

# BOOK REVIEW SYMPOSIUM: WHAT WE DO WHEN “BLOOD WON’T TELL”

## RACE, BLOOD, AND WHAT THE ALLIGATOR KNOWS: A REVIEW OF *WHAT BLOOD WON’T TELL*

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### I. INTRODUCTION

From the opening pages of Ariela J. Gross’s *What Blood Won’t Tell: A History of Race on Trial in America*, it is clear that the reader is about to embark on something special.<sup>1</sup> The story begins in a Louisiana courthouse in 1857, with an enslaved woman named Alexina Morrison claiming that she is white. For her contemporaries, the assertion no doubt carried troubling implications. James White, the man who insisted Morrison was black, had papers to prove that he paid good money for her and that she was his property. But her “blue eyes and flaxen hair” told a different story,<sup>2</sup> and her recent appearances at public balls in Jefferson Parish had convinced a number of residents that her graceful mannerisms and affectations were those of a white woman rather than slave. The courtroom was soon bombarded with a dizzying array of evidence for such a simple question—was she white or was she black?—with men eventually stripping her to the waist to examine her body for the tiniest signs of her true identity. Three trials later, the community still had not resolved the issue.

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1. ARIELA J. GROSS, *WHAT BLOOD WON’T TELL: A HISTORY OF RACE ON TRIAL IN AMERICA* (2008).

2. *Id.* at 1.

But more importantly, from Gross's view, this case provides an unparalleled opportunity to examine the complex and constantly shifting ground of race and its import for this nation's history.

## II. A NEW APPROACH TO THE STUDY OF RACE

*What Blood Won't Tell* confirms why Gross is at the forefront of contemporary race and identity studies. This groundbreaking work effortlessly traverses both time and space, with Gross demonstrating a truly phenomenal grasp of the subject across multiple eras and in a number of different iterations. The book begins with several chapters on racial identity trials during and immediately after slavery times, before moving on to black Indian identity and the Dawes Rolls, Hawaiian and the Pacific Islands, non-European identity and the politics of immigration, and Mexican American identity and the notion of "other" whites. Throughout, Gross explores the question of how race is constructed, taking the reader into local courtrooms, administrative hearings, and the storied room of the Supreme Court. But Gross is not content to simply rehash or even reexamine the usual cases and familiar lines on the subject. To the contrary, as illustrated by her study of cases like Alexina Morrison's, she is much more interested in exploring the meaning of race from the margins, both literally and figuratively. Indeed, central to Gross's study are cases and inquiries of contested identity—people who were not clearly marked as one race or another—and most of these neither made headlines then nor have they found their way into the dominant discourse about race today. But Gross's rationale for finding and exploring such out-of-the-way cases is a good one. Not only do these cases demonstrate that the issue of ambiguous identity was probably much larger than we have traditionally thought, but they also illustrate how people from the time understood and participated in the making of race. As Gross observes: "People revealed what race meant to them only when they needed to adjudicate its boundaries. And in drawing those boundaries, they were creating race."<sup>3</sup>

In fact, without selling short its conclusions, perhaps the most intriguing aspect of *What Blood Won't Tell* is its methodology. Several years ago, Gross made the case for knocking down the artificial divide between social historians and legal historians, in particular how each approached the subject of race and slavery.<sup>4</sup> Gross follows her own advice

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3. *Id.* at 11.

4. See Ariela J. Gross, *Beyond Black and White: Cultural Approaches to Race and Slavery*, 101 COLUM. L. REV. 640, 689 (2001).

here, abandoning the tendency of legal historians to overemphasize canonical cases and legislative enactments while at the same time rejecting the conclusions of social historians that law was largely irrelevant to most people's lives.<sup>5</sup> Her evidence—particularly in the earlier chapters, the focus of my research and hence my review—consists largely of trial records she has uncovered through painstaking research and time-consuming trips to county courthouses. From these records, Gross opens up a new way of thinking about race, giving us the opportunity to view the subject from the perspective of ordinary people; indeed, through the cases they filed, the testimony they provided, and the conclusions they reached, we gain a unique insight into how men and women from various communities viewed the world in which they lived. From there, it becomes abundantly clear that “[r]ace was not something imposed from above.”<sup>6</sup> Instead, race was something that was contested, fought over, and eventually hashed out in local courtrooms throughout the country, as people struggled to label and categorize women like Alexina Morrison and others of indeterminate ancestry.

