

## REPARATIONS WITHIN THE RULE OF LAW

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### I. INTRODUCTION

The debate over monetary reparations for slavery raises a number of questions. One important question is how reparations relate to the Rule of Law. There are two ways in which the Rule of Law impacts the reparations debate. First, reparations might be required under the Rule of Law. Second, they might be counter to the Rule of Law. Either possibility would impact the discussion of reparations.

The answer to these questions will depend on how we view underlying issues about what the Rule of Law is and who defines it. The Rule of Law is an important and widely accepted idea, integral to most understandings of how society interacts with law.<sup>1</sup> At its most basic, the Rule of Law is the idea that laws are equally applied, knowable, and distinct from arbitrary power.<sup>2</sup> The Rule of Law is an imprecisely defined concept, however. There are varying versions of the Rule of Law, and they include different components.

In this Essay, I will discuss how slavery may be viewed as a violation of different versions of the Rule of Law. I will suggest

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1. "Apparently transcending partisan concerns, it is embraced and venerated by virtually all shades of political opinion." Allan Hutchison & Patrick Monahan, *Introduction, in THE RULE OF LAW, IDEAL OR IDEOLOGY* ix, ix (1987).

2. *See infra* notes 4, 5, and 6 and accompanying text (discussing definitions of the Rule of Law).

that if slavery was a breach of the Rule of Law, then reparations are an important way to address that breach. They are a tool to allow the community to repair the damage done to the Rule of Law under slavery. I will discuss how reparations fit within the concept of healing the Rule of Law. Finally, I will discuss whether reparations themselves raise Rule of Law concerns.

## II. RULE OF LAW CONCERNS RELATING TO SLAVERY

Slavery involved many problematic state acts. It involved the creation and maintenance of a legal regime that removed rights from one class of citizens and allowed others to treat them as property.<sup>3</sup> It involved legal sanction of heinous acts perpetuated against a powerless class. It is linked to the marginalization of Blacks, their exclusion from political power, and the perpetuation of racist beliefs.

Given the many horrors of slavery, it is possible to conceive of slavery as a violation of the Rule of Law. However, a threshold question is how the Rule of Law is defined. There are many different definitions of the Rule of Law. A full discussion of these definitions is far beyond the scope of this essay; rather, I will give only an extremely abbreviated background, and will focus mainly on a few of the more prominent articulations of the Rule of Law ideal and how they relate to slavery in particular.

At its most basic, the idea of the Rule of Law requires that state exercises of legal authority be based on application of law rather than arbitrary exercise of power, that laws be equally applied to all individuals, and that laws be knowable and performable.<sup>4</sup> This concept is often held up as a contrast to the “rule of men,” which is described as a state where the arbitrary

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3. See Keith Hylton, *Slavery and Tort Law*, 84 B.U. L. REV. 1209, 1213-37 (2004); Kaimipono David Wenger, *Causation and Attenuation in the Slavery Reparations Debate*, 40 U.S.F. L. REV. 279, 283-84 (2006).

4. William N. Eskridge, Jr. & John Ferejohn, *Politics, Interpretation, and the Rule of Law*, in THE RULE OF LAW 265, 265 (Ian Shapiro ed., 1994); see also Kaimipono David Wenger & David A. Hoffman, *Nullificatory Juries*, 2003 WISC. L. REV. 1115, 1131 (noting that the Rule of Law typically requires that laws be general, applicable to all citizens, and nonretroactive). See generally Lawrence Solum, *Legal Theory Lexicon 017, The Rule of Law*, (2004) <http://legaltheorylexicon.blogspot.com/2004/01/legal-theory-lexicon-017-rule-of.html> (giving background of Rule of Law concept) [hereinafter Solum, *Lexicon*].

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will of one or more persons has the force of law.<sup>5</sup> Some versions of the Rule of Law are limited to this procedural skeleton; others incorporate substantive ideas as well.<sup>6</sup> I will examine how slavery interacts with both purely procedural and more substantive versions of the Rule of Law.

Slavery seems largely compatible with some of the more *procedural* versions of the Rule of Law. The most important of these was set out by the English jurist A.V. Dicey.<sup>7</sup> Under Dicey's influential formulation, the Rule of Law contains three elements: "The absolute supremacy of regular law as opposed to the influence of arbitrary power"; "equality before the law, or the equal subjection of all classes [including government officials] to the ordinary law"; and "law of the Constitution" which is "the consequence of the rights of individuals" and is "the result of the ordinary law of the land."<sup>8</sup> These three prongs are all that the Rule of Law requires: As long as government is engaging in application of enacted law (rather than arbitrary exercises of power), laws are applicable to government officials, and constitutional law exists, then the Dician Rule of Law is satisfied.

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5. One prominent formulation of this distinction is found in the Massachusetts Constitution, drafted by John Adams, which states that its structure exists "to the end it may be a government of laws and not of men." MASS. CONST., part I., art. XXX (1780). Similar formulation has appeared frequently in case law. *See, e.g.*, *United States v. Sparf & Hansen*, 156 U.S. 51, 103 (comparing concepts of Rule of Law and rule of men). Interestingly, the Rule of Law—which is held up as the opposite of the rule of men—depends for its execution on the acts of individual men (and women), thus creating a sort of paradox. For further discussion of this arrangement, see Ernest J. Weinrib, *The Intelligibility of the Rule of Law*, in *THE RULE OF LAW, IDEAL OR IDEOLOGY* 59, 59 (1987).

