocates must bear in mind the interest convergence problem, as laid out by Derrick Bell — that Blacks are most likely to be politically successful when they can convince whites that their political interests are aligned. Brophy, Taking Reparations Seriously, *supra* note 34, at 39; Derrick Bell, Brown v. Board of Education and the Interest-Convergence Dilemma, 93 Harv. L. Rev. 518 (1980).

¹²⁰ Cf. See Robert L. Rabin, A Sociolegal History of the Tobacco Tort Litigation, 44 Stan. L. Rev. 853, 874-75 (1992); Peter H. Schuck, Agent Orange on Trial (1986) (describing trial and resolution, including process of arriving at

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legal strategies to advance past *Cato*, and *Slave Descendants* which keep reparations stalled at the first Stage. That is, both legal and moral concerns must be addressed prior to any settlement.

Chart 2: Simplified Strategic Chronology



Given this timeline, the effect of attenuation concerns — particularly the un rebutted legal concerns — becomes more clear. The movement for reparations suits is currently living “in the shadow of” attenuation. Un rebutted legal attenuation concerns are an immediate problem. Un rebutted moral concerns will also eventually need to be addressed.

As suggested earlier, responses to attenuation have not been particularly effective. Our analytical tools give a reason for this: Responses to attenuation have failed to appreciate the different subtypes of argument. The result is that not all attenuation arguments have been adequately addressed.

settlement); In *Re Holocaust Victims Assets Litigation*, 105 F. Supp. 2d 139 (E.D.N.Y. 2000) (approving settlement).

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Chart 3: Responses to Attenuation

	Legal Response	Moral Response
Wrongdoer Attenuation	Suits against government and corporations	<i>None</i> (possibly group benefit)
Victim Attenuation	<i>None</i>	Fairness, Group harm
Act Attenuation	<i>None</i> (possibly social research)	Fairness

As this chart demonstrates, three of the six sub-types of attenuation have yet to be addressed by reparations advocates. In addition, the limited effectiveness of some responses to attenuation makes the case against attenuation even weaker. Suits against government solve the problem of wrongdoer attenuation in the legal sphere, but may be unworkable due to sovereign immunity. Fairness responses are probably more effective in the moral sphere. An assessment of the effectiveness of responses to attenuation is thus:

Chart 4: Effectiveness of Responses to Attenuation

	Legal Response	Moral Response
Wrongdoer Attenuation	Suits against government and corporations <i>Effectiveness: Limited due to sovereign immunity.</i>	<i>None</i> (possibly group benefit) <i>Effectiveness: Ineffective</i>
Victim Attenuation	<i>None</i> <i>Effectiveness: Ineffective</i>	Fairness, Group harm <i>Effectiveness: Moderate.</i>
Act Attenuation	<i>None</i> (possibly social research) <i>Effectiveness: Ineffective</i>	Fairness <i>Effectiveness: Moderate.</i>

An immediate and striking feature that is evident from Chart 4 is that the current responses to attenuation in the legal sphere have been

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limited, ineffective, or non-existent. This is particularly problematic given the importance of a strong legal case if reparations is to have any chance of succeeding.

The current situation for reparations is thus precarious. Little progress has been made in the courts, due to the continued inability to avoid legal attenuation concerns. The lack of progress in the courts means that governments and corporations feel little pressure or threat that a judgment will be rendered against them.¹²¹ This lack of pressure allows the government and private actors to dismiss reparations claims in the public and legislative spheres. Since there is no pressure created by litigation, governments need not view reparations as “serious.”¹²²

It is crucial to resolve causation and attenuation concerns quickly because the attenuation problem is not going to get better. Attenuation is a losing battle of attrition for reparations advocates, because every day, slavery becomes more attenuated. If reparations advocates cannot move the litigation forward quickly, they run the risk of being trapped in a quagmire, and never advancing past Stage One.

C. Preliminary Notes on Addressing Attenuation

Before moving on to some specific legal ideas for addressing attenuation, we will go over some preliminary points that will inform our discussion. First, not all sub-types of attenuation are equally

¹²¹ *Cf.* Hylton, *Slavery*, *supra* note 22, at 1 (“Like all lawsuits, this one has the power to force one’s attention.”). In this sense, the courts act as gatekeepers, and screen out reparations proposals that are unworthy of attention.