But notice what this does for our study of the law. Traditional legal analysis would have sought out the declarative rules on the subject, reminding us that a person with one-fourth, one-eighth, or perhaps one drop of African ancestry was black. What Gross does, however, in focusing our attention on trials, is show that the rules of race as practiced in local communities had very little to do with the law as written. In fact, what mattered far more than abstract notions of blood quantum was simply common sense and community understanding—did this person look white, or perhaps more importantly, did they *act* white? For men, did they vote, muster in the militia, serve on juries, or perform other aspects of civic life? For women, did they demonstrate their sexual virtue by maintaining good reputations of chastity and so forth? By examining how local juries answered these questions, Gross introduces a new way to think about race and its history and demonstrates that the rigid rules so carefully drawn by the legislatures and so diligently researched by a generation of legal historians were actually much more fluid and contested than we ever thought. Race, as Gross says in an enlightening passage, was not only something people “*were*, it was something they *did*.”<sup>7</sup>

At the very least, the result of all this is that Gross has presented us

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5. See *id.* at 640–43 (noting the differing approaches to the study of race and slavery, including the sources and methods used by social and legal historians).

6. GROSS, *supra* note 1, at 10.

7. *Id.* at 53.

with a much more complicated picture of race and identity than traditional accounts allow. But her work surely goes deeper than that: through her methodology and her evidence, Gross has forced us to rethink how we talk about these issues. It is not blood quantum, but performance. It is not paternalism or capitalism, but both, or perhaps neither, or perhaps all of that and much more.<sup>8</sup> In the local courthouse, men and women shaped and created the law in cases like Morrison's to fit their conceptions of what was right and just, and their interpretations often reflected less the official rules and policies than they did the contradictions and conflicting interests that made up their own lives. Viewed this way, the law of race and slavery hardly comes across as just a tool of the powerful classes, promoting interests however defined. Instead, under Gross's approach, ordinary people—farmers, laborers, merchants, housekeepers, and, in Alexina Morrison's case, even slaves—emerge as active participants in defining the rules that governed them, pushing the law in unexpected directions, twisting it and turning it and molding it to address their unique circumstances and their own experiences. "Race," Gross sums up, "was created and re-created every day through the workings of community institutions and individuals in daily life."<sup>9</sup>

### III. MINOR HICCUPS IN *WHAT BLOOD WON'T TELL*

Having set up a view of race that elevates indeterminacy over certainty, conflict over consensus, Gross nonetheless finds overarching patterns in how various communities defined and dealt with race over time. One of the most crucial junctures, she argues, was the Civil War. Prior to then, Gross posits that race was largely a matter of performance, with whiteness defined and obtained by exercising the rights and responsibilities of a citizen of free society.<sup>10</sup> Here, Gross is careful to point out that not all communities would have agreed on race's essential characteristics, with each trial raising troublesome questions about how much weight to give to each act of civic participation (for men), or of purity or moral virtue (for

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8. See Gross, *supra* note 4, at 643–44 (arguing that trial records, in the hands of historians interested in both law and culture, have the potential to break down the older historical debates—including whether Southern slaveholders were paternalists or capitalists—that have come to dominate the discourse on race and slavery).

9. GROSS, *supra* note 1, at 10.

10. *Id.* at 9 ("In the middle decades of the nineteenth century, both the science and the performance of race became increasingly important to the determination of racial status."); *id.* at 78 ("Under slavery, performance of civic virtue (for men) or sexual purity (for women) had been the key to establishing a white identity."). See chapters 1 and 2, *id.* at 16–72, for further discussion of race as performance.

women), or lack thereof.<sup>11</sup> But at their core, trials of racial identity in the antebellum era rested on a person's public and private acts. Following the Civil War, Gross maintains, trials shifted away from evidence of performance to evidence of associations, with race being determined by the company people held.<sup>12</sup> Gross ties this shift into the emerging social order that sought both to deny and to eliminate "race mixing," a practice that was inevitable where slaves worked in the fields and in the homes of their owners.<sup>13</sup> During Reconstruction and Jim Crow, however, after whites purposefully drew social and legal lines separating the races, logic dictated that "[p]eople who had associated with whites must be white themselves, just as people who had associated with blacks had to be black."<sup>14</sup>

Yet, for all the intellectual sense her argument makes, I found myself puzzled over the actual differences in proof introduced at these trials. Indeed, far from a transformation in how people adjudicated black-white identity, it seems that evidence of performance *and* associations (along with a hodgepodge of other evidence) was introduced throughout both eras. Two examples should suffice, both drawn from Gross's own retelling of the cases. The first involves Abby Guy, a woman like Alexina Morrison who sued for her freedom in the 1850s in Arkansas on the ground that she was white. Among other evidence, Richard Stanley testified about Abby's associations, in an era that was supposed to be about performance, that she "visited among white folks, and went to church parties, etc.," and that her daughter "boarded out" at the local school.<sup>15</sup> Another witness, Keightly Saunders, agreed. He testified that Abby "visited among the whites as an equal."<sup>16</sup> After the Civil War, we again see evidence that does not fit the pattern Gross describes, with evidence of performance coming into trials that were supposed to be about associations. In Martha Bolton's case, for example, which came to trial in Tennessee in the 1870s, the court considered whether her grandfather had "acted like a white man," with

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11. *See id.* at 57 (noting that participants in trials did not have racial definitions "ready in their minds before the trial began" and that "jurors and judges struggled over these definitions, creating and re-creating racial categories with every decision").