6. *See* Lawrence B. Solum, *Equity and the Rule of Law*, in *THE RULE OF LAW: NOMOS XXXVI* 120, 121 (Ian Shapiro ed., 1994) [hereinafter Solum, *Equity*]; Solum, *Lexicon*, *supra* note 4.

7. ALBERT V. DICEY, *AN INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 120 (1885).

8. *Id.* *See also* Solum, *Equity*, *supra* note 6, at 122 (summing up Dician Rule of Law as "(1) the supremacy of regular law as opposed to arbitrary power; (2) equality before the law of all persons and classes, including government officials, and (3) the incorporation of constitutional law as a binding part of the ordinary law of the land."). The Dician view has been criticized by various commenters. *See, e.g.*, Judith Shklar, *Political Theory and the Rule of Law*, in *THE RULE OF LAW, IDEAL OR IDEOLOGY* 1, 5 (1987) (referring to "Dicey's unfortunate outburst of Anglo-Saxon parochialism.").

Because Dicey's version of the Rule of Law focuses on procedural protections, it is not clear that slavery violates a Dician Rule of Law. Laws instituting and enforcing slavery were certainly cruel and inhumane. However, as long as they were properly passed and executed on a procedural basis, they comply with the procedural requirements of a Dician Rule of Law.

Even under a Dician Rule of Law, slavery could still present Rule of Law problems to the extent the laws were not properly enforced or were not passed through proper procedures. Slavery sometimes involved procedural irregularities, and more than a few instances of slave interaction with the law involved arbitrary results that would not pass even Dicey's procedural version of the Rule of Law.<sup>9</sup> However, in many other instances, slave laws were duly enforced. Laws instituting and protecting slavery, if enforced according to established procedures, are consistent with a Dician Rule of Law because that version is primarily concerned with procedural protections.<sup>10</sup>

However, other conceptions of the Rule of Law include greater substantive protection. I will examine Rule of Law definitions that include three different kinds of substantive components: fairness, morality, and democracy.

Slavery may be a violation of Rule of Law definitions that include or link to *fairness*. John Rawls articulated the most important such formulation. As Margaret Radin notes, "Rawls claims that the Rule of Law is an aspect of his overall scheme of 'justice as fairness.'"<sup>11</sup> For Rawls, the Rule of Law is closely linked to the concept of liberty.<sup>12</sup> It informs citizens what they

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9. See, e.g., THOMAS D. MORRIS, *SOUTHERN SLAVERY AND THE LAW*, 1619-1860 (1996) (discussing application of slave law in everyday life); Walter Johnson, *Inconsistency, Contradiction, and Complete Confusion: The Everyday Life Of The Law Of Slavery*, 22 *LAW & SOC. INQUIRY* 405 (1997) (reviewing Morris, and noting that slave life was filled with legal inconsistency, arbitrariness, and racist applications of law); see also PHILIP J. SCHWARZ, *TWICE CONDEMNED, SLAVES AND THE CRIMINAL LAWS OF VIRGINIA* 14-27 (1988) (discussing how "shackles" of law and slaveowner rights were applied).

10. To the extent that slavery *is* consistent with Dicey's vision of the Rule of Law, this admission itself raises questions about the desirability of such a Rule of Law, one that allows for such a heinous institution as slavery. See *infra* note 27 and accompanying text (explaining this idea).

11. Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 *B.U. L. REV.* 781, 787.

12. JOHN RAWLS, *A THEORY OF JUSTICE* 207 (1999).

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can and cannot do.<sup>13</sup> The Rawlsian Rule of Law contains several procedural elements: laws should be possible to be performed; they should be general, in that similar cases are treated similarly; they should be knowable; and they should be enforced according to some system that gives due process.<sup>14</sup> These listed elements are all procedural in nature.<sup>15</sup> However, they link to Rawls' expansive conception of justice as fairness.<sup>16</sup> Since Rawls' theory of justice is broader than these procedural protections alone, the Rawlsian Rule of Law may give some additional substantive protection related to its link to fairness.

Because it is unclear how much additional substantive protection this link gives, it is not entirely clear whether slavery violates a Rawlsian Rule of Law. It is doubtful that slavery violates the procedural elements of Rawls' list. Slavery existed in a framework in which laws were possible, general, knowable, and enforced with due process. However, slavery violates Rawlsian ideas of liberty and of justice as fairness, which are linked to Rawls' Rule of Law. Therefore, it may be possible to view slavery as a violation of a fairness-linked, Rawlsian conception of the Rule of Law.

Slavery may also violate versions of the Rule of Law linked to *morality*. The most important of these was set out by Lon Fuller. Fuller links the Rule of Law to morality, and suggests that the law cannot be based solely on positive rules but must instead be linked to an "inner morality."<sup>17</sup> A Fullerian Rule of

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13. *Id.*

14. *Id.* at 208-10.