¹²² The end goal for most litigants in the modern court system is to reach a settlement. *See* Samuel R. Gross & Kent D. Syverd, *Don’t Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 *UCLA L. Rev.* 1, 2-3 (1996) (noting that most law suits filed in America settle, and most of the remainder are dismissed); Peter H. Scheck, *The Role of the Judge in Settling Complex Cases: The Agent Orange Example*, 53 *U. Chi. L. Rev.* 337, 337 (1986) (noting that most cases settle before trial); Mark Galanter & Mia Cahill, “Most Cases Settle”: Judicial Promotion and Regulation of Settlements, 46 *Stan. L. Rev.* 1339 (1994) (discussing phenomenon and perception of settlement).

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important. At the present, a particularly important concern is victim attenuation in the legal sphere. This is the concern which has blocked the advancement of reparations cases in the courts. Thus, the most important task right now is addressing legal victim attenuation.¹²³

Other concerns are on the horizon. For example, moral concerns about wrongdoer attenuation may be an important hurdle for settlement. Reparations advocates must address both legal arguments, in order to present a colorable claim which payers wish to settle, and moral arguments, so that a settlement is politically feasible.¹²⁴

Second, reparations advocates should be aware of how their arguments relate to the broad distributive versus corrective justice concerns. Some arguments against attenuation may imply a move away from corrective and towards distributive justice. This may weaken the case for bringing reparations under the tort banner, and suggest that like other distributive justice devices they should be legislated.¹²⁵ But such a settlement will be most likely if a viable legal case puts pressure on payers to settle. Thus, it is important to use the tools of corrective justice, the tort system, to create the pressure that may ultimately lead to a remedy from the legislature, which may look more like distributive justice. To the extent that attenuation concerns undercut the corrective justice argument, they must be addressed, but not in a way that moves the discussion completely away from corrective justice.

¹²³ As noted earlier, the legal concerns of victim and act attenuation are closely related. The victim attenuation concern of standing is related to an inability of current claimants to show harm. To the extent that plaintiffs show harm, they may address both victim and act attenuation concerns.

¹²⁴ Cf. Brophy, *Taking Reparations Seriously*, *supra* note 34, at 39-41 (discussing the need for a politically palatable reparations plan); Yamamoto, *supra* note 47, at 479-96 (discussing the political element in reparations).

¹²⁵ Cf. Richard Epstein, *The Case Against Black Reparations*, *___ B.U. L. Rev.* ___, *9 (2004) (“Why think of the claim as one for reparations when the program looks far more like some legislative initiative that does not have to observe the standard constraints of corrective justice, but simply has to command sufficient political support to pass.”).

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I will use the remainder of the Article to discuss conceptual and theoretical tools which can address attenuation, in particular legal concerns of victim attenuation. This priority is because victim attenuation is the most pressing concern at present, and must be addressed in order to move past the current roadblock. Part III will discuss what may be the best option for addressing legal concerns of victim attenuation: The use of causation tools developed in the mass tort context.

Following that discussion, I will give some preliminary ideas on next steps in developing conceptual theories of causation and responsibility that allow reparations to be accepted by legislatures and the public. A full analysis and rebuttal of all of the moral and legal issues of attenuation is beyond the scope of this Article. In particular, moral concerns and concerns of act and wrongdoer attenuation will necessarily remain underdeveloped within this Article. However, the discussion should provide useful analysis for addressing other types of attenuation.

III. 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, reparations advocates have not employed the theoretical tools from the mass tort context. Courts and scholars have addressed 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. Section B will examine similarities between causation issues in mass torts and in reparations. Section C will discuss some solutions that have emerged in the mass tort context, both theoretical and practical, and will discuss how these apply to reparations.

A. Problems of Causation in Mass Torts

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It is not unusual for a tort to have more than one potential cause.¹²⁶ Courts often deal with cases where it is not possible to know whether a defendant's act would have led to the injury or whether other intervening factors would have prevented an injury. It is similarly impossible in many instances to know whether a defendant's taking precautions would have prevented an injury. The problem is that a single event may be logically traceable to more than one cause, meaning that each cause individually is *underdeterminative*.

Underdetermination is caused by the inability to know which of potential competing causes contributed to a harm.¹²⁷ For example, 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.¹²⁸ The sailor may have been swept overboard despite the precautions; the cause of his death is underdetermined.

Underdetermination arises often in the mass tort context. Mass torts typically involve a large number of plaintiffs harmed by a defendant's product. Where the harm manifests in a physical disease

¹²⁶ 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).

¹²⁷ *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 126, 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).

¹²⁸ Malone, *supra* note 126, at 76.

