POLLEY V. RATCLIFF: A NEW WAY TO ADDRESS AN ORIGINAL SIN?

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I. INTRODUCTION

The past is never dead. It's not even past.

—*William Faulkner*[1]

A remarkable thing happened in Wayne County, West Virginia, on April 6, 2012. Judge Darrell Pratt of the Circuit Court of Wayne County

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1 WILLIAM FAULKNER, REQUIEM FOR A NUN act 1, sc. 3 (1951).

entered a decree declaring that the children of Mr. Peyton Polley—Harrison, Louisa, and Anna[2]—who had been freed from slavery in 1849 and then kidnapped and forced again into slavery in 1851—"were, and are, FREE PERSONS as of March 22, 1859."[3] This remarkable judgment ended a 160-year saga by giving a final resolution to this long-open case.[4]

As remarkable as this judgment is, what is more remarkable is the motivation behind it and what it could mean for how we think about race in twenty-first century America. The plaintiffs, through their next friend, Mr. James L. Hale, a fifth generation descendent of Harrison Polley, pursued this action to have a declaration on the record concerning the legal status of the Polley children.[5] Indeed, the Court itself, on the record, stated that it granted a trial on this matter under its equitable powers under the *nunc pro tunc* doctrine[6] to "set the record straight"[7] about the history of the Polley family. This was not

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[2] Polley v. Ratcliff, No. 12-P-(Upon A Suit For Freedom, August 1856) (W. Va. Cir. Ct. Apr. 6, 2012) at 14 [hereinafter *Polley*], *available at* http://assets.slate.wvu.edu/resources/710/1352817314.pdf. The factual summary that follows is based upon the Findings of Facts rendered by the court. *See generally id.* at 1–6.

[3] *Id.* at 15.

[4] It is not clear why this matter was never resolved in the mid-nineteenth century. Nowhere in the available historical record available is there an explanation as to exactly why the retrial of this case never occurred. So we are left to speculate as to why this matter was delayed for over 150 years. For more discussion on this point see *infra* note 55.

[5] The court found that Mr. Hale had standing to bring and control this lawsuit by virtue of his status as a descendent of the original petitioners. *Polley*, *supra* note 2, at 6. In effect, the court granted Mr. Hale "next friend" standing to bring this claim. *Id.* 1. "Next friend" standing is granted in instances where a party has met all the elements of standing, but the party is incapable due to a disability to pursue the case personally. *See* BLACK'S LAW DICTIONARY 1142 (9th ed. 2009). In such an instance, a court may allow another person to pursue the action on behalf of the disabled party. *Id.* Thus, standing is appropriate for Mr. Hale as Polley's descendent because the Polley children had a claim, but could not bring the claim personally. For a further explanation of "next friend" standing in a modern context, *see, e.g.*, Caroline Nasrallah Belk, Note, *Next Friend Standing and the War on Terror*, 53 DUKE L. J. 1747, 1751–59 (2004) (explaining the common law doctrine of "next friend" standing); Erwin Chemerinsky, *Ignoring the Rule of Law: The Courts and the Guantanamo Detainees*, 25 T. JEFFERSON L. REV. 303, 307–09 (2003) (discussing the next friend doctrine in the context of the federal habeas statute, 28 U.S.C. § 2242).

[6] *Nunc pro tunc* (Latin for "now for then") is an equitable power that allows a court to retroactively effect rulings, orders, or other actions at a later time than when they should have been done. *See* BLACK'S LAW DICTIONARY, *supra* note 5, at 1174. A *nunc pro tunc* order from a court is effective from the earlier date when it should have been entered upon the record. J.B.G., *Correcting Clerical Errors in Judgments*, 10 A.L.R. 526 (1921). Courts use the *nunc pro tunc* doctrine to correct the record of clerical errors and errors of omission. *Nunc pro tunc* cannot be used to amend judicial errors of judgment. *Id.* Such errors of judgment would be addressed, instead, in the appellate process. *Id.*

[7] Hearing, Polley v. Ratcliff, No. 12-P-(Upon A Suit For Freedom, August 1856) (W. Va. Cir. Ct. Apr. 6, 2012) [hereinafter Hearing]. At the time of publication a transcript of the April 6, 2012, hearing was not available, but the Author was present at the hearing. All citations to the hearing are based on the Author's notes, which are on file with the Author.

only litigation to remedy an omission from the judicial record; this litigation represented a kind of truth telling about the American history of slavery, a telling validated by the fact that it took place under the sanction of a court and was validated by entry of a final judgment. This Essay will argue that this kind of "Truth and Reconciliation" process can lead to a transformative result for the participants and for society by allowing us to reframe our conceptions of the legacy of American slavery.

While writing this Essay, I told various friends, acquaintances, and colleagues about this singular happening—the trial of a *Dred Scott*-era kidnapping and emancipation case.[8] Aside from the amazement people expressed, the story of the 2012 *Polley v. Ratcliff* litigation elicited reactions that ranged from befuddlement about what this case meant, to curiosity about the narrative, to amazement that a court would expend judicial resources on an irrelevant matter. In particular, several of my colleagues inquired about the legal theory behind the case; some asked what the plaintiffs in this case could expect to get out of this decision, if anything, especially in light of the fact that the Thirteenth Amendment to the U.S. Constitution ended slavery.[9] Other colleagues wondered whether a follow-up suit for damages might be appropriate in light of the emancipation ruling.[10]

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[8] In the 1850s emancipation or freedom suits depended upon several compounding factors. The most notable freedom suit, *Dred Scott* v. *Sandford*, 60 U.S. 393 (1856), denied a man of African descent his freedom based on his lack of citizenship at the time the Constitution was adopted. Not only did suits for emancipation vary according to the federal legislation, but also based on the slavery laws of each state and the legal claim asserted. The legal issues in these cases were multi-layered and ripe with political dispute between the free and slave states. Legal strategy may have been premised on manumission by will, property doctrines, kidnapping, gender, marital status, residency and birth, just to name a few. For further discussion of the complicated nature of such suits, see, e.g., Lea VanderVelde & Sandhya Subramanian, *Mrs. Dred Scott*, 106 YALE L.J. 1033, 1038–41 (1997); A. Leon Higginbotham, Jr. & F. Michael Higginbotham, *"Yearning to Breathe Free": Legal Barriers Against and Options in Favor of Liberty in Antebellum Virginia*, 68 N.Y.U. L. REV. 1213, 1234–55 (1993); David Thomas Konig, *The Long Road to* Dred Scott*: Personhood and The Rule of Law in the Trial Court Records of St. Louis Slave Freedom Suits*, 75 UMKC L. REV. 53, 73–79 (2006).

[9] "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. XIII, § 1.

[10] Though this is speculation, the common law basis for such a lawsuit would be under a theory of *quantum meruit* or a theory of unjust enrichment. *Quantum meruit* is Latin for "as much as he deserved." BLACK'S LAW DICTIONARY, *supra* note 5, at 1361. *Quantum meruit* cases are premised on the idea that if an employee is under no legal obligation to render services, and services are performed nonetheless, the beneficiary of the services should pay the employee the reasonable value of the work performed. *Id. See also* Candace Saari Kovacic-Fleischer, *Quantum Meruit and the Restatement (Third) of Restitution and Unjust Enrichment*, 27 REVIEW OF LITIGATION 127, 129–30 (2007) (describing *quantum meruit* as a type of contract implied in fact and defining contract implied in fact as "an action in restitution in which the defendant received a gain at plaintiff's expense under circumstances that make it unjust for the defendant to keep the

These different ways of seeing the *Polley* case lie at the heart of the argument this Essay will make. This Essay claims that *Polley* suggests a novel approach to thinking about our history of slavery in particular, and more generally, a way of having discussions about the American legacy of racism. The reactions I mentioned above revealed the three different lenses through which we currently look at this history: the lens of reparations for damages done during slavery; the lens of race-consciousness (even if there is nothing one can "do" about the past); and the lens of declaring the issue moot. This last view echoes the perspective announced in recent slavery reparation litigation—that such claims are stale[11]—and it echoes the post-racialism paradigm that such discussion is irrelevant.[12]

Yet, some, including the family of the plaintiffs and the Circuit Court Judge, believed that history needed to be clarified—that the record should be set straight for the benefit of the descendants and for society. This approach—a state-sanctioned airing of the history of racial oppression through the acknowledgement that the Polley children were indeed free persons who were

gain."). Thus, under this theory, Ratcliff as defendant would owe the Polley children as plaintiffs for the value of the services rendered by the children after the time the court declared the children free. Similarly, unjust enrichment is "'the unjust retention of a benefit to the loss of another. . . .' where 'the defendant received a benefit from the plaintiff . . . [and] it would be inequitable for the defendant to retain such benefit.'" Roy L. Brooks, *The Slave Redress Cases*, 27 N.C. CENT. L.J. 130, 134 (2005). Thus, under this theory, Ratcliff (or his successors) would owe the Polley children for the value of services wrongfully acquired during the period between the time they should have been considered free, March 1859, and the time they were returned to their parents in the mid-1860s, because during this time they were wrongfully detained and presumably were serving as laborers. Either lawsuit would be difficult for a number of reasons, as will be discussed *infra* Part III. Moreover, and important to the thesis of this Essay, the Polley descendants did not bring such a theory and as far as I know, they will not do so because this was not the goal of their litigation. As James Hale explained, "[w]e are seeking a ruling that the children were free." Paul J. Nyden, *Man Wants Record Clear on His Freed Ancestors*, THE CHARLESTON GAZETTE, Apr. 5, 2012, at 1C, *available at* 2012 WLNR 7261403.

[11] In terms of seeking damages and reparations via the judicial system, slave descendant litigation suits have so far proven unsuccessful. Most recently, the U.S. Court of Appeals for the Seventh Circuit ruled that a group of slave descendants lacked standing to bring derivative injury claims on behalf of their ancestors and that the statute of limitations precluded relief for their claims brought as representatives of the slaves' estates. *In re* African-American Slave Descendants Litigation, 471 F.3d 754 (7th Cir. 2006). In addition to lack of standing and the statute of limitations, scholars have observed that causation and attenuation problems present roadblocks for determining damages in slave descendant litigation and reparation debates generally. *See, e.g.*, Kaimipono David Wenger, *Causation and Attenuation in the Slavery Reparations Debate*, 40 U.S.F. L. REV. 279, 280 (2006).