12. *Id.* at 10 ("After the Civil War, individuals in the courtroom increasingly emphasized race as association, an understanding of the concept that could make sense only in a segregated world, in which people associated only with those of their own race."). *See also id.* at 78 ("Under Reconstruction and Jim Crow, separation became the key to whiteness."). *See* chapter 3, *id.* at 73–110, for further discussion of race as association.

13. *Id.* at 73 ("Free people of color—most of whom had some European ancestry—were visible and constant reminders of the race mixing that was an inevitable part of this intimate domination of master over slave.").

14. *Id.* at 78.

15. *Id.* at 37.

16. *Id.*

witnesses testifying that he was “a citizen and voted in the elections” and that he “always mustered [in the militia] until he got too old.”<sup>17</sup> There was also testimony about Martha’s mother being a “lewd woman,” clear evidence about whether she performed white female virtue.<sup>18</sup>

Thus, far from exemplifying two different eras, Abby Guy’s and Martha Bolton’s cases seem to represent similar—although uniquely fascinating—instances of local communities sifting through a variety of evidence to solve the elusive question of race. In each instance, evidence of performance was considered alongside evidence of association. Added to the mix might have been a bill of sale or a will or a marriage license. Medical experts, schooled in the art of discerning one race from the other, may have lectured on the finer points of physiology or craniology. Perhaps the claimant made herself available to the jury so it could judge for itself the significance of the wisp of a curl or the arch of a foot. But this only makes sense. After all, we cannot forget that these were *real* people trying to win *real* cases, opening up their lives in the hopes of maintaining the status quo or perhaps obtaining something better. As such, whether before or after the Civil War, whether in Arkansas or Tennessee, the evidence they presented naturally and invariably took the form of whatever helped them.

But surely Gross knows this, which makes her decision to organize her analysis along a linear narrative—from “race as performance” to “race as association”—somewhat surprising.<sup>19</sup> As her own methodology teaches us, life at the local level did not operate in neat categories and progressive steps. Life was far messier than that. It stopped and turned and backed up and moved forward. The answer people gave in the backwoods of Arkansas may have differed significantly from the opinion in the streets of Charleston. Jump forward in time and the results look even less certain. Even in the same community, individual circumstances may have dictated different results. “[I]t may be well and proper, that a man of worth, honesty, industry and respectability, should have the rank of a white man,” Judge Harper of the South Carolina Supreme Court famously declared, “while a vagabond of the same degree of blood should be confined to the inferior caste.”<sup>20</sup> As we venture from the tobacco fields of the Chesapeake to the cotton culture of the Deep South, and as we make our way from

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17. *Id.* at 82 (alteration in original).

18. *Id.* at 85.

19. Indeed, Gross’s observations about individual cases do not always match up with her overarching narrative. For example, she notes that Abby Guy’s witnesses focused on her “social identity, her associations with white people, *and* her performances.” *Id.* at 37 (emphasis added).

20. *State v. Cantey*, 20 S.C.L. (2 Hill) 614, 616 (1835).

subsistence farming in the 1840s to sharecropping in the 1870s, it becomes clear why racial identity was never fixed. Life, simply put, got in the way.

Admittedly, this uncertainty has the potential to create problems for such an ambitious undertaking as Gross's work, and I am tempted to suggest that the sheer scope of her study gets in the way of what makes Gross's methods so intriguing in the first place. This is not to say that I am entirely convinced that Walter Johnson had it right: that, if we follow the trail of local records down the rabbit hole, it leads inevitably to one place, "complete confusion."<sup>21</sup> But the intense localism of trial studies does caution against the types of general conclusions and broad theoretical frameworks we sometimes see in Gross's work, encouraging us instead to celebrate the constant tensions and inherent contradictions of everyday life.

In fact, in my view, Gross is at her best when she is deep into the stories, quoting freely from witness testimonies and jauntily playing with our assumptions about what should have mattered. A fantastic writer, Gross wields a unique talent for involving the reader in the story, turning obscure and difficult-to-read court files into real-life events. And, surely, we are better off because of it. Through her, we get to push open the doors of county courtrooms and take our seat next to the observers, learning not only what they thought, but also what we might have done. "Today," Gross writes, "we like to think that we understand race, that the categories of 'black man' and 'white man' are self-evident, essences that common sense can immediately discern. Yet our own definitions are often just as fragmented, uncertain, and provisional as those of the antebellum era."<sup>22</sup> From police stops now to suits for freedom then, race has always been a terribly slippery concept, and Gross's insights and details serve as much to clarify as they do to complicate.

