THE "COMMON SENSE" OF RACE

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I. INTRODUCTION

In *What Blood Won't Tell: A History of Race on Trial in America*, Ariela J. Gross provides a compelling and nuanced account of race in America.[1] Through her examination of "racial trials"—litigation in which racial identification plays a crucial role—Gross ties together the personal, social, and political dimensions of racial identity and classification. This discussion provides an important new perspective on the study of race in this country.

Earlier studies of racial classification have focused on the meanings of statutory racial categories. Gross, however, centers her analysis on the formation and reaffirmation of racial categories as a primarily social process. Gross draws from numerous racial trials—spanning slavery in the antebellum South to modern-day Mexican Americans grappling with "whiteness"—in order to survey the origins and history of "black" and "white" as categories in American life.

In analyzing racial trials, Gross focuses upon the "fringes" of the traditional black and white racial categories. Some of her accounts—of Alexina Morrison and Sally Miller, for example—center on women who challenged their place within the overall racial scheme. Others tell of individuals raising group challenges—for example, the "celebrated Melungeon case," as well as the trials of Takeo Ozawa and Bhagat Singh Thind, who sought naturalization as people of Japanese and East Indian origin, respectively. In both these specific-individual and individual-for-group challenges, individuals sought a legal determination of their racial

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

identity—asking the courts to tell them where they fit in America's racial regime, which had traditionally classified people as simply either black or white. In her examination of racial identification, Gross looks not only at how such identity claims were ultimately decided under American law, but also at how racial identity played out in people's everyday lives.

Central to Gross's analysis is what she terms the "'common sense' of race."[2] In explaining the common sense of race, Gross reveals that "[t]wo contradictory notions—race as clear-cut identity (with the ever-present possibility of deception) versus race as ever-shifting category (with the ever-present possibility of confusion)—together make up our contemporary 'common sense' of race."[3] Gross goes on to define racial common sense as "what we know without being aware that we know it" and posits that "this racial common sense now appears so self-evident to most Americans—whether we consider ourselves white, black, or 'other'—that it is virtually impossible to imagine a world in which people thought about race in any other way."[4]

In this review, I draw from Gross's discussion of racial common sense and examine how the common sense of race approach differs from the other treatments of race. Gross uses the racial common sense model in two different ways. First, as noted above, the common sense of race can be understood as the broad set of racial understandings that are so firmly established in our world view that they are never discussed. Examining these implicit views requires considerable analytic and sometimes emotional effort. The second model of racial common sense involves the use of common sense as a specific evidentiary methodology, admissible in court, to assist racial identification. This review focuses upon the second, more specific usage—"common sense racial identification."

I believe that Gross's success in describing and documenting the common sense of race and common sense racial identification is a significant contribution to the study of race in America. Common sense racial identification is an important alternative mode of racial identification that captures the intricate link between private and informal incidents of racial identification, and formalized racial categories. Further, common sense racial identification helps explain the racialization of individuals who do not fit into either of the traditional (black or white) racial categories found in American racial practice. At the end of this review, I will offer my

2. GROSS, *supra* note 1, at 16.
3. *Id*.
4. *Id*.

assertion that common sense racial identification lives on in modern-day calls for racial "colorblindness."

II. THE COMMON SENSE OF RACE AS AN ALTERNATIVE MODE OF RACIAL IDENTIFICATION

In *What Blood Won't Tell*, Gross maps the various ways courts assigned race to individuals in racial classification trials.[5] Gross begins with an account of the trial of Alexina Morrison, a slave from Jefferson Parish, Louisiana who fled from her master, surrendered herself to the parish jail for protection, and convinced her jailer, as well as other residents of Carrollton, Louisiana, that she was white and had been wrongly kidnapped into slavery.[6] In Alexina's trial and subsequent stories, we find examples of different methodologies used to identify a person's racial classification.