[12] Post-racialism has various meanings, from colorblindness to a rendering of the black-white divide irrelevant. "In its simplest and least controversial form, the term is intended merely to signal a hopeful trajectory for events and social trends, not an accomplished fact of social life." Lawrence D. Bobo, *Somewhere between Jim Crow & Post-Racialism: Reflections on the Racial Divide in America Today*, 140 DAEDALUS 13 (2011), *available at* http://www.mitpressjournals.org/doi/pdfplus/10.1162/DAED_a_00091.

kidnapped and treated as chattel, along with a validating judgment where the state acknowledges the truth of this claim—seems to suggest a lens distinct from racial awareness, reparations, or post-racialism. The *Polley* litigation is more akin to a Truth and Reconciliation approach[13] to the history of slavery in the United States. This novel methodology could lead to a needed dialogue and transformation of understanding about race in twenty-first century America.

This Essay is meant to record the history of the *Polley* case within the realm of legal academia and to inform scholars, lawyers, and the public about this remarkable case. This is not to say that this historical period has not been discussed at length. A number of scholars have discussed this period generally.[14] However, to my knowledge, the history of the *Polley* case has not been discussed in detail in the law review literature—though several historians have noted the famous *Polley* case in the academic historical literature of the late antebellum period.[15] More importantly, this Essay serves a second purpose—it will use this history as a lens on the question of what our societal response to slavery and racism has been over time and what it ought to be in the twenty-first century. It will contemplate whether this court's approach can begin a serious dialogue about race and reparations in the United States.

This Essay will approach this task in the following manner. In Part II, it explores the history of the nineteenth century *Polley* case, and then analyzes the April 6, 2012, judicial opinion. Through its *nunc pro tunc* powers, the court sought to, in its words, "set the record straight" concerning the plight of the Polley family both as a historical matter and in light of the fact that succeeding generations of the Polley's descendants will bear the legacy of this decision.[16] Part III of this Essay examines the broader context through which we read cases like *Polley* by briefly considering our approaches to analyzing the American legacy of slavery and racism. Part IV of this Essay considers the

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[13] Truth and Reconciliation Commissions are intended to investigate these past violations of human rights and formally acknowledge the "long-silenced past" of human rights abuses. *See* Priscilla B. Hayner, *Fifteen Truth Commissions—1974 to 1994: A Comparative Study*, 16 HUM. RTS. Q. 597, 600–04 (1994). As opposed to placing importance upon finding the truth underlying these human rights abuses, these commissions serve the purpose of officially acknowledging the truth. *Id.* For further discussion, see *infra* Part IV.

[14] *See, e.g.*, DAVID BRION DAVIS, THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION, 1770–1823 (Cornell University Press 1975); Paul Finkelman, *Fugitive Slaves, Midwestern Racial Tolerance, and the Value of "Justice Delayed,"* 78 IOWA L. REV. 89 (1992); Paul Finkelman, Scott v. Sandford*: The Court's Most Dreadful Case and How It Changed History*, 82 CHI.-KENT L. REV. 3 (2007).

[15] *See* STEPHEN MIDDLETON, THE BLACK LAWS 216–19 (Ohio University Press 2005); Carol Wilson, *Freedom at Risk: The Kidnapping of Free Blacks in America*, 1780–1865, 82–92 (1991) (unpublished Ph.D. dissertation, West Virginia University).

[16] Speaking to the importance of correcting the record, Judge Darrell Pratt explained, "[i]t's a very important piece of history for the Polley family and an incredible piece of history for Wayne County." Bill Rosenberger, *Man's Ancestors Declared Freed*, HERALD-DISPATCH (Huntington, WV), Apr. 7, 2012, *available at* 2012 WL 11097485.

Polley decision as a different precedent for addressing the rifts of slavery. This Essay ponders whether the Truth and Reconciliation or truth-telling approach suggested in the *Polley* case is an appropriate use of governmental resources and whether this approach—or a variation on it—could be used to address other slavery-era wrongs more broadly. The ultimate question this Essay poses is whether this approach can open a new avenue of reconciliation and truth telling in relation to the history of slavery in the United States. This Essay argues that such a conversation may better and more mindfully inform the ongoing dialogue about reparations for racial subjugation in the United States.

II. *POLLEY V. RATCLIFF*: THEN AND NOW

In the main, the law was a foe, not a friend to free blacks.

—Carol Wilson[17]

A. The Nineteenth Century Polley *Litigation*[18]

In November 1839, David Polley of Pike County, Kentucky, wrote a will of manumission intended to emancipate his seven slaves.[19] Under the terms of the will, Peyton Polley, along with his six siblings[20] were to "be free and liberated from all servitude" after David Polley's death.[21] After David Polley's death in January of 1847 and the subsequent probate of his estate, the seven Polley siblings of African descendants were emancipated.[22] The African Peyton

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17 Wilson, *supra* note 15, at 82–92.

18 The following account is based on the Findings of Facts rendered in *Polley*. *Polley*, *supra* note 2, at 1–6. Some historians have also given substantial attention to the narrative of the Polley family and their emancipation saga. *See, e.g.*, MIDDLETON, *supra* note 15, at 216–19; Wilson, *supra* note 15, at 82–92. These accounts will be used to supplement this narrative.

19 *Polley*, *supra* note 2, at 1. His will specified that his slaves would be emancipated after his death. *Id.* at 2. The Circuit Court discussed that "lawful manumission by an owner, as well as Court ordered emancipations, were recognized and given full faith and credit between the states." *Id.* at 8 (citing U.S. CONST. art. IV, §1). The Kentucky Constitution prior to 1850 stated that the General Assembly "shall pass laws to permit the owners of slaves to emancipate them, saving the rights of creditors, and preventing them from becoming chargeable to the county in which they reside." ASA EARL MARTIN, THE ANTI-SLAVERY MOVEMENT IN KENTUCKY PRIOR TO 1850, at 14 n.14 (Cornell University 1918) (citing KY. CONST. art. VII, §1 (1799)).

20 Peyton's siblings included Dug, William, Jude, Martha, John, and Spencer. *Polley*, *supra* note 2, at 1.

21 *Id.* 1–2.

22 *Id.* at 2. The probate of David Polley's estate was contested by Nancy Polley Campbell, David's daughter, and her husband David Campbell (among others). *Id.* The estate and the Campbells reached a settlement where certain real estate from David Polley's estate was sold and the Campbells were paid $500. *Id.* Once the estate was settled, the Polleys of African descent were set free in accordance with Kentucky law. *Id.*

Polley family, which included Peyton's spouse, Violet, and the couple's twelve children,[23] remained in Pike County, Kentucky, near Nancy Polley Campbell (David's daughter) and her husband, David Campbell.[24] The Polley family and the Campbell family had a good relationship.[25]

Although the will freed the Polleys under Kentucky law, David Campbell and Nancy Polley Campbell decided to execute a deed of manumission (or bill of sale) to insure the freedom of the Polleys.[26] They took this action because David Campbell, a failed businessman, gained a reputation as a heavy drinker, and allegedly distributed illegal alcohol.[27] He generated a significant amount of debt from his failed enterprises and bad habits, and he feared that his creditors would attach the Peyton Polley family as collateral to secure Campbell's debt.[28]

To avoid this, David and Nancy sold the Peyton Polley family to Douglas Polley, a free black man residing in Ohio, on January 20, 1849.[29] The Bill of Sale included Violet and seven children.[30] The Circuit Court opinion states that Douglas Polley paid a sum of $5 for the family, as well as other various debts acquired by David Campbell that prohibited him from leaving Kentucky.[31] However, other records show that Douglas Polley paid as much as $800 to emancipate and remove the family to Ohio.[32] Once this transaction was

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[23] *Id.* at 3.

[24] *Id.* at 2. Nancy Polley Campbell was the daughter of David Polley. *Id.*

[25] *Id.* The Court specifically describes the relationship as "more as friends and neighbors than as slaves and owner." *Id.*

[26] *Id.* at 3.

[27] *Id.* at 2.

[28] *Id.* at 3–4. Often creditors would invoke fraudulent conveyance laws to prevent a debtor from hiding his assets, such as slaves. Jenny Bourne Wahl, *Legal Constraints on Slave Masters: The Problem of Social Cost*, 41 AM. J. LEGAL HIST. 1, 10 n.30 (1997) (citing Littlejohn v. Underhill, 4 N.C. (Car. L. Rep.) 377, 381 (N.C. 1816)). To prohibit debtor slave-owners from cheating creditors in such a manner, courts might disallow manumission or place slaves under the service of the creditor until the debt was satisfied. *Id.* at 14 n.50. However, the Polley slaves, freed by David Polley's will, were not the property of Nancy and David Campbell, and legally could not have been attached to satisfy Campbell's debts.

[29] *Polley*, *supra* note 2, at 3. It is unclear, but records seem to show that Douglas Polley was also a former slave of David Polley, who was emancipated by his last will and testament along with Peyton Polley. *Id.* at 1; Wilson, *supra* note 15, at 83.

[30] *Polley*, *supra* note 2, at 3.

[31] *Id.*

[32] There is some conflict on this issue. The Circuit Court Opinion stated that Douglas was required to pay the sum of $5 and additional debts incurred by David Campbell. *Id.* However, Wilson's account stated that Douglas Polley paid about $800 to Nancy and David Campbell to remove the family from Kentucky and secure their freedom. Wilson, *supra* note 15, at 83. Middleton, however, stated that David Polley sold the Peyton Polley family to Douglas, for an

completed, the Peyton Polley family migrated from Kentucky to Lawrence County, Ohio, just across the Ohio River from their former residence in Kentucky.[33]

After the Peyton Polley family took up residence in Ohio, David Justice, a well-known slave catcher, reached an agreement with David Campbell to settle a $1,000 debt in exchange for ownership of the slave children.[34] On this basis, David Justice claimed that he was the rightful owner of the Polley children and took matters into his own hands to regain his property.