15. As Larry Solum notes, Rawls does not even require that government officials be bound by law, making his version in some ways weaker than Dicey's. See Solum, *Lexicon*, *supra* note 4.

16. For example, Rawls' liberty principle requires that citizens have "political liberty (the right to vote and to be eligible for public office) together with freedom of speech and assembly; liberty of conscience and freedom of thought; freedom of the person along with the right to hold (personal) property; and freedom from arbitrary arrest and seizure as defined by the concept of the rule of law." RAWLS, *supra* note 12, at 53. See generally Seana Valentine Shiffrin, *Race, Labor, and the Fair Equality of Opportunity Principle*, 72 *FORDHAM L. REV.* 1643, 1644-62 (discussing Rawlsian conception of liberty as it relates to race).

17. LON L. FULLER, *THE MORALITY OF LAW* 42-43 (rev. ed. 1969). A full discussion of Fuller's argument is beyond the scope of this Article. Fuller's argument, summarized very briefly, is that law depends on inner morality for its legitimacy. This argument has been criticized by legal positivists such as H.L.A. Hart. See generally ROY L. BROOKS, *STRUCTURES OF JUDICIAL*

Law contains a number of procedural protections requiring that laws must be: generally applicable; promulgated to the public; non-retroactive; understandable; internally consistent; possible to be performed; constant through time; and linked to official action.<sup>18</sup> In addition, a broad morality underlies Fuller's conception of the Rule of Law. Thus, Fuller writes that the Rule of Law can be damaged through "a general and drastic deterioration in legality, such as occurred in Germany under Hitler."<sup>19</sup> In such circumstances, through the use of oppressive tools like retrospective laws, governments undermine public faith in the link between law and morality: "Increasingly the principal object of government seems to be, not that of giving the citizen rules by which to shape his conduct, but to frighten him into impotence."<sup>20</sup> In these circumstances, the Rule of Law is not present.<sup>21</sup>

Slavery may violate Fuller's Rule of Law. As with the Dician and Rawlsian versions, slavery is probably not in violation of Fuller's procedural elements. However, it may meet Fuller's description of a breakdown in legality and the use of government oppression to frighten some citizens into impotence. Thus, slavery may violate Fuller's Rule of Law because it is inconsistent with the morality that underlies the law.

On the other hand, during the time it was legal, slavery was regularly justified through a series of moral arguments.<sup>22</sup> To the extent that one accepts these defenses, then the morality component of Fuller's Rule of Law may be satisfied. As Judith Shklar notes, "Fuller's inwardly moral law not only may, but has been, perfectly compatible with governments of the most repressive and irrational sort."<sup>23</sup>

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DECISION-MAKING FROM LEGAL FORMALISM TO CRITICAL THEORY 164-67 (2002).

18. FULLER, *supra* note 17, at 33-94.

19. *Id.* at 40.

20. *Id.*

21. Similar ideas have a lengthy pedigree. See, e.g., Brophy, *The Rule of Law in Antebellum College Lectures: The Case of William Greene*, 31 CUMB. L. REV. 231, 245 (2001-02) (noting natural law and Rule of Law discussions regarding adoption of the Fugitive Slave Act) [hereinafter Brophy, *Antebellum*].

22. See PAUL FINKELMAN, *DEFENDING SLAVERY: PROSLAVERY THOUGHT IN THE OLD SOUTH -- A BRIEF HISTORY WITH DOCUMENTS* (2003).

23. Shklar, *supra* note 8, at 13. Professor Shklar believes that Nazi Germany is consistent with a Fullerian Rule of Law. *Id.* at 13-14.

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Finally, slavery is certainly a violation of Rule of Law formulations linked to *democratic ideals*. Political theorist Guillermo O'Donnell is one writer who defines the Rule of Law in this way, arguing that the Rule of Law "ensures political rights, civil liberties, and mechanisms of accountability which in turn affirm the political equality of all citizens and constrain potential abuses of state power."<sup>24</sup> The relationship between the Rule of Law and liberal democracy is complicated, and scholars disagree on the extent to which the two ideas are compatible;<sup>25</sup> however, for theorists such as O'Donnell, the two ideas are inseparable.

Slavery is almost certainly in violation of an O'Donnellian conception of the Rule of Law, because it deprived a class of people of civil rights and excluded them from the political process. The removal of legal protection and civil and political rights extended beyond slavery itself. Blacks were denied civil and political rights and participation in the political process.<sup>26</sup> Removal of the rights of Blacks was particularly serious because slavery classified people along explicitly racial lines, linking government to harmful racism. The arbitrary nature of this distinction accentuated Rule of Law problems.<sup>27</sup> Because of the

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24. Guillermo O'Donnell, *Why the Rule of Law Matters*, 15 J. DEMOCRACY 32, 32 (2004); see also Guillermo O'Donnell, *Democracy, Law, and Comparative Politics*, 36 STUD. IN COMP. INT'L DEV. 1 (2001).