But this does lead me to one question, perhaps a nuanced and picky one, but one I believe important: Where, in the midst of these trials, are the lawyers? Surely Gross, as a lawyer herself, appreciates the impact a good lawyer can have on a case, knowledgeable not only about the legal rules, but also about how to craft a favorable story from the evidence. But lawyers are noticeably absent from her discussions of Alexina Morrison, Abby Guy, and most other nineteenth-century cases.<sup>23</sup> The oversight

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21. Walter Johnson, *Inconsistency, Contradiction, and Complete Confusion: The Everyday Life of the Law of Slavery*, 22 *LAW & SOC. INQUIRY* 405, 409 (1997) (book review).

22. GROSS, *supra* note 1, at 57.

23. The lack of discussion of nineteenth-century lawyers stands in marked contrast to later chapters, where, for example, Gross introduces us to some of the civil rights lawyers representing Mexican Americans and discusses their litigation strategies. *See id.* at 274–93.

cannot simply be that they were not known; the trial records routinely listed attorney names, and the briefs they filed would have confirmed any doubts about who they were. Moreover, we could learn more about these lawyers from tax records and census records, along with other cases, providing some insight into their family, their law practice, and perhaps even why they took the case.

And this, it seems to me, is a very intriguing question. After all, a number of these cases must have been deeply unpopular. Alexina Morrison and Abby Guy suing for their freedom, for example, forced a confrontation between a slave and a slaveholder, openly questioning the moral authority and ownership rights of individuals occupying positions of power and status.<sup>24</sup> Yet, from what we know of the period and the profession, I doubt that any of the attorneys were abolitionists or otherwise interested in challenging the system, as later civil rights lawyers might have been. Southern lawyers regularly, and understandably, came from the wealthy and landed class, making them more likely to identify with slaveholding interests than a poor or middling individual, no matter how sympathetic.<sup>25</sup> But I also do not think it is accurate to dismiss these lawyers as “hired guns.” To do so improperly discounts the role they played in deciding to bring a case, to call a witness, or to make a particular argument, and surely no one familiar with the practice of law would dismiss them so casually. To the contrary, one of the most striking aspects of these cases is how successful the lawyers (even those who may have been appointed by the court) actually were—as if, like Atticus Finch, they “aimed to defend” their clients to the best of their abilities.<sup>26</sup> Their absence from the stories thus neglects the important role they played in dusting up the issues and challenging people’s strongly held beliefs, and ignores the impact they would have had in shaping and creating race.

To be sure, this persnickety comment has the potential to undo more than it intends, because if we start shifting the pieces in Gross’s analysis—if we start adding the attorneys or someone else to the equation—we also risk tinkering with the conclusions. From that, some may object further, arguing that Gross’s entire narrative analysis would break down by

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24. See IRA BERLIN, *MANY THOUSANDS GONE: THE FIRST TWO CENTURIES OF SLAVERY IN NORTH AMERICA* 97–98 (1998) (noting how the slaveholder’s “authority radiated from the great estates to the statehouses, courtrooms, countinghouses, churches, colleges, taverns, racetracks, private clubs, and the like”).

25. See Jason A. Gillmer, *Poor Whites, Benevolent Masters, and the Ideologies of Slavery: The Local Trial of a Slave Accused of Rape*, 85 N.C. L. REV. 489, 537–41 (2007) (discussing the background of an attorney representing a slave accused of a crime).

26. HARPER LEE, *TO KILL A MOCKINGBIRD* 187 (Harper Collins 1999) (1960).

becoming too dependent on the storyteller. After all, the historian in the role of the storyteller is the one deciding which cases to discuss and which voices to privilege. But what some might criticize as a fatal flaw I find to be some of the most rewarding and exciting parts of Gross's approach.<sup>27</sup> For me, sifting through the evidence, rearranging it, and trying out new formulations is what ultimately allows us to gain new insight into the past, and that, in the end, is arguably the most lasting contribution of Gross's work. By forcing us to consider the evidence in a new light, by holding it up and turning it over, she has forced us to rethink and reconsider the entire historical terrain of race.

#### IV. APPROACHING RACE FROM THE MARGINS: THE STUDY OF TRI-RACIAL FAMILIES

While this Essay is not meant to exhaust the list, I think some of the most intriguing possibilities for future inquiries come in Gross's discussion of the so-called "tri-racial isolates," the sometimes large but distinct groups of families of European, African, and Indian ancestry.<sup>28</sup> What is particularly fascinating about these groups is that they defy easy categorization, traversing the lines of race and slipping in and out of expected roles. Sometimes labeled as white, they were more often classed as free people of color. Yet it is far from clear that this designation proved to be a significant or daily disability, at least during the years before the Civil War. Gross hints at as much in her discussion of the trial of Jacob Perkins, a "Melungeon" whose identity was questioned in the 1850s.<sup>29</sup> Some thought he was white, perhaps of Portuguese extraction; others were convinced his character and disposition revealed "negro" ancestry. But as the community came together and debated his future, I kept wondering

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27. Indeed, Gross herself offers a solid defense to the charge. See Gross, *supra* note 4, at 684 (arguing that historians, through breadth of research and quantitative analysis, can defend their choices as both typical and representative).