First, Gross introduces the "race as clear-cut identity" approach to racial classification.[7] This approach adopts the logic that it is seemingly "nonsensical to suggest that racial identity could be such a source of conflict when for so many people racial identity seems obvious, unquestionable. A slave with very dark skin and African features was unlikely to be the subject of racial identity litigation."[8] Second, Gross discusses the "race as ancestry/blood quantum" approach, in which "legal rules about . . . identity [are] formulated in terms of ancestry (such as 'one great-grandfather an African')."[9] Third, Gross posits the "race as performance" view of racial classification.[10] This approach played a vital role in Alexina's case, as "[t]he participants in her trial believed that they had to read not only bodies but also actions, demeanor, character, all the ways in which Alexina might *perform* her [racial] identity."[11] Fourth, Gross delves into "racial science"—an approach originating in the antebellum period in which "doctors presented themselves to courts as experts on racial identity, claiming a monopoly on scientific racial knowledge."[12] Fifth, Gross addresses the "race as association" approach, as "[u]nder

5. *See generally* Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1 (1991) (mapping racial practices found in Supreme Court opinions, namely, status-race, formal-race, historical-race, and cultural-race).

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

7. *Id*. at 16.

8. *Id*. at 11.

9. *Id*. at 3.

10. *Id*. at 70.

11. *Id*. at 3.

12. *Id*. at 10.

Reconstruction and Jim Crow [racial segregation], separation became the key to whiteness," people who had "associated with whites must [have been] white themselves, just as people who had associated with blacks had to [have been] black."[13] Completing her remarkable survey of approaches to racial identification, Gross discusses a sixth approach—"race as common sense." Alexina took advantage of this approach by calling "white witnesses who swore their certainty that she was white, arguing that a true Louisiana native could 'always detect in a person whether that person is of African origin.'"[14]

Some of these approaches, such as blood quantum and racial science, have been well studied.[15] Racial performance has been the subject of significant recent scholarship including work by Gross herself.[16] Race as association and race as common sense, however, are new contributions by Gross. Her accounts of how these approaches have been applied in American racial trials provide a particularly coherent presentation on how different racial classification practices have been accepted and understood in the American legal system.

Although Gross addresses how the focus of racial trials has shifted and evolved during different time periods and across various regions, Gross also reveals that there is a remarkable consistency in American racial practices. These varied racial understandings and practices are easily recognizable, even though they were applied in vastly different legal and social climates over a span of one hundred fifty years. As Gross asserts in her conclusion, the familiarity of these earlier trials is not coincidental.[17] Rather, these recurring themes persist because we continue to live under a racial regime in which many of these earlier understandings live on as part of our common sense of race.

One particularly troubling aspect of common sense racial identification is that racial common sense unjustly privileges whites. Gross explains the role of white privilege in both creating and *perpetuating* racial classifications:

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13. *Id*. at 78.

14. *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)).

15. *Id*. at 223–30 (discussing the history of racial science from hierarchal "natural science" to antiracist cultural anthropology).

16. Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 YALE L.J. 109, 174 (1998) (examining how race was performed by trial witnesses throughout the nineteenth century).

17. *See* GROSS, *supra* note 1, at 294–306.

> Ultimately we have to ask why communities and legal institutions invested so much time and effort in determining racial boundaries. Why did people care so much about whether an individual or group counted as "white," "negro," "Indian," or something else? A lot was at stake in these cases: 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. In every one of these cases, racial line-drawing served to uphold white privilege: the enslavement of African Americans, the appropriation of Indian lands, the exclusion at the U.S. borders of those deemed unworthy of citizenship.[18]

The common sense of race establishes the authority to declare another person colored—and therefore subject to racial subordination. The cases Gross discusses make clear that racial common sense was the basis for many personal as well as legal adjudications, as ordinary citizens' testimonies of common sense racial identification became available for use in court and could become an integral part of the court's decision.