25. Cf. Shklar, *supra* note 8, at 16 (arguing that the Rule of Law is "an essential element of constitutional government generally and of representative democracy particularly"), with Allan C. Hutchinson & Patrick Monahan, *Democracy and the Rule of Law*, in THE RULE OF LAW, IDEAL OR IDEOLOGY 97, 110-11(1987) (suggesting that the Rule of Law serves to entrench elitist ideals and power structures, furthering the control of democracies by elites); José María Maravall & Adam Przeworski, *Introduction*, in DEMOCRACY AND THE RULE OF LAW 1, 12 (2003) (discussing this concept).

26. For a discussion of one instance of Black disenfranchisement, see Gabriel J. Chin & Randy Wagner, *The Tyranny of the Minority: The African American Majority And The Revolutionary Creation of the Governments of the Former Confederate States* (draft, on file with author).

27. Beneficial race-based classificatory schemes, such as affirmative action, would probably not trigger the same concerns. This concept has been recognized by a number of commenters. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 243 (1995) (Stevens, J., dissenting) ("Invidious discrimination is an engine of oppression, subjugating a disfavored group," but "[r]emedial race-based preferences reflect the opposite impulse: a desire to foster equality in society"); Maurice R. Dyson, *Multiracial Identity, Monoracial Authenticity, and Racial Privacy: Towards an Adequate Theory of Multiracial Resistance*, 16. 9 MICH. J. RACE & L. 387, 414 (2004) (discussing benefits of

way it disenfranchised and removed rights from slaves, slavery violates an O'Donnellian conception of the Rule of Law.

Thus, under many (though not all) formulations of the Rule of Law, it is possible to view slavery as a breakdown of the Rule of Law. The following chart illustrates some of these possibilities.

**Slavery as a violation of different conceptions of the Rule of Law:**

|           |   |
|-----------|---|
| Dicey     | Not a violation, except to the extent that slavery involved arbitrariness.  |
| Rawls     | Not a violation of Rawls' elements as set out; however likely a violation of other Rawlsian ideals of justice as fairness that interact with the Rule of Law. |
| Fuller    | Possibly a violation of the Rule of Law due to the immoral nature of slavery and to the general breakdown in legality.  |
| O'Donnell | Definitely a violation of the Rule of Law, because it deprives a class of people of civil rights and excludes them from the political process.                |

In addition, reparations may be appropriate even if slavery was not a violation of the Rule of Law.

First, they may be appropriate under the idea that slavery was a sufficiently heinous institution that any Rule of Law that would allow for slavery is a Rule of Law that doesn't deserve obedience. As Lawrence Solum notes, "when it comes to horrendously evil laws, anarchy or revolution is likely to be preferable to the [R]ule of [L]aw."<sup>28</sup> And a related argument is that the complete removal of a group from the law's aegis creates a system of lawlessness under which the Rule of Law is displaced. Keith Hylton writes, "The appropriate model is one in which warlords have displaced the state and held it at bay while they imposed their own law on their subjected populations.

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addressing racial inequality through affirmative action).

28. Solum, *Lexicon*, *supra* note 4.

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When the state becomes strong enough to displace the warlords, it has no moral duty to respect the warlord's law."<sup>29</sup> If this view is accepted, then slavery was not a Rule of Law at all.

Second, reparations may be appropriate under theories other than Rule of Law violation. This Essay has examined only whether slavery was a violation of the Rule of Law. However, reparations may well be appropriate even if slavery was not a Rule of Law violation under theories of tort,<sup>30</sup> unjust enrichment,<sup>31</sup> takings,<sup>32</sup> or other approaches.<sup>33</sup> The availability of those avenues is unaffected by the independent question of whether slavery violates the Rule of Law.

## III. NEED TO REPAIR AND HEAL THE RULE OF LAW

If slavery violated the Rule of Law, the question then becomes, "What now?" Society removed Rule of Law protections for a class of people, and has not taken steps to remedy that Rule of Law breach. Instead, slavery itself, the greatest breach in the Rule of Law, was simply replaced by a system of lesser breaches: Jim Crow, peonage, legalized discrimination, Black disenfranchisement, and so forth.

Only in recent years has society taken steps to bring its treatment of Blacks into line with the Rule of Law. Blacks now share in some measure, the protection of the Rule of Law. However, no attempt has been made to repair the damage done by the lengthy past breach.

Instead, society now seems determined to shut the book. This sends a message that society can and will remove Rule of Law protections as applied to some members of society, and will then act as if nothing happened. That message is not conducive

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29. Hylton, *supra* note 3, at 1219-20.

30. *Id.*

31. Hanoch Dagan, *Restitution and Slavery: On Incomplete Commodification, Intergenerational Justice, and Legal Transitions*, 84 B.U. L. REV. 1139 (2004).

32. Kaimipono David Wenger, *Slavery as a Takings Clause Violation*, 53 AM. U. L. REV. 191 (2003).

33. See generally Alfred L. Brophy, *Some Conceptual and Legal Problems in Reparations for Slavery*, 58 N.Y.U. ANN. SURV. AM. L. 497, 505-09 (2002) (discussing development of reparations theory); SHOULD AMERICA PAY?: SLAVERY AND THE RAGING DEBATE ON REPARATIONS (Raymond A. Winbush ed., 2003); Robert Westley, *Many Billions Gone, Is it Time to Reconsider the Case for Black Reparations?*, 40 B.C. L. REV. 429 (1998).

to building a strong Rule of Law. Rather, Rule of Law violations need to be met with recognition and remedy.