28. See generally PAUL HEINEGG, *FREE AFRICAN AMERICANS OF VIRGINIA, NORTH CAROLINA, SOUTH CAROLINA, MARYLAND AND DELAWARE* (2009), available at <http://www.freeafricanamericans.com> (tracing the genealogies of free African American families using court order and minute books, census records, parish records, and other historical documents); Virginia Easley DeMarce, "Verry Slitly Mixt": *Tri-Racial Isolate Families of the Upper South—A Genealogical Study*, 80 NAT. GENEALOGICAL SOC. Q. 5 (1992) (discussing researchers' current knowledge of tri-racial families and suggesting new research methods); Gary B. Mills, *Tracing Free People of Color in the Antebellum South: Methods, Sources, and Perspectives*, 78 NAT. GENEALOGICAL SOC. Q. 262 (1990) (tracing the histories of tri-racial families and recommending legal, civic, ecclesiastical, and other records that researchers can utilize to learn more about these peoples).

29. See GROSS, *supra* note 1, at 64–70 (discussing the contested identity and origins of Perkins and other Melungeons).

about his past. Following the characteristic patterns of these groups, did he come to Tennessee with others members of his extended family and other families of known tri-racial descent? If so, when did they arrive in the area, and did they participate in the building of roads and the construction of the town along with their white neighbors? How did their wealth compare to that of others in the area? Did they own land? How about slaves? Were they involved in other disputes, and how did they fare? In short, did their race matter, either to them or to their neighbors?

The point being that, as we shine a light on the edges of society and examine the lives of the Perkins and some of these other tri-racial families in detail, I wonder if our views about the *significance* of race will be as much in flux as our notions about the *meaning* of race. Gross teases us with an answer; she says that race became an issue only when a person made someone “mad.”<sup>30</sup> But the analysis surely needs to go deeper than that if we hope to understand the life and times of these families and the impact they had on their communities. If we tackle the subject with as much vigor and responsibility as Gross, and if we learn from her teachings, I suspect that we will find that their experiences add more than just a layer of complexity to the basic assumption that race was always foremost in people’s minds. Like Gross discovered in the creation of race, my guess is that local communities handled the issue differently, with some running them out of town, while others welcomed them as peaceable and productive members.

Some of my own research into the amazing Ashworth clan of Texas—distant relatives of Jacob Perkins—suggests this as a possibility, and with the reader’s indulgence, perhaps I could explain what I mean.<sup>31</sup> After migrating from South Carolina to Louisiana in the first decade of the nineteenth century, the Ashworths crossed the Sabine River into southeast Texas in the early 1830s, while Texas was still part of Mexico.<sup>32</sup> There, the Ashworths helped carve a community out of the dense forests and swampy

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30. *Id.* at 65.

31. See Jason A. Gillmer, *Shades of Gray: The Life and Times of a Free Family of Color in Antebellum Texas* (Aug. 13, 2009) (unpublished manuscript, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1448739](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1448739)). In 1810 and 1811, Mary Ashworth married George Perkins, James Ashworth married Mary Perkins, and Jesse Ashworth married Sarah Perkins. Marriage Certificate of (Mary) Polly Ashworth and George Perkins (Dec. 4, 1810); Marriage Certificate of James Ashworth and Mary Perkins (Sept. 23, 1811); Marriage Certificate of Jesse Ashworth and Sarah Perkins (Oct. 3, 1810) (collection of St. Landry Parish Civil Court) (on file with author).

32. See Headright Certificate for William Ashworth, No. 111 (Jefferson County, Mar. 5, 1838) (collection of Sam Houston Regional Library and Research Center) (on file with author) (indicating that he arrived in 1831).

lowlands along the Neches River, near present-day Beaumont. Within a few years, they joined arms with their fellow Texans and fought valiantly for their independence from Mexico.<sup>33</sup> In the ensuing years, the Ashworths—identified as people of color, “though nearly white”<sup>34</sup>—rose in both their wealth and social standing. William Ashworth, one of several siblings, operated a ferry (the dominant mode of travel at the time) along the rivers and bays, charging enough per passenger and their possessions to earn a respectable living.<sup>35</sup> The Ashworths also raised cattle and grew crops, with one brother becoming the largest stock raiser in the entire county in the decade before the Civil War.<sup>36</sup> Like others of their status, they also owned slaves—not relatives, but human beings that they bought, sold, and passed on to their heirs—just like their white counterparts.<sup>37</sup>

Records further suggest that at the same time Texas was clamoring to become a slave society, the Ashworths managed to create space for themselves at the margins of a black-white world. One of the most fascinating strings of events occurred in 1840 after the Texas legislature, intent on aligning race with status, ordered all free people of color out of the Republic.<sup>38</sup> Soon thereafter, the Ashworths turned to their friends and neighbors for support, drawing on almost a decade of good will. The

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33. See Application for Veteran Land Certificate, Delaide Ashworth, Widow of William Ashworth, Voucher File No. 1110, at B (May 5, 1884) (affidavit of Delaide Ashworth) (collection of Texas General Land Office) (on file with author) (indicating that William served in the Texas army during the fall of 1835).