In describing and analyzing the common sense of race, Gross reveals how private social meanings can become legally recognized, and formal racial classifications can be disputed and subverted. This possibility remains within a broader regime of racial classification and subordination. Note, however, that racial common sense does not *always* perpetuate racist practices; rather, racial categories informed by the common sense of race can be used for antidiscrimination purposes.[19]

III. RACIAL IDENTIFICATION AND RACIALIZATION OF OTHER "NONWHITES"

Gross's study of common sense racial identification also addresses the (oftentimes-neglected) racialization of other "nonwhites." The cases Gross discusses involve not only black-white litigation, but also cases involving individuals of mixed black-Indian ancestry, Indians in the allotment era, native Hawaiians, Asians facing immigration laws, and legally contested Mexican American racial classifications in the mid-twentieth century. These cases span over one hundred fifty years and the entire geographical

18. *Id*. at 14–15.

19. *See, e.g*., Civil Rights Act of 1964, Pub. L. No. 88-352, § 703, 78 Stat. 241, 255–57 (codified at 42 U.S.C. § 2000e-2 (2006)) (barring under Title VII discrimination in employment on the basis of race and national origin, thereby implicitly recognizing the existence and identifiable nature of racial categories); Civil Rights Act of 1866, ch. 31, §§ 1–2, 14 Stat. 27, 27 (referencing racial categories in mapping the contours of equal protection); St. Francis College v. Al Khazraji, 481 U.S. 604, 613 (1987) (holding that 42 U.S.C. § 1981 illustrates Congress's intent to protect *identifiable* classes of persons from intentional discrimination who were targeted based on ethnicity or ancestry).

scope of the United States.

In the existing literature of racial studies outside of the "black-white paradigm," there is often an unstated assumption that race will carry the same meaning for all nonwhite races, even across different legal and social settings. However, in my own work on Asian Americans and race, I have rejected the automatic assumption that the racialization of whites, blacks, and Asians are identical. Rather, I have examined how the process of differentiating whites from Chinese, Japanese, and other Asians is both similar to and different from white-black racialization.[20]

In chapter 7, "Racial Science, Immigration and the 'White Races,'" Gross asserts that immigration cases should be analyzed as part of our existing understandings of whiteness and black-white common sense racialization. To illustrate this point, Gross focuses on federal naturalization statutes and decisions with racial prerequisites.

The phrase "common understanding" in Supreme Court racial jurisprudence can be found in two decisions—*Ozawa v. United States*[21] and *United States v. Thind*.[22] These cases are unusual in their explicit discussion of white classification in federal statutory law. More specifically, *Ozawa* and *Thind* address racial prerequisites for naturalization under federal laws limiting naturalization to "free white persons."[23] Despite evidence that Ozawa "had appropriately performed

20. *See generally* Neil Gotanda, *Asian American Rights and the "Miss Saigon Syndrome," in* ASIAN AMERICANS AND THE SUPREME COURT: A DOCUMENTARY HISTORY 1087 (Hyung-chan Kim ed., 1992) (discussing how the racialization of Asian Americans differs from racializations occurring in the traditional black-white paradigm); Neil T. Gotanda, *Citizenship Nullification: The Impossibility of Asian American Politics*, *in* ASIAN AMERICANS AND POLITICS: PERSPECTIVES, EXPERIENCES, PROSPECTS 79 (Gordon H. Chang ed., 2001) (same); Neil Gotanda, *Exclusion and Inclusion: Immigration and American Orientalism*, *in* ACROSS THE PACIFIC: ASIAN AMERICANS AND GLOBALIZATION 129 (Evelyn Hu-DeHart ed., 1999) (same).

21. Ozawa v. United States, 260 U.S. 178 (1922).

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

23. These racial perquisites drew from the Naturalization Act of 1790, the first statute granting formal citizenship. Naturalization Act of 1790, ch. 3, § 1, 1 Stat. 103, 103 ("[A]ny alien, being a free white person . . . may be admitted to become a citizen . . . ."), *amended by* Naturalization Act of 1870, ch. 254, § 7, 16 Stat. 254, 256 ("[T]he naturalization laws are hereby extended to aliens of African nativity and to persons of African descent."). *See also* GROSS, *supra* note 1, at 212.

