

Book Review

Ariela J. Gross, *What Blood Won't Tell: A History of Race on Trial in America*. Cambridge: Harvard University Press, 2008, pp. 384, \$29.95.

Reviewed by Lucy E. Salyer

Race, like obscenity, has defied precise legal definition by judges, but they have proclaimed to “know it when they see it.” Ariela Gross, in her thoughtful and provocative history, explains how Americans have “seen” race through different cultural and legal lenses over the course of the 19th and 20th centuries. Gross builds upon a now widely-shared premise among social theorists—that race is not an objective biological fact but rather a social and political construction which establishes and perpetuates hierarchies of power—to provide a particularly compelling and analytically rich account of how racial knowledge was created and sustained by litigants, laypeople, administrative officials, and judges. Even more importantly, she reveals why racial identity mattered, as the material and psychological rewards of citizenship have been—and to a large extent, still are—tied to “whiteness.”

Gross explores shifting definitions of race over time by examining a variety of trials which hinged on determining an individual’s racial identity. Moving chronologically, Gross focuses on particular types of trials in each era to reveal the broader social and political changes at work in America, each of which posed new challenges to racial definitions. Gross explores emancipation lawsuits in the antebellum period; miscegenation, school segregation, and slander suits in the age of Jim Crow; administrative determinations of Indian and Hawaiian identities in land allotment proceedings in the age of imperial expansion; federal court determinations of petitions by Asian and Middle Eastern immigrants for naturalization during the period of mass immigration; and 20th century civil rights litigation brought by Mexican Americans, defined legally as white, but discriminated against as racial “others.”

The litigants in all of the cases were “racially ambiguous,” liminal figures who defied easy racial categorization and blurred the boundaries of race. Theirs were the hard cases, the cases that lay at the margins of racial categories. For that very reason, Gross argues, the legal proceedings that sought to fix their racial identities expose race in the making as participants contested what made one “black,” “white,” “Indian,” and so forth. Physical appearance—skin color, hair texture, the shape of facial or bodily features, even one’s gait—

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was one marker of race, and slaves who claimed to be white submitted to public physical examinations and extended commentary about their bodily features in their emancipation trials. Yet decision makers did not trust mere appearance and resorted to a host of other tests and authorities to assign racial identity. Witnesses' testimony that an individual "acted white"—that is, associated with whites in social settings, voted, performed military service, sat on juries, conformed to middle class white gender roles—could be critical in antebellum trials, as could evidence about racial "pedigree" or ancestry. In the late 19th and early 20th centuries, "racial science" with its seemingly objective, scholarly assessment of racial types grew in stature, though it could always be trumped by judges' resort to "common sense" definitions of race. Thus, Bhagat Singh Thind drew on the new racial science to argue that as an Indian from the Punjab, he was a "Caucasian," and consequently "white" under U.S. naturalization law; the Supreme Court disagreed in 1923, saying "the great body of our people instinctively recognize" the racial difference of Asian Indians.¹ Being Caucasian did not make one "white," according to the prevailing and conclusive common sense definitions of race.

In all of these cases, the stakes involved were high and litigants often confronted hard choices in reconciling their own beliefs about who and what they were with the racial identities imposed by law. Racial identity determined one's access to fundamental material resources and political status. Freedom, itself, hung in the balance of emancipation suits; in other cases, access to education, land, jobs, inheritance from relatives, marriage, citizenship as well as the less material but substantial social and political rewards of "whiteness" hinged upon legal determinations of an individual's race. Gross argues that after the Civil War and the advent of Jim Crow, racial categories narrowed, and the lines between white and black were drawn more sharply, often prompting groups to align themselves as much as possible with whites and the benefits whiteness offered. Gross provides an especially intriguing analysis of the different paths taken in the late 19th century by Melungeons, Narragansetts and the Croatans—all "racially ambiguous" communities of people with mixed African, European, and Indian ancestry—as they confronted hardening racial lines. The Melungeons adamantly asserted a white European identity, denying any Indian and African heritage, a position maintained to this day. The Narragansett resisted the demand to choose "black" or "Indian," proclaiming a national identity which embraced both, a choice with dire consequences as Rhode Island would declare the tribe "extinct" and so thoroughly intermixed with African Americans and Caucasians that it was no longer "Indian." Narragansett often found themselves re-classified as "black" in official records. The Croatan of North Carolina staved off a similar fate by proclaiming themselves "Indians" and seeking federal recognition as the "Lumbee tribe;" they not only denied any African heritage but also instituted their own Jim Crow regime, preventing blacks from attending their schools.

1. *United States v. Thind*, 261 U.S. 204 (1923).