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that can have many causes, underdetermination is common, and showing conventional causation can be difficult.¹²⁹ 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.”¹³⁰ This difficulty 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.”¹³¹

Judge Weinstein, in the Agent Orange case, was faced with a complex problem of underdetermination. He 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

¹²⁹ 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).

¹³⁰ *Id.* at 2121-22; see also Gold, *supra* note 129, at 376 (“Proving the cause of injuries that remain latent for years, are associated with diverse risk factors, and occur at background levels even without any apparent cause, is the central problem for toxic tort plaintiffs.”).

¹³¹ Rosenberg, *supra* note 103, at 856; see also Jack B. Weinstein, *Individual Justice in Mass Tort Litigation* (1995) (discussing this problem); Robinson, *supra* note 126, 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).

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certain type could be expected, but that 1,100 exist, and that this increase is “statistically significant,” permitting a reasonable conclusion that 100 cancers are due to the product of the manufacturers.¹³²

In such a case, Weinstein recognized, “no plaintiff can show that his or her cancer was caused by any one of the defendants.”¹³³ 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.¹³⁴ 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.¹³⁵ DES was manufactured by a variety of companies, and many different types of DES tablets, made by different manufacturers, were interchanged freely.¹³⁶ 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.¹³⁷ 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.¹³⁸ There may be no area of law where underdetermination has been more closely examined than mass torts.

B. The Reparations Analogy

¹³² In re “Agent Orange” Litig., 597 F. Supp. 740, 837 (E.D.N.Y. 1984).

¹³³ *Id.*

¹³⁴ 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, 1080-81 (1991).

¹³⁵ See generally Robinson, *supra* note 126, at 713-17.

¹³⁶ *Id.* at 722-26.

¹³⁷ *Id.*

¹³⁸ See generally John B. Maynard, Note, Third-Generation-DES Claims, 27 New Eng. L. Rev. 241, 285 (1992).

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Using the terminology developed in Part II of this Article, we can see how underdetermination relates to the previously examined categories of attenuation. It is evident that the problems of underdetermination that affect mass torts have much in common with the attenuation difficulties 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.

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Chart 5: Mass Tort Issues as Mapped onto Attenuation Grid

Wrongdoer Attenuation	Tracing harm to a specific tortfeasor ¹³⁹
Victim Attenuation	Tracing harm to later victims; DES granddaughters; causation issues leading to standing concerns
Act Attenuation	Linking harm to defendants

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

C. Solving the Underdetermination Problem

Tort law in general, and mass torts in particular, has developed means of dealing with underdetermination. While underdetermination complicates the legal questions of causation, it does not altogether rule out a finding of legal causation. This Section will discuss how tort law handles underdetermination: Section 1 will discuss theoretical background, and Section 2 will discuss the use of statistical evidence. Section 3 will then apply these ideas to the problems of act, victim, and wrongdoer attenuation.

1. Conceptualizing Recovery in Underdetermined Cases

¹³⁹ 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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This Section will examine some conceptual and theoretical tools used in underdetermined cases. Two important ideas are loss of chance and burden shifting. Following a discussion of those concepts, as well as some general considerations, this Section will discuss how these have been used in mass tort cases.

a. Loss of Chance

The tort system allows recovery in some underdetermined cases.¹⁴⁰ 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.¹⁴¹ 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.¹⁴² “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 rescue operation as a reason for dismissing the claim,” noted Malone.¹⁴³

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.”¹⁴⁴ In such cases, a

¹⁴⁰ See Twerski & Sebok, *supra* note 127, at 1381; Malone, *supra* note 126, at 72-73.

¹⁴¹ Malone, *supra* note 126, at 75-77.

¹⁴² Twerski & Sebok, *supra* note 127, at 1380; Gray, *supra* note 8, at 97-100 & n.18 (discussing cases).

¹⁴³ Malone, *supra* note 126, at 75-77.

¹⁴⁴ *Id.* at 80; see also Twerski & Sebok, *supra* note 127, 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 126, at 80.

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defendant facilitates the realization of an independently created risk.¹⁴⁵ 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.¹⁴⁶ Similarly, courts are more willing to find liability where defendants violated a rule "designed to protect" against the harm that in fact occurred.¹⁴⁷ The gambler's chance lost by slave descendants is likely to be quite substantial.¹⁴⁸

b. Burden Shifting and Other Factors

A second technique is to shift the burden of proof.¹⁴⁹ After all, in many underdetermined cases, it can be impossible to show either causation or non-causation. Courts may shift the burden to defendants, as the court chose to in *Summers v. Tice*, the classic case involving a hunting accident where it was impossible to determine which of two negligent shooters had caused the injury.¹⁵⁰ The court held that "practical justice" allowed the burden to shift to defendants, to establish that they were not the cause of harm.¹⁵¹ Some courts have applied similar reasoning in the mass tort litigation over DES.