Note that race-specific naturalization statutes attracted little attention from the federal courts until after the mid-nineteenth century with the arrival of Chinese immigrants and other national groups whose physical features arguably excluded them from the category of "free white persons." In his groundbreaking book *White by Law*, Ian Haney-López analyzes immigration cases from 1878 to 1944 involving race-specific naturalization acts. IAN HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (2d ed. 2006). Haney-López observes that many of these decisions used "common understanding" or referred to the "common man" as part of their rationale. *Id*. at 5–7. Haney-López, however, does not delve too deeply into the *meaning* behind those terms. Thus, Gross is unique

whiteness,"[24] and scientific arguments that Thind was biologically "Caucasian"[25]—the Supreme Court denied both Ozawa and Thind citizenship, asserting that race must be determined by so-called common knowledge.[26] In so holding, the Supreme Court was by no means breaking new ground. Rather, the Court was simply summarizing and restating the century-old racial practices of lower state courts, which denied individuals white status—and thereby citizenship—based on the "insistence that race is something 'any white man' should know when he saw it."[27]

To better understand how common sense racialization works in the context of individuals who do not fit into either the traditional black or white racial categories, it is helpful to look at the racialization of Chinese people as reflected in American law.

An early example of how the common sense of race contributed to the racialization of Chinese people comes through the Supreme Court's affirmation of Chinese exclusion in *Chae Chan Ping v. United States*.[28] Like earlier cases addressing Chinese exclusion,[29] *Chae Chan Ping* applied a common sense understanding of race to Chinese individuals—depicting Chinese individuals as a foreign and permanently inassimilable people.

Notably, this language of permanent foreignness was adopted without justification. Rather, the courts considered the supposed inherent nature of Chinese individuals *so* obvious that it needed no explanation. In other words, Chinese foreignness was simply a matter of common sense.[30]

In *What Blood Won't Tell*, Gross reveals how the common sense racializations of Chinese individuals fit within the traditional black-white paradigm. While the courts stressed the "unity" of the white race on the white side of the black-white paradigm,[31] they hastily crammed "the black,

in her explicit analysis of racial common sense and what exactly it means to base racial classification on "common understanding" and the notions of the "common man."

24. GROSS, *supra* note 1, at 242.

25. *Id*. at 243.

26. *Id*. at 242–44.

27. *Id*. at 212.

28. Chae Chan Ping v. United States, 130 U.S. 581 (1889).

29. *See, e.g*., Fong Yue Ting v. United States, 149 U.S. 698, 731–32 (1893) (denying writs of habeas corpus to Chinese laborers who failed to obtain certificates under the Chinese Exclusion Act); Chew Heong v. United States, 112 U.S. 536, 559–60 (1884) (holding that the plaintiff could reenter the United States without a certificate because he had left the country *before* the implementation of the Chinese Restriction Act).

30. Note that this particular form of racial common sense was largely limited to the Chinese racial category. Examining how foreignness came to apply to other Asians is a separate historical inquiry.

31. *See* GROSS, *supra* note 1, at 236.

red, yellow, [and] brown races" into the black side of the black-white paradigm.[32] The early twentieth-century case of *Gong Lum v. Rice*[33] illustrates this discrepancy. In this 1927 case, the Supreme Court upheld the segregation of Chinese students living in Mississippi into black schools. Though coming after dozens of decisions addressing Chinese exclusion, citizenship, immigration and treaty rights, the *Gong Lum* Court cited almost exclusively cases involving *black* and white segregation.[34]

Although the Court rightfully noted that "[m]ost of the cases cited arose . . . over the establishment of separate schools as between *white* pupils and *black* pupils,"[35] it then concluded, without any further explanation, "we cannot think that the question is any different, or that any different result can be reached . . . where the issue is as between white pupils and the pupils of the yellow races."[36] Rather than explaining *why* "pupils of the yellow races" should be treated as black students, the Court instead gave a cursory nod to the right of states to regulate public schools and held that no Fourteenth Amendment violation had occurred.[37]

Thus, while the Supreme Court did not go so far as to explicitly label Chinese individuals *as* black, it had no problem adopting language that indiscriminately labeled nonwhites as "colored"[38]—thus ushering Chinese individuals to the nonwhite side of the black-white paradigm.