On the night of June 6, 1850, Justice led a gang of four white men[35] from Kentucky across the Ohio River into Ohio. They assaulted the Polley household and kidnapped seven of the Polley children: Hulda, Peyton (Jr.), Harrison, Nelson, Anna, Louisa, and Martha.[36] Justice sold four of Peyton Polley's children, Harrison, Nelson, Louisa, and Anna, to William Ratcliff of Wayne County, Virginia[37] for $1000.[38] Hulda, Peyton (Jr.), and Martha were sold to James McMillian of Fayette County, Kentucky.[39]

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unspecified price, and that Douglas had to also pay debts acquired by David Polley, because the slaves were still collateral for his unsatisfied creditors. MIDDLETON, *supra* note 15, at 216–17.

[33] The account of historian Stephen Middleton differs from the Circuit Court opinion's findings of fact on this issue. Middleton stated that David Polley put the Peyton Polley family up for sale in order to settle his (David's) debts. MIDDLETON, *supra* note 15, at 216. His daughter, Nancy, persuaded him to keep the family together, and David Polley came up with the plan to sell the family to Douglas Polley, the free brother of Peyton living in Ohio. *Id.* at 216. Festivities were held shortly after the sale to celebrate the emancipation; however, according to Middleton's account, David Polley had not satisfied the debts to his creditors, and the slave family would be held as collateral. *Id.* at 217. To retain the family in his possession, Douglas was said to pay David Polley's creditors more than $800. *Id.* at 217. Trying to escape his slave past and other possible creditors of David Polley, Peyton Polley decided to relocate his family to Lawrence County, Ohio, just across the Ohio River. *Id.* at 217.

[34] *Polley*, *supra* note 2, at 4. Middleton described David Justice as a relative of David Polley. Justice, according to Middleton, had been offended because he was excluded from David Polley's will. MIDDLETON, *supra* note 15, at 217. Justice had filed a contest of the David Polley will, but his contest failed. *Id.* at 217.

[35] The gang of kidnappers included Fildon Isaac, James Sperry, Washington Smith, and Hamilton Willis. MIDDLETON, *supra* note 15, at 217.

[36] *See* MIDDLETON, *supra* note 15, at 217; Wilson, *supra* note 15, at 84.

[37] Although Wayne County at the time of these events was located in the western part of the Commonwealth of Virginia, an Act of Congress during the Civil War separated the northwestern part of Virginia from the remainder of the state and established the State of West Virginia in 1863. *See* Vasan Kesavan & Michael Stokes Paulsen, *Is West Virginia Unconstitutional*, 90 CALIF. L. REV. 291, 301 (2002) (describing the formation of West Virginia). Thus, the twenty-first century proceedings in the matter of the kidnapped Polley children were heard in the State of West Virginia rather than the Commonwealth of Virginia. Though it is now a given that West Virginia is a state of the union, it is worth noting that there is some scholarly controversy concerning the statehood of West Virginia. The formation of West Virginia was initiated by the fact that while the Commonwealth of Virginia was in succession, a government formed in the western Virginia city of Wheeling and declared itself the sanctioned government of Virginia. *Id.*

The cases for the freedom of the Polley children were litigated separately in the separate states where the kidnapped children were taken. Hulda, Martha, Peyton (Jr.), and Mary Jane won their freedom after the case was tried in Pike and Fayette County, Kentucky, in 1853.[40] Securing the freedom of the remaining four children in Virginia proved much more difficult.

Governor Reuben Wood of Ohio initiated proceedings in Virginia, just as he had in Kentucky.[41] Leroy D. Walton filed a writ of habeas corpus for the case of *Peyton Polley v. William Ratcliff* in 1851 in Cabell County, Virginia.[42] The writ was issued, but William Ratcliff was allowed to retake possession of the Polley children until subsequent proceedings resolved the matter.[43] The efforts undertaken by the State of Ohio continued through the governorships of Salmon P. Chase and William Dennison.[44] On September 15, 1854, the case finally proceeded to trial, and the court declared the Polley children free

at 293. Under this legal fiction, this government of Virginia then granted consent to itself to separate from the parts of Virginia in rebellion and thus petitioned for recognition as a separate state—West Virginia. *Id.* at 293, 297–302. Kesavan and Paulsen correctly point out that the creation of West Virginia raises difficult constitutional questions of principled formalism which have impact even today. *See id.* at 293–97. Similarly, Roger Billings has explored these questions and contextualized this question of legality of West Virginia in a broader historical and international law context of the meaning of succession. *See* Roger Billings, Constitution Day 2011 Address at West Virginia University College of Law: Lincoln, West Virginia, and the Law of Secession, *available at* http://lawmediasite.wvu.edu/Mediasite/Play/628a9123fb52485bb24e3478cf0ba70d1d.

38 *Polley*, *supra* note 2, at 4; *see also* MIDDLETON, *supra* note 15, at 218; Wilson, *supra* note 15, at 84.

39 *Polley*, *supra* note 2, at 4. Middleton, however, claimed that Justice kept four of the Polley children for his own purposes: Hilda, Mary Jane, Martha, and Peyton (Jr.). MIDDLETON, *supra* note 15, at 218. And yet Wilson identifies Alfred O. Robards as the slave owner from Kentucky who purchased four of the children. Wilson, *supra* note 15, at 84.

40 *Polley*, *supra* note 2, at 4.

41 Governor Wood appointed Joel Wilson as the State's agent to investigate the Polley case both in Kentucky and Virginia. Wilson, *supra* note 15, at 84. Ralph Leete discovered that the Kentucky children had secured their freedom from Alfred O. Robards in the Louisville Chancery Court in November 1851. *Id.* at 84. Middleton states that Governor Seabury Ford was urged to take action by Ohio abolitionists. MIDDLETON, *supra* note 15, at 217. His successor, Reuben Wood, assigned Ralph Leete to address the matter in both Kentucky and Virginia. *Id.* at 217–18. Leroy D. Walton was later appointed as counsel for the Virginia Polley children and subsequently joined by Joel Wilson. *Id.* at 218. However, the Circuit Court of Wayne County found that the Kentucky children procured their freedom in 1853 and identifies L. D. Walton and John Laidley as counsel in the Virginia proceedings. *Polley*, *supra* note 2, at 4–5.

42 Wilson states that the case went to trial in 1853. Wilson, *supra* note 15, at 86. However, the facts show that the petition for writ of habeas corpus was filed on March 10, 1851, and the case proceeded to trial on September 15, 1854. *Polley*, *supra* note 2, at 4–5.

43 *Polley*, *supra* note 2, at 5. Wilson identifies Judge Samuel McComas of Cabell County as the justice who granted the writ of habeas corpus. Wilson, *supra* note 15, at 86.

44 Wilson, *supra* note 15, at 87–89.

persons.[45] However, in 1855, the Virginia Supreme Court of Appeals reversed the decision on the grounds that the Cabell County Court lacked jurisdiction to hear the case.[46] Under the law at the time, the case should have been tried where the persons in dispute resided, Wayne County, Virginia.[47]

Once the matter had been dismissed, John Laidley, a representative of Ohio and resident of Virginia, filed suit against Ratcliff to sue for the freedom of the three remaining Polley children.[48] Laidley filed this lawsuit in 1856 in Wayne County, Virginia.[49] Both Governor Chase and John Laidley shared Ralph Leete's sentiment that "it is wrong to let the case be abandoned now; if the Federal Government could spend $100,000 to reduce one man to slavery,[50] certainly the State of Ohio should not withhold the necessary amount of means to restore three persons to freedom."[51] The *Polley* case remained pending until March 22, 1859, when an incomplete and unsigned order was filed by the court on the record.[52] The order suggests that counsel for Ratcliff was to show cause why the assignment of John Laidley as counsel should be set aside, reversed, and annulled.[53] Ohio had spent more than $3,000 in prosecuting the suits and it was unlikely that the Virginia Polleys would be returned to freedom.[54] After entry of this incomplete order, there was no further record, entry, or action in the case until 2012.[55]

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45 *Polley*, *supra* note 2, at 5.

46 *Id.*

47 *See* Ratcliff v. Polly, 53 Va. 528, 532 (1855) (stating that the statute requires that a complaint for a suit for freedom shall be made in "the county or to the court in the county or corporation where the complainant shall reside, and not elsewhere").

48 Nelson Polley died in 1855. *Polley*, *supra* note 2, at 5.

49 *Id.*

50 Middleton, *supra* note 15, at 218; Wilson, *supra* note 15, at 87.

51 Wilson, *supra* note 15, at 87.

52 *Polley*, at 5.

53 But as the 2012 Circuit Court observed, this order was incomplete. *Polley*, *supra* note 2, at 5. The sentence where this was entered was not completed. *Id.*

54 Wilson, *supra* note 15, at 88.

55 It is unclear why there was nothing on the record, which explained why this case was never adjudicated. As this order was entered in 1859, it is doubtful that the disruption of governmental operations due to the Civil War contributed to this. *Polley*, *supra* note 2, at 5. From the evidence available, it is simply a mystery why no further action was taken on the case. It is fair to say, however, that Ratcliff and his counsel likely stalled for time in this case. Wilson acknowledges that poor weather, money, and intimidation by the kidnappers likely delayed the prosecution in the Virginia suit. Wilson, *supra* note 15, at 87–90. Perhaps the stalling tactics worked to continue to push this case down the docket, and as a result Ratcliff received the benefit of having the Polley children in custody. It is uncertain what became of the Virginia Polley children until their eventual emancipation in 1863. *Id.* at 89. However, Wilson states that the case went to trial yet again in March 1859 and was dismissed because it was brought without the authorization of the

B. The Twenty-First Century Polley *Trial*

In 2012, James L. Hale, the great, great grandson of Harrison Polley, petitioned the Wayne County (now West Virginia) Circuit Court to hold a trial in the *Polley* case.[56] The Circuit Court granted Mr. Hale's petition and a trial was held on April 6, 2012.[57]

At trial, the court heard the matter through deposition testimony collected from the original trial in *Polley v. Ratcliff*, as well as depositions taken from the related Polley family cases.[58] The court heard deposition testimony from Campbell and other witnesses.[59] This testimony explained the nature of the intention to emancipate the Peyton Polley family both by will of manumission and by deed of manumission and to convey them to Ohio.[60] Mr. Hale and other descendants of the Peyton Polley family presented this testimony. Additionally, members of the bar of Wayne County read into evidence deposition testimony from William Ratcliff, David Campbell, and David Justice.[61] The essence of the defense was that David Campbell had engaged in a sham transaction in order to protect his "property"—the Polley children—from his creditors, including David Justice.[62] On this basis, as the argument goes, Justice was justified in returning his property from Ohio to Kentucky, and the sale of his property to William Ratcliff was proper.[63]

Judge Pratt, speaking for the Circuit Court of Wayne County, West Virginia, rendered an Order and Judgment declaring that the Polley children

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Polley children. *Id.* at 88. As of June 1860, Salmon Chase and Ralph Leete persisted in continuing the case, but it disappears from the record after this point. *Id.* at 89.