¹⁴⁵ Twerski & Sebok, *supra* note 127, at 1383. *See also id.* at 1383-84 (giving examples); Robert L. Rabin, *Enabling Torts*, 49 *DePaul L. Rev.* 435, 439-48 (1999).

¹⁴⁶ Twerski & Sebok, *supra* note 127, at 1385-86.

¹⁴⁷ Malone, *supra* note 126, at 72.

¹⁴⁸ Hylton, *Slavery*, *supra* note 22, at 39, suggests that descendants might have an approximately forty percent chance of inheriting excess wealth from four generations removed. *Id.* at 39.

¹⁴⁹ Robinson, *supra* note 126, at 721-26; Gray, *supra* note 8, at 117-18 (discussing burden shifting).

¹⁵⁰ *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 126, at 83 (stating that the court 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).

¹⁵¹ 33 *Cal. 2d* 80, 86-88 (1948).

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c. Other General Considerations

Scholars have suggested that courts are most likely to find liability in cases where causation is underdetermined if 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.¹⁵² Courts may reject cases where the chance of harm is particularly low.¹⁵³ And they may be likely to find liability where a party engaged in particularly noxious acts.¹⁵⁴

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.¹⁵⁵ A defendant’s actions will be considered a substantial factor in causing a harm if they “satisf[y] the but-for test (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.”¹⁵⁶ 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.”¹⁵⁷

¹⁵² Twerski & Sebok, *supra* note 127, at 1381; Malone, *supra* note 126, at 73, 85-87.

¹⁵³ See Twerski & Sebok, *supra* note 127, 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.*

¹⁵⁴ See *id.* at 1386 (suggesting that the very production of handguns carries culpability); Rabin, *supra* note 145, at 453 (noting that handguns are designed for a dangerous purpose).

¹⁵⁵ Malone, *supra* note 126, at 89-95 (discussing the substantial factor test).

¹⁵⁶ Wright, *supra* note 7, at 1781-82; see also Robinson, *supra* note 126, 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.

¹⁵⁷ Malone, *supra* note 126, at 72.

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d. Application in Mass Tort Context

Courts have applied loss of chance and burden shifting to allow recovery in mass tort cases. *Sindell v. Abbott Laboratories* used burden shifting, holding defendant DES manufacturers liable unless they could show that they did not cause plaintiffs' harm.¹⁵⁸ 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.¹⁵⁹ *Sindell* has been called "modified *Summers*" case because it allowed defendants to pay in proportion to the harm they caused.¹⁶⁰ 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."¹⁶¹ Another DES court noted in a similar vein:

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.¹⁶²

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

¹⁵⁸ *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 126, 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.

¹⁵⁹ *Id.* at 729.

¹⁶⁰ Gray, *supra* note 8, at 105-06.

¹⁶¹ 26 Cal. 3d at 610-11.

¹⁶² Bichler v. Eli Lilly and Co., 79 A.D.2d 317, 324-25 (N.Y. App. Div. 1981).

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defendant.¹⁶³ Other DES courts have also adopted some version of group liability.¹⁶⁴ This is similar to the idea of “enterprise liability,” which was applied in other mass tort settings to find that all actors in an industry are liable for foreseeable harms.¹⁶⁵

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.¹⁶⁶ 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.¹⁶⁷

Another useful analysis of 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 cause by negligent distribution of handguns.¹⁶⁸ In that opinion — which was later reversed on other grounds¹⁶⁹ — the district court found causation despite some misgivings about underdetermination. The judge noted

¹⁶³ *Id.* at 325-26.

¹⁶⁴ *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).

¹⁶⁵ *See, e.g.*, *Hall v. E. I. Du Pont De Nemours & Co., Inc.*, 345 F. Supp. 353 (E.D.N.Y. 1972).

¹⁶⁶ *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).

¹⁶⁷ *Robinson, supra* note 126, at 729.

¹⁶⁸ *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).

¹⁶⁹ 264 F.3d 21 (2d Cir. 2001).