It is important to note that it was not as though the Supreme Court had no guidance in determining Chinese identity and had no choice *but* to group Chinese people with blacks. After six decades of cases involving Chinese immigration and naturalization,[39] the Court had a well-developed

32. *Id*. at 237 (quoting United States v. Balsara, 180 F. 694, 695 (2d Cir. 1910)).

33. Gong Lum v. Rice, 275 U.S. 78 (1927).

34. *Id*. at 85–87 (citing one Chinese school segregation case, Wong Him v. Callahan, 119 F. 381, 382 (N.D. Cal. 1902) (upholding segregation in a San Francisco grammar school), but numerous black school segregation cases, *e.g*., Cumming v. Richmond County Bd. of Educ., 175 U.S. 528, 545 (1899) (upholding segregation, even in the absence of black high schools); Plessy v. Ferguson, 163 U.S. 537, 552 (1896) (upholding Louisiana's segregated railway cars); Roberts v. City of Boston, 59 Mass. 198, 209–10 (1849) (upholding Boston's segregated schools)).

35. *Id*. at 87 (emphasis added).

36. *Id*.

37. *Id*.

38. *See id*. at 85 ("The case then reduces itself to the question whether a state can be said to afford to a child of Chinese ancestry, born in this country and a citizen of the United States, the equal protection of the laws, by giving her the opportunity for a common school education in a school which receives only colored children of the brown, yellow or black races.").

39. *See, e.g*., Yick Wo v. Hopkins, 118 U.S. 356 (1886) (addressing the meaning of "Chinese" under the Equal Protection Clause). *But see* Gabriel J. Chin, *Unexplainable on Grounds of Race: Doubts About* Yick Wo, 2008 U. ILL. L. REV. 1359 (arguing that *Yick Wo* concerned neither race nor racial discrimination, but rather turned on the protection of a constitutionally guaranteed property right);

sense of Chinese identity. The absence of any reference to these cases suggests that the Court was not willing to create an understanding of the Chinese racial category beyond that of "not white."

This analysis of racial common sense helps explain the evolution of the black-white paradigm into the colored-white paradigm. By refusing to consider any meaningful differences between the black and Chinese racial categories,[40] the Supreme Court revealed that the driving question behind common sense racialization is, *White or not white?*—again privileging white status at the expense of all other races. Although I limited my focus here on the common sense racialization of Chinese people, as revealed by both Gross's work and my own studies, the same occurred for numerous other groups that were denied white status based on racial common sense.[41]

IV. THE COMMON SENSE OF RACE TODAY—COLORBLINDNESS AS THE COMMON SENSE OF RACE

Litigation over racial classification is rare today. Nevertheless, the common sense of race continues on as a prevailing racial practice that privileges whites. In recent years, a common form of racial consciousness has been the use of so-called colorblindness. While a vision of colorblindness was famously asserted by Martin Luther King, Jr., in his "I Have a Dream" speech, colorblindness has only recently attained popularity in discussions about race. Today, colorblindness is not only a method of constitutional analysis,[42] but it is also the most frequent defense against accusations of racism—declaring that one did not discriminate on the basis of race because one does not even *see* race.[43]

My suggestion is that assertions of colorblindness create a "racial moment" similar to the claim of the witness in Alexina Morrison's trial who asserted that "a true Louisiana native could 'always detect in a person

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Thomas W. Joo, Yick Wo *Revisited: Nonblack Nonwhites and Fourteenth Amendment History*, 2008 U. ILL. L. REV. 1427 (arguing that *Yick Wo* was less about promoting the rights of Chinese Americans, and more about diverting the Fourteenth Amendment from its original antiracist purpose).

40. Not surprisingly, the Supreme Court also ignored the complex and open nature of the Chinese racial category itself. This is most disappointing because, as I have stressed in my work on Asian Americans, it is absolutely essential to unpack the many possible meanings of a term like "Chinese." Possible understandings of the multidimensional Chinese identity include national citizenship, cultural identity, cultural performance, national origin, language fluency, and ancestry.