34. *Journals of the H.R. of the Seventh Cong. of the Republic of Texas, Convened at Washington on the 14th Nov., 1842*, 7th Cong. 63 (Tex. 1843) (statement of Jesse Grimes, Chairman of the Comm. on the State of the Republic).

35. See Jefferson County Commissioner’s Court Minute Book “A,” at 5–7 (Jan. 1838) (collection of Jefferson County Civil Court) (on file with author) (approving Ashworth’s application for a license, “authorizing him to continue his ferry over the two Bayous and the river Neches”); Jefferson County Commissioner’s Court Minute Book “A-2,” at 3–4 (Feb. 1838) (collection of Jefferson County Civil Court) (on file with author) (detailing the pricing scheme).

36. See Manuscript Census Returns, Schedule 4.—Production of Agriculture, Jefferson County, Tex., in BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, POPULATION SCHEDULES OF THE SEVENTH CENSUS OF THE UNITED STATES (1850) (listing Aaron Ashworth as the largest cattle raiser in the entire county, with 2570 head). Abner Ashworth was the next largest in the family, with 975; in the same year, William owned 900, Joshua 550, and David and Aaron Jr. 170 each. *Id.*

37. See Manuscript Census Returns, Schedule 2.—Slave Inhabitants, Jefferson County, Tex. 819, in BUREAU OF THE CENSUS, *supra* note 36 (listing Aaron Ashworth as the owner of six slaves, Abner three, William two, and Joshua one). Copies of deed records in which the Ashworths bought and sold slaves can be found in the Jefferson County Civil Court and the Orange County Civil Court. For a general discussion of slave ownership among free people of color, see IRA BERLIN, *SLAVES WITHOUT MASTERS: THE FREE NEGRO IN THE ANTEBELLUM SOUTH* 269–75 (1974).

38. Act approved Feb. 5, 1840, 4th Cong., R.S., § 1, 1840 Repub. Tex. Laws 151, reprinted in 2 H.P.N. GAMMEL, *THE LAWS OF TEXAS: 1822–1897*, at 325 (Austin, The Gammel Book Co., 1898). The Act ordered all free people “who are now in this Republic” to leave by the first of January, 1842, unless they obtained express permission of the legislature. *Id.* at 326–27.

subsequent petition submitted on their behalf called them “peaceable and respectable citizens” and noted how they had “contributed generously to the advancement of the Revolution.”<sup>39</sup> Some of the signers were prominent citizens; others were of lesser fame. But all agreed that it was both unfair and unjust to “force[] them from the Country whose battles they have fought and whose independence they assisted in achieving.”<sup>40</sup> Congress was persuaded. Several months later, in a testament to the Ashworths’ power and influence, Congress passed a law—later dubbed, of all things, the “Ashworth Act”—exempting “William Ashworth, Abner Ashworth, David Ashworth, Aaron Ashworth, Elisha Thomas, and all free persons of color, together with their families, who were residing in Texas on the day of the declaration of independence” from the general ban.<sup>41</sup>

Other events in the lives of the Ashworths demonstrate the elusiveness of race, upending some of our common assumptions about what race might have meant. The official position toward free people of color, for example, needs little elaboration; Judge Lumpkin of the Georgia Supreme Court summed it up as well as anyone:

In no part of this country, whether North or South, East or West, does the free negro stand erect and on a platform of equality with the white man. . . . To him there is but little in prospect, but a life of poverty, of depression, of ignorance, and of decay. He lives amongst us without motive and without hope. His fancied freedom is all a delusion.<sup>42</sup>

Yet, soon after Congress permitted the Ashworths to remain in Texas, it carved out another exception for their benefit. This time, the problem had to do with land, as a few years earlier the Ashworths had been denied the headright promised to every early settler. The stated reason: they were “coloured persons,” and hence not citizens under the Texas constitution.<sup>43</sup> Once again, however, the Ashworths found support from their neighbors. True enough, they admitted, the Ashworths suffered from a “taint of blood.”<sup>44</sup> But the seventy-odd neighbors who signed the petition put this aside, indicating that the Ashworths were “good and worthy members of

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39. Memorials and Petitions to Congress, Petition of Jefferson County Citizens for Relief of Free Blacks 1, 3 (Sept. 19, 1840) (collection of Texas State Archives Commission) (on file with author).

40. *Id.* at 3.

41. Act approved Dec. 12, 1840, 5th Cong., R.S., 1841 Repub. Tex. Laws 85, reprinted in 2 GAMMEL, *supra* note 38, at 549.

42. Bryan v. Walton, 14 Ga. 185, 205 (1853).

43. Report of Commissioners to Detect Fraudulent Certificates Covering 15 Counties, Jefferson County, Tex. 447 (May 22, 1841) (collection of Texas General Land Office) (on file with author).