The first step in repairing the damage to the Rule of Law is apology.<sup>34</sup> Incredibly enough, no apology has yet been made for slavery.<sup>35</sup> Blacks are owed an apology for the breaches in Rule of Law that slaves suffered. And as Roy Brooks writes, the apology must be made meaningful through acts that demonstrate society's seriousness and sincerity.<sup>36</sup> Reparations are such an action.

Reparations are an acknowledgment of the displacement of the Rule of Law under slavery, a displacement which in turn created a regime of lawlessness and repression. Slavery was made possible through the removal of Rule of Law protections as applied to one segment of the population—Blacks.<sup>37</sup> The legal subordination and denial of Rule of Law protection for Blacks did not end with slavery, but continued for a century or more after slavery's end.<sup>38</sup> Blacks were denied civil and political rights and meaningful participation in the political process until the civil rights era; even today, they struggle for equal rights.<sup>39</sup>

Given this background, reparations serve as a crucial signal to the Black community that society wishes to acknowledge its error and take concrete steps to repair the damaged community.<sup>40</sup> Absent such a signal, the Rule of Law breach that began with slavery will continue, unhealed. The consequences of the breached Rule of Law—resentment, distrust of law, a perception that law is beholden only to power—will continue to

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34. ROY BROOKS, ATONEMENT AND FORGIVENESS: A NEW MODEL FOR BLACK REPARATIONS 142 (2004) [hereinafter BROOKS, ATONEMENT]; Roy L. Brooks, *Toward a Perpetrator-Focused Model of Slave Redress*, 6 AFR.-AM. L. & POL'Y REP. 49 (2004) [hereinafter Brooks, *Redress*]; see also Alfred L. Brophy, *The Cultural War over Reparations for Slavery*, 53 DEPAUL L. REV. 1181 (2004) (discussing apology).

35. BROOKS, ATONEMENT, *supra* note 34, at 142.

36. *Id.* at 141-42.

37. See Alfred L. Brophy, *Reparations Talk: Reparations for Slavery and the Tort Law Analogy*, 24 B.C. THIRD WORLD L.J. 81, 127 (2004); David Lyons, *Corrective Justice, Equal Opportunity, and the Legacy of Slavery and Jim Crow*, 84 B.U. L. REV. 1375, at 1385-89 (2004). See also Wenger, *supra* note 32, at 211-13 (discussing peonage).

38. Brophy, *supra* note 37; Lyons, *supra* note 37, at 1385-97.

39. See generally Lyons, *supra* note 37, at 1385-97.

40. BROOKS, ATONEMENT, *supra* note 34, at 143-47; Westley, *supra* note 33, at 474-76.

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negatively impact society and undermine faith in the Rule of Law.<sup>41</sup>

Reparations then become an act of *atonement*.<sup>42</sup> They are a concrete recognition that society wishes to atone for its error. The idea of atonement comes from the religious context, and signifies a few different things. It is a setting straight of records, a reconciliation.<sup>43</sup> It also implies an expiatory act, an act designed to heal harms done in the past. It also ties in to the religious concept of sacrifice. As in the religious context, reparations involve a sacrifice designed to show contrition, to cleanse and make whole the community.

The healing aspects of an atonement model can be related to literature on human rights.<sup>44</sup> Societies must take certain steps following human rights abuses such as genocide, in order to facilitate the healing process. The emphasis is on healing the harm done to society.<sup>45</sup>

It is important that, in order to rebuild faith in the Rule of Law, reparations not be framed as a form of vengeance. Some advocates have argued that reparations should be viewed as payment for a debt.<sup>46</sup> Others have distanced themselves from such imagery.<sup>47</sup> If the emphasis is on repairing the Rule of Law, then a debt analogy is probably less than ideal. Rather, if the Rule of Law was breached under slavery, this should be seen as a breakdown in the social contract or social fabric. Such a breach calls for healing rather than vengeance, and atonement rather than punishment.

In fact, if wrongly framed, reparations could foster resentment and lead to further harm to the Rule of Law. This sequence of events has happened before. We need look no further than post-World War I Germany, where punitive

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41. *Cf.* Fuller, *supra* note 17, at 193 (arguing that “effective interaction” between citizens and lawgivers is an “essential ingredient of the law”).

42. BROOKS, ATONEMENT, *supra* note 34, at 143-47, 165-69.

43. *Id.* at 141.

44. *See, e.g.*, Linda Keller, *Seeking Justice at the International Criminal Court: Victims’ Reparations*, 29 T. JEFFERSON L. REV. 189 (2007) (discussing how human rights actions seek to “rebuild[] society after mass violence”).

45. *See* Keller, *supra* note 44, at 189-191.