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that the defendants' conduct was a "significant contributing factor in the development" of the ultimate harm.¹⁷⁰ 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].¹⁷¹

This decision has been critiqued;¹⁷² indeed it is no longer good law. However, its causation analysis appears to ask the right questions to determine whether liability can be found despite underdetermination. The court asks whether a defendants' conduct was a "significant contributing factor in the development" of a harm or "a substantial factor . . . increasing the probability" of plaintiffs' harm.¹⁷³ The underlying inquiry, as suggested by commentators, is "if defendants had behaved differently, how many fewer plaintiffs would have been harmed?"¹⁷⁴

2. *Use of Statistical Evidence to Show Causation*

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,

¹⁷⁰ *Id.* at 838.

¹⁷¹ *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.

¹⁷² *See* Twerski & Sebok, *supra* note 127, at 1400.

¹⁷³ 62 F.Supp.2d at 838.

¹⁷⁴ Twerski & Sebok, *supra* note 127, at 1403-04.

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and where intervening causation is possible, resulting in inability to definitely trace any individual plaintiff's injury to an individual defendant's actions.¹⁷⁵ In these cases, scholars suggest that the amount recovered should be based on a "probability of causation" for a defendant.¹⁷⁶

In *Agent Orange*, Judge Weinstein suggested that plaintiffs would divide any recovery to reflect the statistical increase in likelihood of harm they suffered.¹⁷⁷ He applied statistical causation, and used a type of proportional liability in allocating damages following the Agent

¹⁷⁵ Robinson, *supra* note 126, at 759-60; Gold, *supra* note 129, 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).

¹⁷⁶ *Id.* at 749-66; *see also* Bush, *supra* note 164, 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).

¹⁷⁷ The court wrote:

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 that this increase is "statistically significant," permitting a reasonable conclusion that 100 cancers are due to the product of the manufacturers. In the absence of other evidence, it might be argued that as to any one of the 1,100 there is only a chance of about 9% (100/1100) that the product caused the cancer. . . . Since no plaintiff can show that his or her cancer was caused by any one of the defendants, they should divide the \$100,000,000 by 1,100, giving each a recovery of about \$90,000.

Id. at 838-39.

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Orange settlement.¹⁷⁸ Statistical, pro rata distribution of damages was used because of the problem of indeterminate defendants and indeterminate plaintiffs.¹⁷⁹ 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.”¹⁸⁰

Statistical causation in mass tort cases is generally shown by the use of epidemiological studies. 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.”¹⁸¹ Epidemiology is the branch of medical science that employs integrated

¹⁷⁸ 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).

¹⁷⁹ *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).

¹⁸⁰ *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 103, 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).

¹⁸¹ Berger, *supra* note 129, at 2125-26; see also Gold, *supra* note 129, at 384 (discussing phenomena of increased risk and enhanced probability of harm).

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use of statistics to “to identify and establish the causes of human diseases.”¹⁸² 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.¹⁸³

3. 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. 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, this link can be shown using statistical tools. This would require some coordination, including running a rigorous and controlled statistical study prior to bringing suit.¹⁸⁴

The basic design of a study to demonstrate causation would probably be along these lines: The alleged harm is poverty; it should be possible to establish whether or not poverty has a higher incidence

¹⁸² See generally Bert Black & David E. Lilienfeld, *Epidemiologic Proof in Toxic Tort Litigation*, 52 *Fordham L. Rev.* 732, 736 (1984).

¹⁸³ Gold, *supra* note 129, at 380.

¹⁸⁴ Cf. Twerski & Sebok, *supra* note 127, 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 129, at 2127-28 (noting the difficulty of conducting epidemiological studies).

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among slave descendants than among the general populace. It can be established that slave descendants currently hold some value, X. Applying statistical tools, it may be possible to show that they would have held some greater amount, X + Y. The premise seems likely, given the well-known economic disparities between Blacks and members of other races.¹⁸⁵ The reasoning would go (to adapt the language previously used by Judge Weinstein in the Agent Orange litigation):

Let us assume . . . a population of 10 million persons exposed to [slave descent]. Assume that among this population 1,000 [instances of poverty] could be expected, but that 1,100 exist, and that this increase is “statistically significant,” permitting a reasonable conclusion that 100 [instances of poverty] are due to the [slave descent].¹⁸⁶

Such analysis can put a solid number on the question of how slaves’ lost property and lost wages affect Blacks today.