44. Memorials and Petitions to Congress, Petition of William Ashworth 2 (Dec. 10, 1842) (collection of Texas State Archives Commission) (on file with author).

the [c]ommunity,” deserving of the land.<sup>45</sup> Surprisingly, Congress once again agreed, and in January of 1843, the president of the Republic of Texas signed a bill directing “the Commissioner of the General Land Office to issue patents . . . to William Ashworth, Abner Ashworth, Aaron Ashworth, [and] the heirs of Moses Ashworth, deceased.”<sup>46</sup>

But perhaps the most intriguing aspect of the Ashworths’ story, and the one that illustrates how convoluted the subject of race at the local level truly was, occurred in the summer of 1856, after Sam Ashworth blasted a hole in the deputy sheriff and then smashed in his head.<sup>47</sup> The dispute had its start after the deputy accused Sam’s cousin of stealing one of his hogs.<sup>48</sup> Soon after, Sam confronted the deputy on the street and challenged him to a fight.<sup>49</sup> The deputy refused, however, probably on the ground that he thought Sam beneath him, and later charged Sam for violating a statute prohibiting “abusive language from negroes.”<sup>50</sup> So Sam hid out along the bayou that evening and killed the deputy when he approached.<sup>51</sup> But what is most interesting is that the town’s reaction did not fall along expected racial lines. To be sure, a good number of the white residents were outraged at Sam’s blatant disregard for the rules of race, and they formed mobs and indicted Sam for murder when the district court met later that fall.<sup>52</sup> But others came to his defense, apparently on the ground that the Ashworths’ long history warranted special considerations.<sup>53</sup> Indeed, in the ensuing war

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45. *Id.* at 1.

46. Act approved Jan. 16, 1843, 7th Cong., 1843 Repub. Tex. Laws 1, reprinted in 2 GAMMEL, *supra* note 38, at 875 (abstract).

47. *Disturbances in Orange County*, GALVESTON WKLY. NEWS, July 15, 1856, at 2. The events surrounding the killing were reported regularly in the newspapers through the summer and fall of 1856. In chronological order, see *Another Murder*, GALVESTON WKLY. NEWS, June 5, 1856, at 1; *Orange County*, GALVESTON WKLY. NEWS, July 8, 1856; *The Orange County Disturbance*, GALVESTON WKLY. NEWS, July 15, 1856, at 3; *More of the Orange County Difficulty*, GALVESTON WKLY. NEWS, July 29, 1856, at 1; GALVESTON WKLY. NEWS, Oct. 21, 1856, at 2; GALVESTON WKLY. NEWS, Nov. 4, 1856, at 3; and GALVESTON WKLY. NEWS, Nov. 25, 1856, at 1. A brief account can also be found in FREDERICK LAW OLMSTED, A JOURNEY THROUGH TEXAS: OR A SADDLE-TRIP ON THE SOUTHWESTERN FRONTIER 386–88 (1857).

48. *Disturbances in Orange County*, *supra* note 47, at 2.

49. *Id.*

50. *Id.*

51. *Id.*

52. See *id.* (describing how citizens formed posses and committees following the murder); State v. Sam Ashworth, No. 124, Orange County District Court Minute Book “A,” at 120 (Nov. 4, 1856) (collection of Sam Houston Regional Library and Research Center) (on file with author) (indicting Sam Ashworth and Jack Bunch for murder). The grand jury also indicted Henderson Ashworth as an accessory before the fact. State v. Henderson Ashworth, No. 126, Orange County District Court Minute Book “A,” at 120 (Nov. 4, 1856) (collection of Sam Houston Regional Library and Research Center) (on file with author).

53. See *Disturbances in Orange County*, *supra* note 47, at 2 (discussing how Ashworth’s

that engulfed the county during the summer months, the Ashworths managed to turn a small community upside down, forcing a confrontation between the ideologies of race and the practical realities of daily life.

The potential for future studies based on these families, however, need not end with questions about the significance of race. Through Gross's methodology, we may also find that an in-depth look at these families will alter our discussions of identity politics and the phenomenon of passing. As Gross notes, in the past century many tri-racial families have gone out of their way to deny their African past, creating fantastic origin myths to help account for mistaken impressions.<sup>54</sup> The reason seems obvious enough. In a world that privileged whiteness over everything else, casting oneself as white—or at least “not black”—had enormous consequences: “personal freedom or enslavement, a good education for one's children, the right to marry the person of one's choice, the right to be a citizen.”<sup>55</sup> But notably, the antebellum Ashworths never denied their African past; they never filed suit or otherwise litigated their identity like Jacob Perkins did. In fact, on at least one occasion Abner Ashworth used it to his advantage, invoking the defense that he “was of African descent by common report” to invalidate a contract obtained through duress.<sup>56</sup> From this, we might inquire further into the psychology of race, viewing the question from the standpoint of a person of mixed-race descent rather than from the perspective of a community seeking to shore up the ambiguities in the social order. It may be that the Ashworths and others like them accepted their racial designation but denied its implications. After all, as slaveholders, they clearly distanced themselves from the mass of others who shared a common ancestry, choosing instead to identify with those who shared similar goals and aspirations. Perhaps, then, it became unnecessary to pass because they had successfully charted a middle course.