46. The leading advocate of this view is Randall Robinson. *See* RANDALL ROBINSON, THE DEBT: WHAT AMERICA OWES TO BLACKS (2000).

47. For example, Roy Brooks has criticized the confrontational tort approach. BROOKS, ATONEMENT, *supra* note 34, at 98-100.

restitution programs led to resentment that in turn opened the door to totalitarianism which further perverted the Rule of Law.<sup>48</sup> In that example, a vengeful approach to reparations only led to greater harm.<sup>49</sup>

In contrast, a reparations program that sought to heal the breach in the Rule of Law would focus on grievances and the chance to discuss them.<sup>50</sup> It would begin with apology. It would look at both pre- and post-Civil War acts,<sup>51</sup> and would focus on the grievances suffered by all parties. The goal of the process is to restore the proper functioning of society. Monetary reparations become not an end themselves, but serve as a concrete act that makes the apology sincere.<sup>52</sup> Society should try to fix the dissonance and move forward, not deny what happened.

The repair of the community, if done properly, should also seek to ameliorate disparities in access to political power.<sup>53</sup> At present, differences in wealth and education are exacerbated by an inability of minority groups to access political power.<sup>54</sup> Slave descendants are excluded from meaningful participation in the democratic process. Reparations must be part of a process that seeks to remedy that disparity.

This repair will help everyone. Society as a whole (and its members individually) benefits from a robust Rule of Law. When confidence in the Rule of Law is low, the law does not interact properly with society. Not surprisingly, Blacks are one of the demographic groups with the lowest levels of confidence in a just Rule of Law in today's America.<sup>55</sup> Reparations may be

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48. See BROOKS, ATONEMENT, *supra* note 34, at xiv (noting “[t]he punitive nature of the regime of reparations the Allies visited upon Germany under the Treaty of Versailles”).

49. *Cf.* BROOKS, ATONEMENT, *supra* note 34, at xiv.

50. *Id.* at 148 (discussing reparations as a chance to clarify the historical record).

51. Brophy, *supra* note 37; *cf.* Lyons, *supra* note 37, at 1385-97.

52. BROOKS, ATONEMENT, *supra* note 34, at 143-54.

53. *See, e.g.*, Chin & Wagner, *supra* note 26; Lyons, *supra* note 37, at 1385-97.

54. Chin & Wagner, *supra* note 26.

55. Black confidence in the Rule of Law is sufficiently low that at least one commenter has suggested that Blacks engage in specific, race-targeted acts of jury nullification in many criminal cases. *See* Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 700 (1995).

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the signal necessary to build African-Americans' faith in the Rule of Law.<sup>56</sup>

Finally, reparations can serve as a signal to underrepresented groups. They are a way of affirming that such breach of the Rule of Law will not recur.<sup>57</sup> They are a commitment to a Rule of Law society, rather than a Hobbesian world of might makes right.<sup>58</sup> Reparations send a signal that the law is what is paramount, and that no individual or group can abuse the law. This allows the law to incorporate our ideals of justice, and for the Rule of Law to reflect those ideals as well.

Slavery was a significant blow to democracy and to some conceptions of the Rule of Law. Should society seek to repair or ameliorate Rule of Law breaches? The reasonable answer is yes. The Rule of Law serves many different purposes, as noted earlier. The purpose of the Rule of Law varies somewhat depending on what version of the Rule of Law is examined. However, there is broad agreement on some major areas in which the Rule of Law benefits society.

One benefit is protection of individuals. The Rule of Law can serve as a safeguard against certain kinds of tyranny and oppression.<sup>59</sup> The protection of the Rule of Law creates a sphere of autonomy within which individuals can be assured their rights will be respected. "[T]he most valuable effect of the Rule of Law is that it enables individual autonomy."<sup>60</sup> A second benefit is legal predictability and certainty.<sup>61</sup> The Rule of Law allows citizens to make decisions based on reasonable expectations so

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56. See BROOKS, ATONEMENT, *supra* note 34, at 164-70. As Roy Brooks writes, "[h]ealing old wounds and providing genuine racial opportunities are essential ingredients for social integration. They give blacks reasons to believe the system is fair and worth investing in heart and soul." *Id.* at 170.

57. *But see*, Calvin Massey, *Some Thoughts on the Law and Politics of Reparations for Slavery*, 24 B.C. THIRD WORLD L.J. 157, 187 (2004) ("With reparations there are only proxies for long-dead bad actors, there will be no deterrence, and wholly speculative gains will be delivered to people who are, at worst, proxies for long-dead victims and, at best, people who suffer in varying degrees from the remote vestiges of slavery.").

58. See ETIENNE GILSON & THOMAS LANGEN, MODERN PHILOSOPHY: DESCARTES TO KANT 51-55 (1963) (discussing Hobbesian conception of the role of government).

59. See Solum, *Lexicon*, *supra* note 4; *Cf.* Shklar, *supra* note 8, at 3 ("Without such justice no one is secure in his material possessions.").