56 At the trial, the court explained that it reviewed the historical evidence gathered by Mr. Hale to determine whether a trial was merited in the matter. *Polley*, *supra* note 2, at 6. Mr. Hale developed an impressive collection of primary and secondary sources, which he supplied the court. This evidence persuaded the court that a trial proceeding was justified in this matter.

57 The trial was something of a news event. Several news outlets in West Virginia and across the country ran stories about the trial. *See, e.g.*, Associated Press, *W. Va. Family Gets Freedom Decree for Ancestors*, CHARLESTON DAILY MAIL, Apr. 9, 2012, at 12A, *available at* 2012 WL 7559230; Michelle Goodman, *Free at Last*, IRONTON TRIB., Apr. 8, 2012, *available at* 2012 WL 7429322; Marcus E. Howard, *Righting a Wrong: Family Rejoices as Ancestors Declared Free*, MARIETTA DAILY J., May 22, 2012, *available at* 2012 WL 11117257; Rosenberger, *supra* note 16; Nyden, *supra* note 10; Alberta Hale Crigler, *Justice for Former Slaves 162 Years Later*, VICTORVILLE DAILY PRESS (Apr. 10, 2012 3:38 PM), http://www.vvdailypress.com/articles/later-33884-justice-years.html.

58 *Polley*, *supra* note 2, at 12.

59 *Id.*

60 *See* Hearing, supra note 7.

61 *Id.*

62 *Id.*

63 *Id.*

should have been declared free as of 1859.[64] In order to exercise its power to do so, the court relied on the equitable doctrine of *nunc pro tunc* ("now for then") in rendering its decision.

The *nunc pro tunc* doctrine allows courts the equitable power to remedy an injustice which existed due to the court's mistake or oversight in making a ruling.[65] The doctrine is designed to remedy injustices where a delay of judgment effectively causes that judgment to be denied. In its modern usage, the doctrine is applied to correct mistakes that affect the rights of the burdened parties in matters such as criminal sentencing, post-conviction relief, murder convictions, bankruptcy, and immigration proceedings.[66] Where the equities mandate application of the doctrine, the present court exercising *nunc pro tunc* power is obligated to apply the law that existed at the time the matter was being considered (that is the "now for then" element) and either render the ruling that was never made or render the correct ruling that is appropriate. The doctrine cannot apply where there is no evidence of a delayed disposition or an incorrect disposition. Interestingly, courts have applied the *nunc pro tunc* doctrine once in relation to fugitive slave cases, and in relation to matters stemming from slavery, it has never been applied since the mid nineteenth century.[67]

In *Polley v. Ratcliff*, the court reasoned that the delay of over 150 years had prejudiced the plaintiffs and that the case was appropriate for a *nunc pro tunc* disposition.[68] The court in its Conclusions of Law applied the law related to fugitive slaves and the emancipation of slaves, as it existed in Ohio, Kentucky, and Virginia during the 1850s, to the facts presented.[69] Specifically, the court reasoned that under the law in effect in the 1850s, the family of David Polley had adequately affected the emancipation of the family of Harrison Polley.[70] This was true both through the valid will of manumission that David Polley had properly executed and duly probated[71] and through the deed of

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64 *Polley*, *supra* note 2, at 15.

65 *Id.* at 13 (citing Mayo v. Whitson, 47 N.C. 231 (1855) (holding that the court record may be amended of clerical error or omission by entry of a *nunc pro tunc* order in an emancipation suit so as to establish the slave family's freedom from the date of their emancipation in February 1803)).

66 State v. Qualls, 967 N.E.2d 718 (Ohio 2012) (using *nunc pro tunc* to correct an omission from the record in a sentencing hearing which included a notification of post-release control and the denial of a new sentencing hearing); *In re* Vitale, 469 B.R. 595 (Bankr. W.D. Pa. 2012) (ordering that an automatic stay of a foreclosure sale was annulled *nunc pro tunc* pertaining to actions taken by the creditor to repossess the collateral property, which was found to be abandoned by the bankruptcy estate).

67 *Mayo*, 47 N.C. 231.

68 *Polley*, *supra* note 2, at 6.

69 *Id.* at 9–12.

70 *Id.* at 9–10.

71 *Id.*

manumission (or bill of sale) of the Polley family by David and Nancy Campbell to Douglass Polley.[72] Thus, it followed that the detention of the Polley children by David Justice and the detention of the children (and their return to slavery) by William Ratcliff was unlawful.[73] Moreover, the court rejected as a common and outlawed strategy that the defense raised by Ratcliff that the bill of sale was fraudulent.[74] On this basis, the Circuit Court of Wayne County, West Virginia reached the conclusion that the Polley children should have been, and are, declared free persons as of 1859.[75]

III. MODERN NARRATIVES ABOUT RACE AND SLAVERY: POST-RACIALISM, RACE-CONSCIOUSNESS, AND REPARATIONS

We do not see things as they are, we see them as we are.

—Anais Nin[76]

The *Polley* case brings to the present a past that is often referred to, but not often discussed, in non-academic contemporary contexts. Indeed, Judge Pratt and the Polley descendants had a dual purpose in bringing this 150 years overdue case to trial. The judge and the descendants sought to "set the record straight"[77] for the knowledge of the Polley descendants and to raise the historical awareness of the general public.[78] In doing so, this case raises larger concerns about how we ought to consider the American history of slavery in our modern context. This next section will offer some introductory remarks on this matter and then briefly examine our varying approaches to this question—how America considers the narrative of slavery and the resulting challenges of race that come with it.

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72 *Id.* at 10–11.

73 *Id.*

74 *Id.* at 12–13.

75 *Id*. at 15.

76 ANAIS NIN, SEDUCTION OF THE MINOTAUR 124 (1961). This version of the quote is so often recited that the quote's origin is difficult to pinpoint. However, the Nin quote above does capture this thought wholly. Yet it is fair to provide the quote in its full context: "Lillian was reminded of the Talmudic words: 'We do not see things as they are, we see them as we are.'" *Id.* However, the author's research has not been able to pinpoint this quote in The Talmud.

77 Hearing, *supra* note 7.

78 *See id.* It is also worth mentioning that the Polley descendants sought this action to bring "legal closure" to this matter. See Rosenberger, *supra* note 16. Indeed, descendant Anisa Dye-Hale (plaintiff James Hale's daughter-in-law) saw this lawsuit as "righting a wrong that's 160 years in the making." *See infra* Part IV.

To put it directly, slavery has often been called the "original sin"[79] of the United States.[80] Slavery existed in each one of the thirteen original colonies. And although never referred to by name in the document itself, the original Constitution of the United States made reference to and laid a foundation for the federal government to mediate the political economy of slavery during the first half of the nineteenth century.[81] Subsequently, the abolition of slavery and the effort to address the consequences of its ending were the key purpose of the Reconstruction Amendments to the Constitution. These amendments have

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[79] The Online Merriam-Webster Dictionary defines the phrase "original sin" as "a wrong of great magnitude" and cites as illustration "the *original sin* of slavery." *Original Sin*, MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/original%20sin (last visited Oct. 5, 2012). As a Judeo-Christian theological concept, "original sin" represents the fallen nature of human beings that defines human nature and requires enduring work of forgiveness. As a metaphor for the relationship between the United States, slavery, and racism, scholars have articulated the relationship between slavery (as both received history and open wound) and its inextricable relationship with modern-day racism. *See, e.g.*, George H. Taylor, *Racism as "The Nation's Crucial Sin": Theology and Derrick Bell*, 9 MICH. J. RACE & L. 269 (2004) (analogizing Derrick Bell's view of racism and the theological view of sin, in that both are permanent and inextricable, yet human action is still meaningful and the struggle against racism is still worthwhile).

[80] This naming, in and of itself, is a divisive and difficult enterprise. I believe it is so because it strikes at the heart of the ongoing and enduring wound that slavery represents. Thus, as Alfred Brophy has observed, it represents an ongoing culture war. *See* Alfred L. Brophy, *The Cultural War Over Reparations for Slavery*, 53 DEPAUL L. REV. 1181, 1209–10 (2004) (discussing the divided arguments concerning reparations and how talk of reparations for our "sins of the past" is in and of itself, divisive among Americans). This ongoing culture war has even recently confronted the narrative of post-racialism—the idea that America has atoned for its "original sin" of slavery. *See generally* Susan Schulten, *Barack Obama, Abraham Lincoln, and John Dewey*, 86 DENV. U. L. REV. 807, 812–15 (2009) (comparing President Barack Obama to Abraham Lincoln through the idea that although slavery was our "original sin," "a more perfect Union" can be achieved with every successive generation, from the abolition of slavery to the perfection of race relations).

[81] The most famous example of this is the "three-fifths compromise" in Article I of the United States Constitution:

> Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.