Reparations advocates can also point to existing cases to suggest that slavery is the type of harm where liability is appropriate despite underdetermination. The harms inflicted under slavery were intentional, not negligent, which is one indicator of potential liability.¹⁸⁷ The harm, against slaves and their children, was also foreseeable, another potential indicator of liability.¹⁸⁸ The very act of slavery carries an “air of culpability” which some commentators suggest is another indicator of liability.¹⁸⁹ Other factors also weigh in

¹⁸⁵ See *supra* note 40 (noting these statistics).

¹⁸⁶ In re “Agent Orange” Litig., 597 F. Supp. 740, 837 (E.D.N.Y. 1984).

¹⁸⁷ Twerski & Sebok, *supra* note 127, at 1385-86.

¹⁸⁸ *Id.* (foreseeability of harm).

¹⁸⁹ *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).

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favor of liability: Slaves were subjected to inhuman treatment,¹⁹⁰ and an argument can be made that slavery was a valueless act.¹⁹¹

b. Victim Attenuation

Because of the relation between the legal concerns of act and victim attenuation in reparations, statistical causation concepts that address act attenuation can also address victim attenuation. As noted by the *Slave Descendants* court, the victim attenuation concern is whether claimants can establish a concrete harm. Use of statistical evidence can demonstrate that concrete harm, overcoming one important hurdle for reparations.

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' ancestors may have chosen to spend their wealth on themselves¹⁹² 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.¹⁹³ They may have been victims of the many financial uncertainties that the

¹⁹⁰ See Malone, *supra* note 126, at 95 (noting that “inhuman treatment” was a factor in court finding causation).

¹⁹¹ 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).

¹⁹² 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 22, at 39 (“Precariousness would have given the slave a strong incentive to spend his money on his own desires right away.”).

¹⁹³ 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.”).

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country has seen, losing money to market crashes, business competition, changing laws, wars, speculation, financial panics, currency fluctuation, and inflation.

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.¹⁹⁴ This is not an unrealistic scenario either; many Americans enjoy some measure of inherited wealth.¹⁹⁵ It is unrealistic to suggest that *none* of the slave descendants would have received inherited wealth. The question is, what is the statistical likelihood of receiving wealth that was lost to slave descendants?¹⁹⁶

¹⁹⁴ 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. Giving assets to one's children is a common course of action. If the court were applying the doctrine of *cy pres* to decide where a party's assets were to go, a natural destination would be a decedent's descendants. A similar principle, applied here, shows how strained the *Slave Descendants* court's reasoning is. In the absence of a will, what would slaves most likely have likely wanted done with their assets? They most likely would have wanted them to go to their children. Hylton, *Slavery*, *supra* note 22, 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 16, at 10 (noting "whimsical" nature of property disposition).

¹⁹⁵ See generally Thomas M. Shapiro, *The Hidden Cost of Being African-American: How Wealth Perpetuates Inequality* (2004) (discussing transfer of wealth between generations).

¹⁹⁶ Showing the statistical likelihood of inheritance answers the recurring critique that the amount of compensation is not calculable. See Epstein, *supra* note 125, at 9 ("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

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To answer this, plaintiffs will need to show the statistical likelihood of present claimants receiving inheritance from slave ancestors, as well as the likely amount of any inheritance. This number should be calculable. Armed with such a number plaintiffs 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.¹⁹⁷ Despite the possibility of intervening causes, plaintiffs have some statistically measurable, non-negligible chance of being the recipients of their ancestors' wealth.¹⁹⁸ (And it is almost certain that reparations defendants could not establish that they were not the cause of plaintiffs' injuries.)

This could establish concrete harm and show standing. Allowing statistical evidence to address the weak act attenuation concerns that lead to victim attenuation resolves the concerns of the *Slave Descendants* court. The court expresses concern that the plaintiffs' ancestors assets may have been dispersed due to intervening events. This is not an unreasonable concern, and is conceptually similar to the possibility of another factor leading to a tort claimant's disease. In both cases, it is appropriate to use statistics.

try pinning a number on the loss suffered by any given contemporary individual descendant of American slavery.”).

¹⁹⁷ 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. & 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.

¹⁹⁸ Of course, the question might be complicated by the potential need for a Daubert-approved statistical model in order to show standing.

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c. Wrongdoer Attenuation

Finally, the framework set out in *Sindell* and other DES cases provides 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."¹⁹⁹ Similar reasoning applies in reparations.