60. Maravall & Przeworski, *supra* note 25, at 2.

61. See Solum, *Lexicon*, *supra* note 4.

they are able to plan their actions in predictable ways.<sup>62</sup> The “Rule of law makes it possible for people to predict the consequences of their actions and, hence, to plan their lives.”<sup>63</sup> Finally, the Rule of Law legitimizes laws and legal regimes and streamlines legal experience. Governments try to make their behavior predictable and beneficial in order to secure the cooperation of individuals.<sup>64</sup> “[I]t makes a difference if the public believes that rules are being enforced fairly.”<sup>65</sup> In contrast, removal of the Rule of Law creates fear and distrust among groups; the possibility of arbitrary actions dampens citizen willingness to invest in the community; and the removal of the Rule of Law can lead to citizen antagonism to the legal regime.<sup>66</sup>

At its best, the Rule of Law can be a mortar that connects the law to the rest of society. If the Rule of Law has been breached, it should be repaired. Reparations are one step in that repair. They are an acknowledgement of the seriousness of the breach, and a step towards healing the group most harmed by that breach. Thus, reparations and similar forms of compensatory repair may be appropriate responses to repair the breach to the Rule of Law that occurred under slavery.

#### IV. POSSIBLE CONFLICTS BETWEEN REPARATIONS AND THE RULE OF LAW

On the flip side, a number of critics have raised Rule of Law concerns regarding reparations. Some critiques explicitly raise or discuss such concerns. One commentator states directly that reparations are inappropriate because “[t]he [R]ule of [L]aw—and the principle of equality—demands a color-blind society

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62. Brophy, *Antebellum*, *supra* note 21, at 248 (noting argument that “[l]aw, in Gaston’s opinion, was not a restraint on freedom; it was the facilitator of it”).

63. Maravall & Przeworski, *supra* note 25, at 2.

64. Stephen Holmes, *Lineages of the Rule of Law*, in *DEMOCRACY AND THE RULE OF LAW* 19, 19 (2003). (“[G]overnments are driven to make their own behavior predictable for the sake of [obtaining citizen] cooperation.”).

65. Holmes, *supra* note 64, at 40. *See also id.* at 38-40 (discussing benefits of a perception of fairness).

66. *See also* Margaret Chon & Donna E. Arzt, *Walking While Muslim*, 68 *L. & CONTEMP. PROBS.* 215, 245-46 (2005) (discussing how law can create racial subordination that leads to distrust and resentment among members of the subordinated group).

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where equal opportunity is the principle of distributive justice.”<sup>67</sup> Another critic, Calvin Massey, suggests in passing that use of the law to divide along racial lines is a misuse of the Rule of Law.<sup>68</sup>

In addition, a number of reparations critiques paint reparations as an arbitrary exercise. For example, Jeremy Waldron criticizes reparation programs for long-past harms as being too dependent on arbitrary chance.<sup>69</sup> This line of criticism implies Rule of Law concerns. If reparations are truly arbitrary, then they would be counter to the Rule of Law. Thus, critiques that paint reparations as arbitrary are a sort of de facto Rule of Law critique.

The use of Rule of Law ideas to critique reparations is an important and potentially problematic development. The invocation of Rule of Law logic can be a powerful tool. Rule of Law critiques can be a particularly effective way to attack and delegitimize legal arguments.<sup>70</sup> These critiques carry great weight due to the respect given to the Rule of Law as an ideal.<sup>71</sup>

Depending on the version of the Rule of Law examined, slavery reparations may present special challenges to the Rule of Law. First, reparations may involve an apparent windfall of sorts. Any reparations program potentially involves the transfer of large amounts of money to a class of people—descendants of an original harmed group—who are seeking payment long after the initial harm. The redistribution to this group may raise fairness questions that involve our Rule of Law ideals.

Second, reparations might be given specifically to members of a racial minority, or they might not; different proposals vary, and may limit takers to slave descendants.<sup>72</sup> However, racial classifications may be used to identify recipients. And in any case, recipients will disproportionately—almost entirely—be drawn from certain racial groups. Because reparations would

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67. Edward J. Erler, *Would Reparations for Slavery be Just?* (May 5, 2002), [http://www.claremont.org/publications/pubid.213/pub\\_detail.asp](http://www.claremont.org/publications/pubid.213/pub_detail.asp).

68. Massey, *supra* note 57, at 168.

69. Jeremy Waldron, *Superseding Historic Injustice*, 103 ETHICS 4, 26-27 (1992).

70. Wenger & Hoffman, *supra* note 4, at 1118-19, 1131-33.

71. *Id.*

72. See, e.g., Complaint at 7, *Farmer-Paellmann v. FleetBoston Fin. Corp.*, No. CV-02-1862 (E.D.N.Y. Mar. 26, 2002) available at <http://www.nyed.uscourts.gov/02cv1862cmp.pdf>; Lyons, *supra* note 37.

single out members of one racial group for a benefit, they may raise Rule of Law concerns.

Third, the cost of any reparations will likely fall on at least some parties who are not morally culpable for the original harm. Slave owners are dead; slaveowning corporations may still exist, but lack assets; some amount of any reparation is likely to come from the government, which in turn is funded by citizens. The attenuated link may raise Rule of Law questions.