U.S. CONST. art. I, § 2, para. 3. This rule re-enforced the political economy of slavery in the South through basing political representation on slavery, and thus further fostering African American slave subordination. *See* Atiba R. Ellis, *Citizens United and Tiered Personhood*, 44 J. MARSHALL L. REV. 711, 723 n.25. *See also* DERRICK BELL, RACE RACISM, AND AMERICAN LAW 28 (6th ed. 2008) (naming the three-fifths compromise as a scheme "to sublimate the rights of blacks to the interests of whites"). For further discussion of the role that slavery played in the creation of the Constitution, *see generally* Juan F. Perea, *Race and Constitutional Law Casebooks: Recognizing the Proslavery Constitution*, 110 MICH. L. REV. 1123, 1143–44 (2012). For a narrative of this history, see LAWRENCE GOLDSTONE, DARK BARGAIN: SLAVERY, PROFITS, AND THE STRUGGLE FOR THE CONSTITUTION (2005).

defined our constitutional law and serve as a cornerstone of the individual rights every American holds.

Moreover, slavery and the racial, cultural, and political divides that slavery created have been intrinsic parts of the history and present-day culture of the United States. Though it goes beyond the scope of this short Essay to provide an extended discussion of the history of slavery and its overarching contribution to defining modern American race relations,[82] most would agree to the basic proposition that slavery defined the American condition.[83] The question then becomes how best to understand this past and what relevance should it have in our present. The claim of this Essay is that slavery is the defining first idea of relations between peoples in the United States.[84]

At the heart of this idea is the notion that slavery has defined this nation and shaped its contours. This claim creates a narrative lens through which one might view how American society functions and what its core principles are.[85] Slavery thus created a narrative within the United States about

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[82] For salient discussions of this issue, see, e.g., W.E.B. DUBOIS, THE SOULS OF BLACK FOLK (Penguin Books 1989) (1903); JOHN HOPE FRANKLIN & EVELYN BROOKS HIGGINBOTHAM, FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS (9th ed. 2011); SUSAN WELCH ET AL., RACE & PLACE: RACE RELATIONS IN AN AMERICAN CITY (2001); Bobo, *supra* note 12; Lawrence D. Bobo & Camille Z. Charles, *Race in the American Mind: From the Moynihan Report to the Obama Candidacy*, 621 ANNALS AM. ACAD. POL. & SOC. SCI. 243 (2009), *available at* http://www.wjh.harvard.edu/soc/faculty/bobo/pdf%20documents/RaceMind.pdf.

[83] For an enlightening discussion of how slavery shaped the United States Constitution and how as a result slavery and the legacy of racism are fundamental to an understanding of the United States, see Perea, *supra* note 81, at 1143–44.

[84] Specifically, this narrative suggests that one's physical characteristics—one's "race"—demark one's social status to the exclusion of all other factors. *See* Deirdre Bowen, *Meeting Across the River: Why Affirmative Action Needs Race and Class Diversity*, 88 DENV. U. L. REV. 751, 756–60 (2011) (describing the concept of "master status" as a way of framing the analysis of race). Erving Goffman recognized this effect when he articulated the concept of a "master status" for a person: a person possess a master status when that person has a characteristic that overrides all other features of the person's identity. *See generally* ERVING GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE (1959). As Bowen explains, "In the case of race, a set of stereotypical traits are imputed on students of color because of one's racial or ethnic status overrides all other statuses an individual may possess. These auxiliary traits then determine how others will interact with the student." Bowen, *supra*, at 757 n.42. Though Bowen was focusing specifically on African American students in her study, this description of how master status shapes our consideration of persons of different races is apt and lies at the heart of this Essay and its claim that the narrative of slavery has strongly influenced the master status for African Americans.

[85] *See, e.g.*, CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado & Jean Stefancic eds., 2d ed. 2000) (a collection of essays and articles portraying the idea that race and race relations need to be told in a various narratives in order to be better understood); NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER (Martha Minow et al. eds., 1995) (a collection of essays examining race, values, power and beliefs through a variety of competing narratives); Derrick Bell, *Learning the Three "I's" of America's Slave Heritage*, 68 CHI.- KENT L. REV. 1037 (1993).

how Americans should understand the damage done by slavery.[86] In this narrative, slavery created (or at least contributed to) a hierarchy based upon white male supremacy and the subjugation of women and people of color.[87] While some might argue that this is the correct assumption through which to understand American society, others would argue that such assumptions are no longer warranted given the passage of time and the advancements that minorities have made in American society.[88]

At the heart of this larger debate is the question of what remedy, if any, ought to be provided in light of the harms one believes are still relevant from the history of slavery (assuming one believes there are still present harms). Put another way, what obligation still exists to create equality between those who suffered slavery and those who benefitted from slavery? There are those who, depending on their narrative, would argue that the harms of slavery have already been remedied, or would argue that the harms need to be addressed in an ongoing way. Even though it may appear that this issue is one of mere history, these debates about remedies for the legacy of slavery continue in modern-day issues, like affirmative action.[89]

Although one might debate the effects of slavery on modern-day America, the *Polley* case presents a different challenge: How should one speak of this history and what remedies for specific actions in the past should be carried out in the present? Rather than focus on cumulative effects and societal changes over time, the *Polley* case forces us to consider whether, how, and to what extent the past should be spoken of in the present. It requires us to think about historical mindfulness and concrete facts about our collective past.

Nonetheless, any American reading these cases approaches them with some combination of three modern narratives about slavery and racism in the United States. We must inevitably view the history of the *Polley* case through these lenses. This part of the Essay will now turn to briefly analyzing the core assumptions of each of these lenses. It will begin by examining the ideology of post-racialism, the view that America no longer needs to consider the problems of racism in its public policy discourse. Then, the Essay will discuss what I am calling the race-conscious viewpoint, which claims that racism is present, salient, and should be considered in addressing modern-day public policy

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86 "[T]he damage done to modern-day blacks as a consequence of the institution of American slavery continues even several centuries after the official abolishment of slavery in the Thirteenth Amendment to the U.S. Constitution." Kevin Hopkins, Review Essay, *Forgive U.S. Our Debts? Righting the Wrongs of Slavery*, 89 GEO. L.J. 2531, 2532–34 (2001).

87 Ralph Richard Banks, *Beyond Colorblindness: Neo-Racialism and the Future of Race and Law Scholarship*, 25 HARV. BLACKLETTER L.J. 41, 44 (2009) (discussing the racism narrative generated by America's slave past and the current racism narrative with the election of Barack Obama to the presidency).

88 *See* discussion *infra* Part III.A.

89 *See* Bell, *supra* note 85, at 1043–44 (recognizing that one of the major debates concerning affirmative action is based on white backlash).

concerns. Finally, this section will examine the reparations approach, which not only claims that racism is salient in modern-day society, but that compensation ought to be paid for the overt harms done by the majority to the minorities during the period of *de jure* racial subjugation. Then, in the next part, this Essay will consider in more detail how the *Polley* case may offer a different approach through which we might consider our collective—and individual—past.

A. Post-Racialism and the Discontinued Relevance of Slavery

Probably the most contemporary lens through which the American dilemma of race is viewed (and as a result it provides a narrative for the history of slavery) is the idea that America is a "post-racial" society.[90] The narrative relies on the premise that American society has concluded its struggle with race and, therefore, when it comes to the structuring of our laws, there is no further need to discuss issues of race. It is the ideology that claims that America has moved beyond race and that there is thus no need to discuss race as a salient issue.[91]

Scholars have explained that post-racialism works as an ideology—it offers a point of view about the world and, thus, allows the adherent to consider and reflect on various issues through this particular lens.[92] In particular, Professor Sumi Cho points out that the power of post-racialism is that of making conversations about race irrelevant to the adherent of the ideology.[93] Adopters of the post-racialism point of view tend to discount the importance of race as the relevant guidepost for the way society is organized.[94] Conversations about race become irrelevant, and those who wish to discuss race are seen as divisive and destructive.[95]

Working in close relationship with post-racialism is the separate but complementary view of colorblindness.[96] Colorblindness is an aspirational concept that takes expression for many as a view that by force of societal

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[90] Kimberlé Williams Crenshaw, *Twenty Years of Critical Race Theory: Looking Back to Move Forward*, 43 CONN. L. REV. 1253, 1313–15 (2011) (observing that a post-racial America is a "racially egalitarian America" where the post-racial discourse is used to de-historicize race in American society); *see also* Lawrence Auster, *What is Post-Racial America?*, VIEW FROM THE RIGHT (Feb. 25, 2008, 10:56 AM), http://www.amnation.com/vfr/archives/010000.html (discussing the notion of post-racial America during an Obama presidency).

[91] Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589, 1594–95 (2009).

[92] *Id.* at 1594.

[93] *Id.* at 1594–95.

[94] *Id.* at 1595.

[95] *Id.* at 1595, 1601–02.

[96] *Id.* at 1597; Donna E. Young, *Post Race Posthaste: Towards an Analytical Convergence of Critical Race Theory and Marxism*, 1 COLUM. J. RACE & L. 499, 502 (2012).

change, race will become irrelevant throughout society; where, in contrast, post-racialism is an ideology which shapes decisions about how the world ought to be viewed and explains choices concerning issues regarding race.[97]

Professor Cho argues that colorblindness, though it is still important to the mainstream, traditional political right, is relatively outmoded in comparison to the ideology of post-racialism.[98] Post-racialism is more virulent and persuasive because it represents an ideology that converges with enough of the facts of the moment and the hopes of people across the political spectrum to offer a salient battle-is-over analysis of the current state of race relations in the United States.[99] Put more directly, post-racialism offers the point of view that the ideology of White Supremacy[100] has effectively run its course, and thus, the adherents of White Supremacy are no longer forced to confront their own prejudice.[101] White people are, therefore, redeemed of their prejudices and absolved of their past bad conduct.[102]

Thus, from this point of view, discussions about race are irrelevant to the public policy and legal conversations of our era. For political conservatives, analyses of social problems are cast in terms of defending the apparent status quo and the existing hierarchy of social class as neutral and beyond race.[103] In particular, analysis of social problems is placed in the context of completing the (illegitimate, they would argue) mission of remedying racial inequality.[104] From

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97 Cho, *supra* note 91, at 1597–98.