Such a conclusion also raises interesting questions about identity politics today. As Gross notes, in our current environment, people often

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“friends immediately rallied for the purpose of protecting him against any party that might attempt his arrest”).

54. See GROSS, *supra* note 1, at 118. See generally Virginia Easley DeMarce, *Looking at Legends—Lumbee and Melungeon: Applied Genealogy and the Origins of Tri-Racial Isolate Settlements*, 81 NAT. GENEALOGICAL SOC. Q. 24 (1993) (describing origin myths in further detail).

55. GROSS, *supra* note 1, at 15.

56. See Transcript of Trial at 14, *Hillebrant v. Ashworth*, No. 206 (Tex. Dist. Ct. Jefferson County May 1855) (holding up his race as a defense to void a payment on a note, allegedly extracted after the holder threatened to sue Ashworth for slander), *aff'd*, 18 Tex. 307 (1857) (collection of Texas State Library and Archives Commission) (on file with author). As Ashworth put it in his answer, the fact that he “was of African descent by common report was used to excite his fears that should a suit be instituted against him by said Barnes a white man he would be stripped of his property.” *Id.*

assert “racial identities with pride” as an effort “to band together in solidarity, as well as to preserve the institutions and traditions of communities under pressure to assimilate.”<sup>57</sup> But there is also an increasing movement, illustrated by events such as the addition of the multiracial category to the 2000 Census,<sup>58</sup> for people of mixed-race descent to celebrate multiracialism.<sup>59</sup> For these individuals, it is not a question of black or white or American Indian or Latina, but a combination of possibly all of the above. Made newsworthy by individuals like Tiger Woods and Barack Obama, the topic has reached into everyday affairs and discussions, with people often choosing for themselves to highlight all aspects of their racial background. To be sure, not all agree with the changing tide. Opponents often argue that multiracialism will dilute civil rights laws and foster racism by valuing white ancestry over nonwhite ancestry.<sup>60</sup> These are admittedly substantial concerns, but the goal is not to resolve them here. Rather, speaking as a parent of two biracial children, the goal is to use Gross’s methodology to get us thinking about the implications of having fluid identities in a racially rigid world. How the antebellum Ashworths and others like them identified themselves seems a worthy subject of inquiry, as their views may affect our discussions of race identity today.

## V. CONCLUSION

In the end, Gross is absolutely right: race has been a “dynamic force” in this country’s history.<sup>61</sup> Despite claims that we know race when we see it—much like “the alligator . . . knows three days in advance that a storm is brewing”<sup>62</sup>—race has proven to be a tremendously elusive subject with even greater implications. In *What Blood Won’t Tell*, Gross paradoxically clarifies the subject while muddying it up. By taking us into the local

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57. GROSS, *supra* note 1, at 300–01.

58. See Nathaniel Persily, *Color by Numbers: Race, Redistricting, and the 2000 Census*, 85 MINN. L. REV. 899, 925–38 (2001) (discussing the addition of the multiracial category to the 2000 Census and the possible legal consequences thereof).

59. See Susan R. Graham, *The Real World*, in THE MULTIRACIAL EXPERIENCE: RACIAL BORDERS AS THE NEW FRONTIER 37 (Maria P. P. Root ed., 1996) (calling for a multiracial category on demographic information collection forms); Deborah Ramirez, *Multicultural Empowerment: It’s Not Just Black and White Anymore*, 47 STAN. L. REV. 957, 986–88 (1995) (discussing the benefits of multicultural empowerment).

60. See Tanya Kateri Hernandez, “Multiracial” Discourse: Racial Classifications in an Era of a Color-Blind Jurisprudence, 57 MD. L. REV. 97, 118–22, 147–51 (1998).

61. GROSS, *supra* note 1, at 298.

62. *Id.* at 2 (quoting Transcript of Trial at 81, *Morrison v. White*, No. 442 (La. New Orleans Dist. Ct. Sept. 1858) (collection of Earl K. Long Library, Special Collections and Archives, University of New Orleans, Supreme Court Records), *rev’d*, 16 La. Ann. 100 (1861)).

courtrooms, we see how race was never imposed from above; instead, through everyday disputes and common interactions, men and women from all walks of life participated in the creation of race and helped adjudicate its boundaries. But locally made law makes for disparate results, leaving us with the tough realization that a person treated as one race might be treated as another in a different place or time. Gross's analysis, however, reminds us that the journey itself is important, as she simultaneously points out new paths for us to pursue.