Of course, there is a potential problem with applying the *Sindell* reasoning. In *Sindell*, tortfeasors comprising a large majority of the market were joined.²⁰⁰ *Sindell* used proportional liability, allocating liability between the defendants in proportion to their market share.²⁰¹ In the reparations context, it may be difficult to apply *Sindell* since there are no dominant producers of slavery. One possibility would be to join government actors. Another would be to let plaintiffs use the "enterprise liability" theories where any actors in an enterprise can be found liable for harms it causes.²⁰²

D. Recap

This Part has examined the idea of causation. It is apparent that legal attenuation critiques, including the *Slave Descendants* court's

¹⁹⁹ 26 Cal.3d at 610-11.

²⁰⁰ *Id.* at 611-12 (noting that joined defendants comprised 90 percent of the DES market).

²⁰¹ *Id.* at 612-13.

²⁰² It is possible to argue that causal chains to wrongdoers may have been broken by natural acts of wealth disbursement. However, cases have established that torts from a third party will not break the causal chain. Robert L. Rabin, *Enabling Torts*, 49 DePaul L. Rev. 435, 439-48 (1999). Some courts have found actors liable for financing the purchase of a car by a party likely to drive unsafely, dropping off a passenger in a dangerous neighborhood, or leaving a car parked, with keys in the ignition, in a neighborhood where it is likely to be stolen and cause damage. *Id.* at 438-41. If case law allows causation to be found for "enabling" acts even where a tortious act by a third party is required to bring the harm to fruition then it seems like, a priori, an "enabling" act that allows harm to occur by the passage of normal, non-tortious acts of wealth disbursement should be actionable.

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analysis, are oversimplified. The question of causation in reparations requires analysis of underdetermined causation, which does not always preclude liability. Slavery is a good candidate for liability despite underdetermined causation. And 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 conceptual tools used in the DES and other cases can be used to address wrongdoer attenuation.

Use of mass tort tools is an application of a legal solution to the legal attenuation concerns. Most importantly, on a strategic level, this analysis provides a means of potentially overcoming victim attenuation at the legal level. As discussed above, that is a necessary step for moving forward with reparations. Mass tort tools also provide means of dealing with other legal attenuation objections to reparations.

Conclusion: Filling in the Gaps

Earlier in this Article, we discussed some strategic considerations. The Article suggested that reparations litigation was stalled at a dangerous point, and that it was crucial to get past the judicial gatekeepers to the next stages of public discourse and, eventually, settlement.

These strategic considerations remain paramount. Reparations advocates must address attenuation, and they must do so effectively, meeting moral argument with moral and legal with legal, addressing each of the three major attenuation arguments. The need to address legal arguments relating to victim attenuation is foremost.

This Article has suggested that many attenuation concerns can be addressed by looking to the mass tort jurisprudence and literature, and has set out some basic ideas which could be used as a framework in adapting the mass tort theory to reparations. Recall that, as previously set out in Chart 3, there are gaps in the responses to attenuation. Those gaps were previously mapped:

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Repeat of Chart 3: Responses to Attenuation.

	Legal Response	Moral Response
Wrongdoer Attenuation	Suits against government and corporations.	<i>None</i> (possibly group benefit)
Victim Attenuation	<i>None</i>	Fairness, Group harm
Act Attenuation	<i>None</i> (possibly social research)	Fairness

This Article has worked to fill these gaps. I have suggested that statistical causation may provide a means of avoiding the problems of victim and act attenuation in the legal sphere. I have also suggested that *Sindell* harm contribution analysis may be used to address legal concerns of wrongdoer attenuation. These advances modify the chart as follows:

Chart 6: Modified Catalog of Responses to Attenuation

	Legal Response	Moral Response
Wrongdoer Attenuation	Suits against government and corporations. <i>Sindell</i> harm contribution analysis.	<i>None</i> (possibly group harm)
Victim Attenuation	Lack of harm (standing) concerns addressed by showing harm through statistical means, as in mass torts.	Fairness, Group harm
Act Attenuation	Possibly social research. Statistical proof may also show causation	Fairness

Much remains to be done. Reparations advocates must test the statistical causation arguments to see if they satisfy courts' lack of harm and standing concerns. The argument should be further

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developed and refined for use in showing causation at trial, ultimately addressing act attenuation concerns that arise at that stage. And the *Sindell* harm contribution analysis should be employed as needed to address wrongdoer attenuation. Despite the work that remains to be done, this Article shows that there is a theoretical foundation for addressing attenuation.