98 *Id.* at 1599–1600.

99 *See* Sheryll Cashin, *Shall We Overcome? "Post-Racialism" and Inclusion in the 21st Century*, 1 ALA. C.R. & C.L.L. REV. 31, 33–41 (2011) (examining the relevance of race and the state of race relations in the political discourse in a post-racial America); Cho, *supra* note 91, at 1601.

100 Wendy Brown Scott has stated that White Supremacy "describes the system of racial subordination instituted to perpetuate the domination of African-Americans and people of color generally." Wendy Brown Scott, *Transformative Desegregation: Liberating Hearts and Minds*, 2 J. GENDER RACE & JUST. 315, 321 n.27 (1999) (citing Frances Lee Ansley, *Stirring the Ashes: Race, Class and the Future of Civil Rights Scholarship*, 74 CORNELL L. REV. 993, 1024 n.129 (1989) (defining White Supremacy as "a political, economic and cultural system in which whites overwhelmingly control power and material resources, conscious and unconscious ideas of white superiority and entitlement are widespread, and relations of white dominance and non-white subordination are daily reenacted across a broad array of institutions and social settings.")). It is in Scott's and Ansley's meanings that I use the phrase "White Supremacy." I have capitalized the phrase in this Essay to illustrate that this is an ideological system and to demonstrate its dominance to the reader. For further discussion in relation to race-conscious thinking, see *infra* notes 114–117 and accompanying text.

101 Peter Halewood, *Laying Down the Law: Post-Racialism and the De-Racination Project*, 72 ALB. L. REV. 1047, 1049–50 (2009).

102 *Id.* at 1050–52.

103 john a. powell, *An Agenda for the Post-Civil Rights Era*, 29 U.S.F. L. Rev. 889, 892–93 (1995).

104 *Id.*

this point of view, for example, the election of Barack Obama becomes a hallmark of triumph, and thus, the attention that the left wing racial rabble-rousers have received can be directed to other issues.[105] Moreover, the ideological oppression of the right can be lifted. In other words, the condemnation that it suffers for perpetuating racial hierarchies is now invalid because a minority has ascended to the highest office in the land, thus feeding the narrative that any person may have access to the social goods of the United States without being limited by race.[106]

Similarly, for the political left, the completion of the conflict concerning race also liberates American society from further need of discussion of the topic. To use again the example of the election of President Obama, it represents the ability to move on to more important concerns because the battle concerning race is now complete, and the liberal vision of America in terms of race is now a reality.[107] Moreover, the problems of social inequality are viewed as having to do with factors other than race—for example, the misdistribution of educational benefits is considered to be one that can be remedied by emphasis on class analyses rather than race.[108]

The effect of this shift of the mode of thinking is that we now arguably have a society that desires to avoid altogether conversations that have to do with race generally.[109] This, in essence, completes the work done by the legal movement towards colorblindness. The aspirational scheme of colorblindness sought to steadily move away from a vision of combating racism towards a vision of a world where race is completely irrelevant.[110] Conversations about race are relegated to the past, and those who attempt to raise the issue are seen as irrelevant. This is despite the mountain of evidence of the role race plays in

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105 Karla Mari McKanders, *Black and Brown Coalition Building During the "*Post-Racial*" Obama Era*, 29 ST. LOUIS U. PUB. L. REV. 473, 473–75 (2010) (critiquing the idea that the election of an African American president has transformed American society into a post-racial era, when in fact great disparities remain among Whites, African Americans, and Latinos).

106 *See, e.g.*, Clarence Lusane, *Obama's Victory and the Myth of Post-Racialism*, *in* APPLIED RESEARCH CTR., CHANGING THE RACE: RACIAL POLITICS AND THE ELECTION OF BARACK OBAMA 67, 68 (Linda Burnham ed., 2009), *available at* http://www.arc.org/downloads/RaceElections_1_R5.pdf (commenting on the idea of post-racialism following the election of President Obama, Clarence Lusane comments that many conservatives felt as though "[r]acism was no longer an issue because the nation had become colorblind").

107 *See* McKanders, *supra* note 105, at 474.

108 Cho, *supra* note 91, at 1595, 1602.

109 Banks, *supra* note 87, at 45–46 (expressing the idea that many believe Martin Luther King Jr.'s "dream" has been realized in our post-racial society electing Barack Obama as president and wish to relegate racial conflicts and division to the past).

110 Cho, *supra* note 91, at 1595, 1601–02; john a. powell, *The "Racing" of American Society: Race Functioning as a Verb Before Signifying as a Noun*, 15 LAW & INEQ. 99, 116 (1997).

political conversations from day to day.[111] Post-racialism represents the achievement of this goal to those who buy into the ideology. The logical conclusion of such a view is that the issue of race as a framework for organizing preferences and priorities in our society is outmoded.

Thus, the post-racialist lens would likely treat a unique historical occurrence like the *Polley* litigation as historical trivia, and therefore view it as irrelevant to modern considerations. More to the point, a post-racialist view would see this as an interesting story about a kidnapping over 150 years ago, but would likely deem it a waste of time for a court to be involved in rehashing wounds from a time long past concerning a history that is no longer relevant. And even if the history were relevant for historical purposes, the use of judicial resources and governmental action in making a declaration of freedom would nonetheless be a waste.

B. Critical Race Theory and an Awareness of Slavery

In contrast to the race-is-now-irrelevant position of the ideology post-racialism and colorblindness, the ideology of race-consciousness begins with the assumption that racism is a tool through which society is organized, and thus, racial hierarchies exist and affect how we see the world.[112] Racism is a present reality, and, thus, policy and practice on both a societal level and an individual level should take this into account in order to improve the state of being throughout our society.

Racism, as both a collective and an individual nature, serves to structure our society. As a collective matter, racism creates a hierarchy where society is structured along racial lines so that members of one race receive more status and benefits than others.[113] In particular, in the United States especially, members of the white race have been the beneficiaries of this distribution where members of other races—for example, Blacks, Latinos, and

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[111] Brandon Paradise, *Racially Transcendent Diversity*, 50 U. LOUISVILLE L. REV. 415 (2012) (describing the concept of "racially transcendent diversity" where America has not yet moved beyond race into post-racialism, but seeks to rise above race while also embracing racial diversity); powell, *supra* note 110, at 116.

[112] Tara J. Yosso, *Whose Culture Has Capital? A Critical Race Theory Discussion of Community Cultural Wealth*, 8 RACE ETHNICITY & EDUC. 69, 73–74 (2005) (defining the five tenements of Critical Race Theory), *available at* http://www.cgu.edu/PDFFiles/ses/TEIP/Tara%20J.%20Yosso%20culturalwealth.pdf.

[113] Derrick Bell, *The Racism Is Permanent Thesis: Courageous Revelation of Unconscious Denial of Racial Genocide*, 22 CAP. U. L. REV. 571, 573 (1993) (addressing criticisms of his thesis in his book, *Faces at the Bottom of the Well*, that "racism is an integral, permanent, and indestructible component" of American society where white dominance is maintained).

Asian Americans—have been denied the same degree of benefit.[114] Indeed, members of these groups have suffered detriment. Given the nature of the system, race-conscious theorists would call this a system of White Supremacy. This system of racial preference distributes prime material benefits to white people and denies or creates a detriment to people of other races.[115]

In addition to the material nature of racism, racism also has an ideological dimension.[116] Racism forms a lens through which one sees the world, or, put another way, it creates a narrative that has explanatory power about how the world is structured. Racism as ideology provides "a pool of beliefs, symbols, metaphors, and images that justify and 'naturalize' its practices."[117] Racism creates a narrative by which one might apply this particular logic whereby one can understand the world. Thus, the racial distribution of property and privilege and social status has a justification. It also provides a view of history whereby the distribution and the beliefs are rationalized and made functional. Racism is both a system of privilege and an epistemology.

The question then becomes whether and how to combat this system in its modern-day guise. For the person who believes this entire narrative, and sees it as the correct structure, no further analysis is necessary. Obviously, this person would be an unrepentant White Supremacist—content with the ideological structure of the world as is (or this person may even desire a shift of the current system of racism to be more in line with his or her ideology). In contrast, the adherent to the race-conscious point of view of which I speak—which perceives racial discrimination as a wrong—would believe that race-consciousness is the beginning of an effort to effect a remedy to such discrimination.[118]

Logically, such a desire to combat the system of White Supremacy would begin with the question of whether the ideology of racism can ever be supplanted. The late Professor Derrick Bell, who is often touted as the founder of the Critical Race Theory intellectual movement in the legal academy, famously argued that racism is permanent.[119] In other words, racism is an

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[114] *See, e.g.*, RAKESH KOCHHAR ET AL., PEW RESEARCH CENTER, TWENTY-TO-ONE: WEALTH GAPS RISE TO RECORD HIGHS BETWEEN WHITES, BLACKS AND HISPANICS (2011), *available at* http://www.pewsocialtrends.org/files/2011/07/SDT-Wealth-Report_7-26-11_FINAL.pdf.

[115] JUAN F. PEREA ET AL., RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA 5–6 (2d ed. 2007).

[116] *Id.* at 6.

[117] *Id.*

[118] *See* Bell, *supra* note 85, at 1048–49.