Gross uses such examples to highlight the paradoxical role that law has played in creating and reinforcing racial categories. On the one hand, her historical analysis provides striking evidence of the constitutive power of law in its ability to fix and define individual and group status. In legitimating certain claims and denying others, courts continually re-created, normalized, and policed the boundaries of race and, in the process, obliterated or obfuscated more complex social realities. For example, the Dawes Act of 1887 provided for the breaking up of tribal land and the allotment of parcels to individual Indians. To implement allotment, the Dawes Commission, beginning in 1898, made lists of tribal members and recorded their “blood quantum,”—e.g. whether they were “full-blood,” “half-blood,” etc.—using these administrative recordings to determine membership in tribes and the ability of recipients of allotments to alienate their land. These administrative decisions had tremendous consequences as they fixed the racial and tribal status of the enrollees—and their descendants—forever. The Dawes Commission not only re-defined Indian nations as races, defining Indian-ness by a rule of “blood quantum” that most Indians found alien—but also kept “black Indians”—those of African descent who had been part of tribes, often as slaves—off the list for allotment. Though black Seminoles and Cherokee might self-identify as Indian, they increasingly found themselves relegated by law and by the tribes as simply “blacks,” subject to the increasingly rigid Jim Crow regime taking hold in Oklahoma.

However, Gross insists that despite the defining power of law, the creation of racial knowledge did not rest just with courts and government officials; there was continual “play” or openings in the definitions that individuals could exploit, as the Croatan did in asserting Indian identity. Even slaves could contest their status if they could build a convincing narrative, persuasive to an all-white jury. Yet, as Gross acknowledges, the law constrained and limited the arguments that individuals could make. Similarly, popular notions of race sometimes trumped legal definitions, and not always in a positive way. Gross’s analysis of Mexican Americans’ struggles for equality—and their limited control over their ascribed identities—are particularly revealing on these points. The Treaty of Hidalgo in 1848 declared Mexicans in the conquered territories to be American citizens; since American citizenship at the time was limited to whites, courts later concluded that having the status of citizens, Mexican Americans must also be “white” by law. But, despite repeated court rulings that Mexican Americans were “white,” local communities and officials persisted in treating them as a separate and inferior race—segregating them in school and other public facilities, counting them as a separate race on census records, and excluding them from juries. Perversely, the only time that hostile officials acknowledged Mexican Americans as white was in response to lawsuits complaining of racial discrimination. When Mexican American defendants complained of their convictions by all-white juries, devoid of Mexican American jurors, state officials retorted that since Mexican Americans were “white,” the all-white juries were, by law, juries of their peers and no

racial discrimination could be alleged. Backed into the “white” corner, lawyers in Mexican American civil rights cases made Mexican American whiteness a cornerstone of their litigation strategy, claiming that though they were white by law, Mexican Americans were not treated as such and were denied the privileges of whiteness.

Gross brilliantly dissects and explicates cultural and legal narratives, such as those employed by Mexican American civil rights lawyers. In fact, I have used her book to help my American history graduate students learn how to read and interpret legal evidence, using the tools and perspectives of both cultural and legal history. Gross cautions against taking legal arguments and court opinions at face value—important reminders for both scholars and students—as “we cannot take [litigants’] legal strategies as a direct reflection of their actual beliefs about their racial or national identity but must see them as an often circuitous if sometimes sincere attempt to win a legal victory” (255). Legal documents were mediated both by litigants’ strategic objectives and their cultural contexts; litigants in constructing their legal narratives and claims took their cues from common cultural genres and tropes. Enslaved women, for example, told stories of unjust bondage and their true white heritage, narratives that resonated with early 19th century Americans familiar with the “white slavery” accounts in political tracts and literature. Gross provides important lessons about how to “read against the text” in scrutinizing trial transcripts and court opinions and paying close attention to language and context for what they might reveal about competing narratives of racial identity.

Gross might have done more to tease out the gendered and class dimensions of racial identity. For example, she notes that almost all of the emancipation suits of the antebellum period were brought by women, but does not speculate about why that might have been so. Class enters into her discussion of Mexican Americans, as she notes that farm laborers were labeled “Mexican” while ranchers and landowners became “Spanish,” inviting speculations about how and when class may have shaped other aspects of racial identity.² But these are minor suggestions for a book that accomplishes so much.

There is much to admire about this book and it is not surprising that it has already won several prizes. Students will find the material challenging yet engagingly told and relevant for contemporary discussions of race. Gross not only provides a sophisticated analysis of the creation of racial knowledge in the past, but also suggests throughout the enduring consequences of that history for our present perceptions of race. If racial identity trials no longer take place, Gross argues that “their legacy is ingrained in our thought, our legal system,

2. As one who has written about Chinese exclusion, I also noted an error in Gross’s discussion of the issue, which does not detract in any way from her core analysis. She correctly notes that in 1882, the Chinese Exclusion Act forbade the immigration of Chinese laborers, but then incorrectly says “six years later the prohibition was broadened from laboring Chinese to include ‘all persons of Chinese race’” (218). In fact, the 1888 act continued to apply only to Chinese laborers. See Lucy E. Salyer, *Laws Harsh as Tigers: Chinese Immigrants and the Shaping of Modern Immigration Law* 17–23 (Univ. of North Carolina Press 1995).

our cultural practice, and our racial common sense" (295). Gross uses history to expose contemporary "racial blinders" and to help readers to become more reflective about the ways that we "see" and perform racial identity today. Her epilogue challenges both "color-blind" and "identity politics" perspectives as "unsatisfactory ways of dismantling racial hierarchy," and ventures intriguing policy recommendations for new anti-discrimination strategies. Yet, it is as an historian, with a critical eye to how race has been understood, constantly negotiated, and continually reproduced that Ariela Gross makes her major contribution to contemporary debates.