Throughout this Article, I have employed the terminology of legal arguments and moral arguments. But in the final analysis, the lines are a little more blurred. Many so-called legal arguments are, at their core, based on moral policy decisions.²⁰³ Legal arguments *are* moral, but they are a special subset of moral arguments, and the legal critiques of reparations must be given a legal response.

Some reparations advocates suggest that they cannot win at law, and that it is therefore necessary to employ moral arguments, rather than legal arguments. In this Article, I take the opposite tack. I agree that the end resolution will likely be outside of court, but what seems to be needed right now is a legal hook to move the debate forward. Therefore, I have proposed a technical framework that should aid in carrying forward the moral argument.

Of course, once reparations cases have demonstrated some chance of success in courts, reparations advocates must still advance a politically feasible case for settlement. The time to begin to lay the groundwork for this is now. This Article has not examined potential solutions for the moral concerns of attenuation. However, I will set

²⁰³ Proximate cause is a legal creation, designed to cut off liability at a rather arbitrary point. As such, it has been criticized. For example, scholars writing about the history of the legal requirement of causation note that it arose from cases involving damage caused by railroad sparks, and courts perceived a need to preserve capitalism. Mari Matsuda, *On Causation*, 100 Colum. L. Rev. 2195, 2200 (2000). Thus, the existing rules of causation seeks stable, objective, and predictable outcomes, *id.* at 2201, and in the process serve to protect class interests, *id.* at 2202. Proximate cause is a policy choice. Other, alternative choices exist. *See id.* at 2195, 2211 (suggesting that under current rules, those least able to correct a wrong are often considered its cause, and that causation should be expanded to cover other parties who have the ability to avoid or prevent a harm).

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out a few preliminary thoughts. It is my hope to generate discussion about these ideas and to encourage the airing of other thoughts on how to address attenuation in the public discourse.

First, reparations advocates can focus on the idea of tainted property. This argument would characterize modern citizens as innocent recipients of tainted property — their possession of tainted property may not be their fault, but they may still be responsible for recompensing the harm caused. A second tactic is strengthening the historical research as well as establishing genealogical ties to slave ancestors for individual Blacks today. This is necessary given the recurrence of ideas of victim attenuation. A related concern is the further development of reparations plans, and in particular the tailoring programs to those who have been harmed.²⁰⁴ Reparations advocates may be able to avoid victim and act attenuation through the use of reparations plans can specifically target harmed slave descendants.

One way to ameliorate resentment and wrongdoer attenuation is to place the burden on the widest possible segment of society, thus creating the least possible burden for any one payer.²⁰⁵ To this end, reparations programs should be broad in scope, and may seek to extend payment over a period of time. Reparations advocates may suggest the development of ideas for administrative solutions to the distribution of reparations.²⁰⁶ The widely accepted success of programs such as the September 11th Victim Compensation Fund might provide a model, as well as support for administrative distribution programs.²⁰⁷ Similarly, they can discuss the generational problem, and point out that, in cases of grave wrongdoing such as the

²⁰⁴ Brophy, Taking Reparations Seriously, *supra* note 34, at 31.

²⁰⁵ Brophy, Taking Reparations Seriously, *supra* note 34, at 39.

²⁰⁶ Jack B. Weinstein, Compensation for Mass Private Delicts: Evolving Roles of Administrative, Criminal, and Tort Law, 2001 U. Ill. L. Rev. 947, 971-74 (2001) (noting the ability of administrative bodies to assist in distributing payment for mass delicts).

²⁰⁷ This might involve further examination of the corrective and distributive justice questions previously discussed.

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Holocaust, the passage of time did not dilute moral responsibility. These ideas — and doubtless many others — can be developed by scholars as a next step to addressing moral concerns of attenuation.²⁰⁸

Given the difficulty in advancing reparations suits and proposed bills, it makes sense to explore legal and moral theories which can be used to explain and advocate reparations to judges, legislatures, and the public. This Article has delineated between different types of attenuation in the reparations context. It has discussed how ideas of statistical causation from the mass tort context may be used in the reparations debate. It has also briefly sketched some ideas that could be developed to further address moral attenuation concerns. By examining the nuances of the questions of causation and attenuation, it demonstrates the possibility of showing causation in reparations. Indeed, it turns out that attenuation, like 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].”²⁰⁹

²⁰⁸ See also Brophy, *Cultural War*, *supra* note 3, at 1188.

²⁰⁹ See Posner & Vermeule, *supra* note 13, at 702 (making this statement about potential problems in determining compensation amounts and in making any distribution of restitution).