[119] *See* DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987); DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM (1992). Both books set forth the theme that racism is permanent in American Society, yet this truth is not despairing for African Americans; in contrast, it is a liberating concept, which will

immutable characteristic of American society and it is impossible to eradicate. To this end, Bell believed that conscious awareness of racism would lead to a more sane and aware scope of life for individuals and for society.[120] For others, strands of critical race theory have taken a different tact than Bell and do not necessarily agree that racism is permanent.[121]

Despite what view one might take concerning the ultimate nature of racism, most race-conscious theorists would agree that advocacy against racism is an appropriate reaction to societal and institutional racism, and that laws of antidiscrimination and conscious awareness of interpersonal interaction would provide a way to ultimately combat—and ideally eliminate—racism on the personal and cultural level. Thus, like the aspiration of colorblindness, the race-conscious combatant of racism would seek a day where racism is irrelevant to our modern lives, but the race-conscious school of thought does not believe that this goal has been reached in the present day. Thus, it must be combated continually through efforts to make people aware of the material harms, status harms, and psychic harms that racism causes.[122]

Within this context, the race-conscious ideology would value an exploration of the history of race revealed by cases like the Polley kidnapping. Conscious confrontation of the "original sin" of slavery and its continuing effects is necessary from this ideological point of view.[123] Thus, an explanation of the harms of slavery and the objectifying nature of its practice—as the *Polley* case illustrates vividly—is a necessary and welcome exercise. Indeed, in the *Polley* case specifically, the narrative is powerful precisely because a legal institution legitimized the Polley descendants' claims. In this sense, the Polley family is validated and legitimized because society has recognized their ancestors' proper status as "*FREE PERSONS*."[124] Moreover, the *Polley* court, through undertaking the hearing and ruling in this case, expresses the values of our modern society. It is powerful to hear the implicit pronouncement of freedom despite imposed slavery by a court of law, even if this effort at justice

encourage the continued commitment to racial equality and justice. Bell recognizes that African Americans have made significant strides in the civil rights struggle, but that the inability of whites as a group to identify with blacks inhibits them from empathy for the suffering of blacks.

120 Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 377–79 (1992).

121 Taylor points out that a comparison of the different strands of Critical Race Theory may reveal differences on the question of whether racism is permanent. *See* Taylor, *supra* note 79, at 321 n.389 (comparing Bell with Richard Delgado and Jean Stefancic's religious beliefs and how they shape the concerning the nature of racism).

122 *See* Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1, 62–69 (1992).

123 Taylor, *supra* note 79, at 282–83 (proposing that the realization of racism's permanence in our society is a necessity and that confrontation with this "necessity" in terms of protest, racial realism, and writing are beneficial and important for a renewed vision of the continued struggle for racial justice).

124 *Polley*, *supra* note 2, at 15.

was 150 years delayed. Furthermore, through naming the history that the Polley children and their descendants suffered, it would, from this view, go a long way to remedying the psychic harms of slavery and its long legacy.

However, even in the race-conscious approach, there are limits. While the *Polley* case may be useful as a psychic exercise to raise consciousness, it would not necessarily satisfy the remedial needs for the harms caused. Those critical race theorists would believe that such a debt exists, whether that debt is material, financial, or psychic, and that the debt should be paid as a necessary step in racial reconciliation. This leads us to discuss the reparations position.

C. Reparations and the Present Demand for a Material Remedy for Slavery

Within the realm of race-conscious ideology is a particular movement that is directed to the state's obligation to address the harms of slavery and the long legacy of racism. This particular claim is premised on the notion that awareness is insufficient to remedy the harms of slavery and racism. The reparations school of thought would argue that racism has created tangible material harms against specific people.[125] They, and their descendants, have suffered material, status, and psychic harms as a result of the existence of racism, and those harms should be remedied. Moreover, the White Supremacist power structure perpetuated and benefitted from such economic, physical, and psychic injury. The nature of society today is built upon this foundation, and, therefore, those who benefit from it should remedy this injurious situation by providing compensation—reparations—to those who have suffered the harms.

This argument has societal and individual dimensions. However, most of the modern debates concerning reparations are about remedying societal and broad economic harms.[126] Various reparations lawsuits have been brought to remedy specific harms such as race riots, systemic and specific harms to groups of people of color, medical experimentation on people of color, and similar large-scale harms.[127] These lawsuits have failed, however, due to a number of

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[125] *See* Katrina Miriam Wyman, *Is There a Moral Justification for Redressing Historical Injustices?*, 61 VAND. L. REV. 127, 133–34 (2008) (defining the term historical injustice in America as a wrong which was authorized or institutionalized by the government, committed at least a generation ago, harmed many individuals, and involved discrimination based on race, religion or ethnicity; slavery is included as an historical injustice in the United States).

[126] *See* Kaimipono David Wenger, *From Radical to Practical (and Back Again?): Reparations, Rhetoric, and Revolution*, 25 J. C.R. & ECON. DEV. 697, 705–06 (2011). This article compares the two basic approaches to the reparations argument: radical reparations arguments, which seek changes such as restructuring society, and practical reparations, which seeks specific gains such as monetary compensation.

[127] *See, e.g.*, *In re* African-American Slave Descendants Litig., 375 F. Supp. 2d 721 (N.D. Ill. 2005), *aff'd in part, rev'd in part*, 471 F.3d 754 (7th Cir. 2006).

legal concerns regarding standing, the complexity of causation, statute of limitations, and the difficulty of conceptualizing the remedy.[128]

Another theoretical issue concerning the reparations movement is how to conceptualize the nature of the remedy.[129] As suggested above, those who advocate for reparations often see themselves as wishing to address material economic and social harms.[130] Most often this is framed as a consideration of specific economic compensations for damages done.[131] But others have framed this consideration as repairing the status and cultural harms done by long-term racism, such as providing educational benefits and economic revitalization to minorities so as to remedy the effects of slavery.[132] There are those who have also argued that an apology, given the authority of and on behalf of the state, would also count as a type of reparation.[133]

From this point of view, the unearthing of facts relating to the harms of slavery would be the first necessary step to providing compensation for its harms. It would then follow that the person to be held accountable—or their successors—would then provide compensation for the harms done to the minority or former slave or their successors. It would, in and of itself, establish a relationship and require a connection that recognizes the nature of the harm and provides compensation for it.

In light of these competing ways of understanding the history of slavery, the twenty-first century *Polley* case represents something that is different from the three modalities described above. The Polley descendants did not ask for any compensation, or any apology, or any concession from the state. This would certainly not represent an effort to obtain reparations as classically conceived. The act of adjudicating this case (where the legal need to do so in light of the Thirteenth Amendment might be thought of as dubious by some)

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[128] *See* Wenger, *supra* note 126, at 724. For the specific cases relevant to this discussion, see the earlier discussion *supra* note 11.

[129] *See* Alfred L. Brophy, *Some Conceptual and Legal Problems in Reparations for Slavery*, 58 N.Y.U. ANN. SURV. AM. L. 497 (2003).

[130] Wenger, *supra* note 126, at 705–06.

[131] *Id.*

[132] *See, e.g.*, Martha R. Mahoney, *Segregation, Whiteness, and Transformation*, *in* RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA 732–38 (2000).

[133] Proponents of apology-based remedies, which may or may not include other forms of reparations, term this as restorative justice which aims to restore society through reconciliation. ROY L. BROOKS, ATONEMENT AND FORGIVENESS: A NEW MODEL FOR BLACK REPARATIONS 141–43, 147–48 (2004) (articulating a reliance on apology in order to atone for the damage done by slavery, whereas a government that has committed such an atrocity has a moral obligation to apologize); *see also* Kaimipono David Wenger, *Apology Lite: Truths, Doubts, and Reconciliation in the Senate's Guarded Apology for Slavery*, 42 CONNTEMPLATIONS 1, 9 (2009), *available at* http://connecticutlawreview.org/files/2012/02/Wenger-FINALforonline.pdf (pointing out that stand-alone apologies can indeed have value, but that limitations and disclaimers attached to that apology generates mixed reactions).

and putting the imputer of the state upon this decision definitely flies in the face of the post-racialist model. A race-conscious theorist would see value in unearthing and making people aware of this history, and they would find a declaration or judgment remedying the error of omission at the heart of the West Virginia *Polley* case essential to an understanding of the present fight against racism. And certainly a post-racialist attitude would deny wholesale the need to even have this conversation, and in particular, place judicial resources behind such a declaration. At best, such a view would relegate the *Polley* case to the history books.

If the *Polley* case does not fit our current models of how to think about race, and as a result how we view the history of slavery, then what does it represent? The next part of this Essay will attempt to offer some thoughts on this by considering the *Polley* case as a nascent Truth and Reconciliation approach to understanding our history of slavery.

IV. TOWARDS TRUTH AND RECONCILIATION: THE *POLLEY* CASE AS A MODEL?

> *Slavery is the greatest atrocity in human history. For my kids to witness the freedom of their ancestors is overwhelming.*
>
> *— Anisa Dye-Hale*[134]

The *Polley* case is novel on several levels. First, it is the first time since 1855 that a court has used *nunc pro tunc* to remedy a slavery case.[135] This, by itself, is quite fascinating and may represent an interesting piece of trivia. Were this all that the *Polley* case represented, there would not be much else to say.

It could be argued, however, that the *Polley* case decision is a step towards truth telling with respect to the institution of slavery and the harms it continues to instill. This is reminiscent of various Truth and Reconciliation Commissions that have taken place across the world to address the human rights abuses inflicted by national governments, militaries, or armed forces of each respective country.[136] Truth and Reconciliation Commissions are intended to investigate these past violations of human rights and formally acknowledge this "long-silenced past."[137] As opposed to placing importance upon finding the truth underlying these human rights abuses, these commissions serve the

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134 Rosenberger, *supra* note 16.

135 The last recorded instance that the author could find of this use of *nunc pro tunc* is in Mayo v. Whitson, 47 N.C. (2 Jones) 231 (1855). *Cf. Polley*, *supra* note 2, at 13–14.

136 Hayner, *supra* note 13, at 600–04. These truth commissions may be sponsored by the nation's government or, alternatively on the international scale, by the United Nations or nongovernmental organizations.