Are these valid Rule of Law objections? First, none of these objections run afoul of purely procedural versions of the Rule of Law such as Dicey's. That is, to the extent that the Rule of Law requires only procedural protections, reparations would be in compliance with the Rule of Law, as long as laws were properly enacted and enforced. There is no reason to believe reparations would violate a procedural Rule of Law.

The second question is whether these potential concerns run afoul of one or more substantive versions of the Rule of Law. Reparations are probably also consistent with the views of scholars like O'Donnell. As a reparative and reconciliatory act of atonement, reparations enhances the ability of a marginalized minority group to more fully participate in the political process, and contributes to the political equality of group members. Thus, reparations are probably unlikely to run afoul of an O'Donnellian Rule of Law.

In addition, it is not clear that reparations would violate Rawls' formulation of the Rule of Law. Rawls' formulation is largely procedural. To the extent that it is not procedural, it incorporates Rawls' ideas of fairness. However, those ideas of fairness may themselves mandate some sort of compensation for the act of slavery, which is a violation of Rawlsian fairness ideals.<sup>73</sup>

Reparations, because of their retroactive nature, raise questions under some versions of the Rule of Law such as Fuller's. Reparations retroactively force some of the citizenry to pay for harm done by prior citizens. However, even under a Fullerian Rule of Law, reparations might not be impermissibly retroactive. First, reparations are framed as a way to heal the

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73. See Radin, *supra* note 11, at 788-90 (noting that Rawls connects the Rule of Law concept to liberty).

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Rule of Law. It is possible that any harm to the Rule of Law through retroactive reparations is less than the harm done by failing to heal the breach in the Rule of Law.

Second, reparations may be conceived as ordinary payment of compensation. All compensatory payments are in some sense retroactive.<sup>74</sup> Reparations may not trigger the boundary of impermissible retroactivity.

One final potential Rule of Law concern relates to payors. This objection is based on the idea that reparations will ultimately come from tax dollars, and that not all Americans participated in slavery. Do reparations violate the Rule of Law by drawing on society as a whole for payment? Probably not. All state compensatory payment schemes rely on payment from some non-wrongdoers.<sup>75</sup> For example, government payment for a takings clause claim or a §1983 civil rights claim is generally permitted, even though most of the taxpayers will not have been involved in the particular wrongdoing. Clearly the Rule of Law allows for some payment from non-wrongdoers; otherwise, all state compensation schemes would violate the Rule of Law. Payment from all citizens is appropriate, because all citizens benefit from societal compliance with law. Similarly, the payment of reparations to heal the Rule of Law is not a benefit that accrues to Blacks only. Rather, it is a benefit to all of society.<sup>76</sup>

Thus, while Rule of Law concerns are certainly reasonable, examination of the broader Rule of Law concerns show that the greatest offense to the Rule of Law would arise from *not* paying reparations.

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74. See Wenger, *supra* note 32, at 249 (discussing the problem of retroactivity).

75. See Alfred Brophy, *Reconsidering Reparations*, 81 IND. L.J. 811, 830 (“[W]e typically expect that taxpayers must pay for the torts of their government.”).

76. Cf. DERRICK BELL, *RACE, RACISM, AND AMERICAN LAW* xxiv-xxv (“Racism burdens whites as well as blacks and racial remedies benefit all groups.”).

**Slavery as a violation of different conceptions of the Rule of Law, and coinciding issues in reparations:**

| Conception of the Rule of Law | Slavery   | Reparations  |
|-------------------------------|---|--|
| Dicey                         | Not a violation, except to the extent that slavery involved arbitrariness.  | Not a violation of the Rule of Law, because the Rule of Law is procedural.   |
| Rawls                         | Not a violation of Rawls' formula as set out; however, likely a violation of other Rawlsian ideals of justice that may interact with the Rule of Law. | Not a violation of the Rule of Law, because the Rule of Law is procedural. Possibly a violation of fairness ideals; however, possibly required by fairness ideals. |
| Fuller                        | Possibly a violation of the Rule of Law due to the immoral nature of slavery and to the general breakdown in legality.                                | Raises questions relating to retroactivity. These may be addressed by pointing out net effect. Also, reparations may be permissibly retroactive.                   |
| O'Donnell                     | Definitely a violation of the Rule of Law, because it deprives a class of people of civil rights and excludes them from the political process.        | Not a violation of the Rule of Law; possibly required in order to restore confidence of a marginalized group.  |

## V. CONCLUSION

Slavery was a serious breach for some versions of the Rule of Law. If the Rule of Law was breached, it should be repaired. Societal expression of remorse for the Rule of Law breach—

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coupled with concrete steps to ameliorate the harm—is a necessary step in repairing the damage done by slavery to the Rule of Law. Reparations show the societal will to set things right following the removal of the Rule of Law protections for Blacks. Thus, payment of reparations allows society to move forward and encourages disadvantaged groups to regain confidence in the Rule of Law.

Not only are reparations consistent with the Rule of Law, they in fact may be required by many visions of the Rule of Law. The most promising forms of reparations for healing society are those based on an atonement model. Reparations as atonement offer a means of healing the damage done to the Rule of Law and restoring societal confidence in the Rule of Law.