41. *See generally* LAURA E. GÓMEZ, MANIFEST DESTINIES: THE MAKING OF THE MEXICAN AMERICAN RACE (2007) (providing a pathbreaking exploration of Mexican American racialization).

42. *See* GROSS, *supra* note 1, at 299–300.

43. *Id*. at 303 (noting criticism of "colorblindness, identity politics/diversity, and disaggregation of race and culture [as] unsatisfactory ways of dismantling racial hierarchy").

whether that person is of African origin,' just as 'the alligator . . . knows three days in advance that a storm is brewing.'"[44] Stated more plainly, a *white* person knows who is not white. This racial moment establishes not only that racial knowledge is based on the common sense of race, but also that only whites are capable of such racial common sense—once again creating a moment of white racial privilege. Further compounding white privilege, this assertion of racial knowledge often results in a nonwhite being placed in a subordinate position. Today, this racial moment is recreated whenever someone claims that he or she is colorblind.

To examine my suggestion that colorblindness is a moment of racial common sense, we can first analyze the process of a colorblind employment decision. As asserted in my previous work on colorblindness:

> We accept as unremarkable an employer who asserts, "Yes, I noticed that she was Black, but I did not consider her race in making my hiring or promotion decision." This technique of "noticing but not considering race" implicitly involves recognition of the employee's racial category and a transformation or sublimation of that recognition so that the racial label is not "considered" in the employer's decisionmaking process.[45]

Racial nonrecognition consists of three elements. First, there must be a *cognizable* "racial characteristic or classification."[46] Next, the characteristic or classification must be *recognized*. Finally, the characteristic or classification must not be *considered* in a decision. As I have noted in my previous analysis of racial nonrecognition, "For nonrecognition to make sense, it must be possible to recognize something while not including it in making a decision."[47]

It is important to recognize that racial nonrecognition is a technique. As I have stressed, it is "not a principle of traditional substantive common law or constitutional interpretation."[48] Racial nonrecognition takes on the racial classification "not by examining the social realities or legal categories of race, but by setting forth an analytical methodology."[49] The technique relies heavily on assertions of colorblindness, as colorblindness "suggests a seemingly neutral and objective method of decisionmaking that

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44. *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)).

45. Gotanda, *supra* note 5, at 16.

46. *Id*.

47. *Id*. at 17.

48. *Id*.

49. *Id*.

avoids any consideration of race."[50] In contemporary racial discourse, to claim to be colorblind is to posit oneself as modern, rational, and ethically superior to someone who is "race conscious" and therefore supposedly racially biased. However, colorblindness is little more than repackaged racial common sense, which traces back to antebellum times. Common sense racial identification arises in colorblindness in at least two ways. First, as noted above, colorblindness, through the unspoken technique of racial nonrecognition, involves a common sense racial identification that that must first be recognized before it can be transformed or sublimated. Second, because the nonrecognition process is based on common sense racial identification, the process is not subject to further explanation.

V. CONCLUSION

In my experience, an assertion of colorblindness can operate to preempt an informal accusation of bias, as well as provide a defense against a formal charge of racial discrimination.[51] Here, a comparison can be drawn to the witness in Alexina Morrison's trial who claimed that a white person *just knows* who is not white. Similarly, today, a white person *just knows* when a decision is colorblind and when a decision is based on racial bias. Seen as such, an assertion of colorblindness is simply a present-day iteration of the common sense of race. Challenging another's claim of colorblindness is considered rude, and more importantly, the challenger must be prepared with substantial "proof" of racial bias.

Of course, this interpretation of colorblindness as perpetuating the common sense of race and common sense racial identification is only a preliminary idea. My inquiry and its future development should in no way be seen as reducing Gross's extraordinary achievement in *What Blood Won't Tell*. Her book is rich in detail and sweeping in its historical scope. Our racial scholarship has been significantly enriched by her efforts.

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50. *Id*.

51. My personal sense—I only present it as such because proving this point would require considerable further research—is that an assertion of colorblindness is especially difficult to overcome if the person asserting colorblindness is white and in a position of authority.