137 *Id.*

purpose of officially acknowledging the truth.[138] Although the principle of truth commissions is to acknowledge the truth and heal the wounds of the past, they are not always successful and can be set up by a government to manipulate the public's perception.[139]

Seen in this light, the *Polley* case is novel in a different and potentially more transformative respect. The *Polley* trial of 2012, by virtue of the fact that both the descendants of the Polley children and the Circuit Court of Wayne County, West Virginia felt it necessary to "set the record straight"[140] about the status of the kidnapped Polley children, took a new approach to addressing the harm of slavery.[141] The plaintiffs and the court explicitly sought to address directly the history of stigma through utilizing *nunc pro tunc* to conclude an adjudication and make a declaration that the Polley children should have been declared free persons as of 1859.[142]

Admittedly, this situation is probably as unique as it is novel. The likelihood of similar cases concerning emancipated slaves who were then kidnapped wrongfully and for whom *nunc pro tunc* adjudication would be appropriate is probably quite low. And even if it were not low, the fact of the matter is that the amount of historical research necessary to bring to light another similar case would be extraordinary.[143]

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138 *Id.*

139 *See* Hayner, *supra* note 13, at 607–08. Indeed, one might object to this approach on this basis. It could be argued that by merely acknowledging this lawsuit, the court acted to provide some validation but nonetheless validated its own status as an institution of power and its role within the power structure in relation to race. Thus, any claim of movement towards racial healing would be perceived as ineffective and illusory, or even deceptive. This rings true with the history of Truth and Reconciliation commissions (and similar activities sponsored by governments) designed to merely re-enforce the power structure of the government. Moreover, research has shown that Truth and Reconciliation commissions which are perceived as merely Band-Aids and do not have popular support create atmospheres that are eventually counter to their stated purpose. *See, e.g.*, ROSALIND SHAW, U.S. INST. OF PEACE, RETHINKING TRUTH AND RECONCILIATION COMMISSIONS: LESSONS FROM SIERRA LEONE (2005), *available at* http://www.usip.org/files/resources/sr130.pdf. In noting these difficulties, however, I think there is a value to these commissions, or some similar governmental task. Truth-telling that is allowed to validate individual stories and raise the consciousness of the surrounding community can take place in a context like the United States, a developed country that would not rely on the commission to bolster its own legitimacy. Such a process could be directed at raising awareness about the legacy of race in and of itself, and thus ultimately serve a personal and a communal good, as I describe below.

140 *See* Hearing, *supra* note 7.

141 *Polley*, *supra* note 2, at 13–14 (stating that the prior petition for freedom on behalf of the Polley children was "unreasonably delayed" and "erroneously concluded without a final order on the merits, and therefore, it is appropriate for *nunc pro tunc* resolution").

142 *Id.*

143 "There are not many people, period, in the world who can find their family history documented. It's overwhelming. It's knowing who you are and where you came from. For many African-Americans that's not possible." Crigler, *supra* note 57.

In these respects, *Polley* defies these odds. As both the judge and the family members pointed out, their desire was to "set the record straight"[144] and to bring to light this unresolved history.[145] This seems to run counter to the trends of wanting to avoid conversations of slavery and its effects; it brings it to light so that the family that suffered its indignity can know the truth and the present community can acknowledge and at least be aware of its history.

This deliberate choice represents an important model—or at least an important suggestion—about how to approach the difficult history of slavery in our society. Though there is not likely a literal open case waiting for adjudication like *Polley*, conversations could nonetheless be based on the reality of slavery and a concrete consideration of that history based on what happened to the real enslaved people and the injustices they faced. Put another way, the twenty-first century adjudication of the *Polley* case represented an instance where the plaintiffs' representatives had the opportunity to name the indignity they suffered and claim redress—even if the redress only has rhetorical force over 150 years after the crime was committed—and a court recognized and sanctioned that need.

This kind of truth telling is reminiscent of the various and occasional efforts to establish Truth and Reconciliation projects in various places throughout the world.[146] In South Africa, for example, the effort to recover from Apartheid was undergirded by the Truth and Reconciliation Commissions established throughout that country.[147] Those commissions worked on the premise that persons who were involved in the crimes and abuses of the Apartheid regime could come and state their role and disclose completely the crimes of which they knew.[148] In exchange, they were in many cases granted amnesty for their actions,[149] but they were required to face the public and acknowledge their actions.[150] The benefits were numerous, including the ability for both the perpetrators of the crimes and the victims (or their descendants) to know the whole truth about the actions of the state during that time.[151] This created a path for dialogue and created a possibility for national healing—a

144 *See* Hearing, *supra* note 7.

145 *See* Goodman, *supra* note 57; Rosenberger, *supra* note 16.

146 *See* Hayner, *supra* note 13, at 600–04 (offering a comparative study of fifteen different truth commissions).

147 Anthony Lewis, *At Home Abroad; Truth and Healing*, N.Y. TIMES, Jan. 16, 1995, at A17.

148 *Id.*

149 BROOKS, *supra* note 133, at 147.

150 *Id.*

151 *See* Lewis, *supra* note 147.

unique occurrence so soon after the ending of the South African Apartheid regime.[152]

These essential elements—an opportunity to be heard, a redress for past wrongs, and state recognition and sanction of the redress—seem to provide suggestions as a way forward to considering how to address the left-over wrongs of the era of *de jure* White Supremacy.[153]

This conversation has never happened on the institutional level in the United States. Indeed, the legacy left by the end of the slavery era was one of renewed American Apartheid through Jim Crow and then eventually the changes brought about by the political and legal Civil Rights Movement of the 1950s and 1960s. At least one unintended consequence of this movement of change and evolution was the fact that conversations about the legacy of slavery and the government's responsibility for that legacy have remained at the level of abstract policy. The government has not engaged in a dialogue about the lived history of slavery and its enduring legacy. This dialogue—which is not about monetary reparations, but about creating awareness and seeing the past, and eventually the present, as it is—seems essential in order to create progress in the ongoing confrontation of the legacy of racism.[154] It provides an opportunity to reframe not only our history, but also our modern debates concerning race. If we can consider anew the indignity of slavery, segregation, and second-class status perpetrated by systems and individuals in our tortured legacy around race, we can understand the discourse that surrounds affirmative action, immigration, and even reparations in a different way.

Moreover, beyond the societal and collective potential that a Truth and Reconciliation type discussion would allow, this approach provides a real opportunity for validation and transformation on the individual and community

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[152] The Truth and Reconciliation Commission in South Africa was unique in that it provided for a fragile transition to a stable government. Brooks acknowledges that without offering amnesty to apartheid perpetrators, racial reconciliation and democratic government would not have been successful. BROOKS, *supra* note 133, at 147.

[153] *See* Hayner, *supra* note 13, at 600–04 where she describes the objectives of a truth commission as follows:

> [F]irst, a truth commission focuses on the past. Second, a truth commission is not focused on a specific event, but attempts to paint the overall picture of certain human rights abuses, or violations of international humanitarian law, over a period of time. Third, a truth commission usually exists temporarily and for a pre-defined period of time, ceasing to exist with the submission of a report of its findings. Finally, a truth commission is always vested with some sort of authority, by way of its sponsor, that allows it greater access to information, greater security or protection to dig into sensitive issues, and a greater impact with its report.

Id.

[154] "Apologies offer accountability, a 'reality check' allowing society to admit the harm and set the record straight. . . . [a]pologies can be particularly valuable when they address previously unrecognized harms." Wenger, *supra* note 133, at 5.

level.[155] The descendants of the Polley children through their own reflections have spoken to the psychic benefit that the court's declaration provided. For example, in reflecting on the import of the trial, Theresa Polley Shellcroft said, "I am struck by the overwhelming emotions of this entire event . . . [t]o go from not knowing who you are—or your roots—to knowing your family history with court records to document that history, to witnessing the decision that began 160 years ago about whether your ancestors were legally free or slaves is overwhelming."[156] James Hale also reflected on the momentous nature of the trial: "[T]his is a legacy for our family that future generations can talk about . . . [m]y grandchildren can say, 'I sat in the courtroom as part of the story.'"[157]

These quotes suggest that for the descendants of the Polley children, the declaration validated what they believed about themselves and their ancestors and transformed the narrative of kidnapping and enslavement to one of freedom. Moreover, for the audience in attendance at the trial, those who read the newspaper accounts and even now as you the reader consider this Essay, this truth telling provides an opportunity for us to consider concretely the history of slavery and transform our own views about it. And yet, as I reflect on this, I am aware of the fact that this specific factual scenario would be difficult to implement en masse. As Shellcroft explained, "[T]here are not many people, period, in the world who can find their family history documented. It's overwhelming. It's knowing who you are and where you came from. For many African-Americans that's not possible."[158]

Yet, through using the power of the state to provide space to allow voices that were silenced to speak their truth about their indignities, it is possible that the larger validation and awareness can take place. Perhaps the *Polley* case represents a way to rethink the historical trap of forgetfulness and continually defining our world by the legacy of White Supremacy. The adjudication completed history, validated the Polley descendants views about their ancestors and themselves, and raised the consciousness of those involved and those who watched it.

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155 Eric K. Yamamoto & Ashley Kaiao Obrey, *Reframing Redress: A "Social Healing Through Justice" Approach to United States-Native Hawaiian and Japan-Ainu Reconciliation Initiatives*, 16 ASIAN AM. L.J. 5, 18–24 (2009) (proposing that many democracies have placed reconciliation, with regards to slavery and other historical injustices, high on their political agendas given the growing "emphasis on the individual and societal benefits of storytelling, apologies, symbolic payments, and public education").

156 Crigler, *supra* note 57.

157 Rosenberger, *supra* note 16.

158 Crigler, *supra* note 57.

V. CONCLUSION

The *Polley* case represents an amazing history and a conscious decision by the State through the Circuit Court of Wayne County, West Virginia, to bring that history to light for both the Polley descendants and for the residents of Wayne County to name the Polley children as free persons and to educate the broader community. This choice was to use the court as a space where the truth about the Polley children could be told. Its ends included the transformation of the descendants of the Polley children and the opportunity to make real and present the legacy of slavery, which continues to define the United States and its ongoing struggles concerning race.

In the end, the *Polley* adjudication suggests that the power of truth telling is an important interest that the government could pursue as a means to take responsibility for the history of slavery, a history the government itself helped to perpetuate. Moreover, such truth telling can go towards healing the harms of slavery on a personal and societal level. In this sense, there is more to be done than to stop discriminating on the basis of race. The wounds that racial discrimination has inflicted (and continues to inflict) should be brought to light so that healing on all sides can actually take place. The *Polley* adjudication serves as a pointer towards this approach. It is up to future work to develop it into something more.