Race, Law, and Comparative History

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What are we comparing when we compare law and race across cultures? This was once an easier question to answer. If we take "races" to be real categories existing in the world, then we can compare "race relations" and "racial classifications" in different legal systems, and measure the impact of different legal systems on the salience of racial distinction and the level of racial hierarchy in a given society. That was the approach of the leading comparativist scholars at mid-century. Frank Tannenbaum and Carl Degler compared race relations in the United States and Latin America, drawing heavily on legal sources regarding racial definition, manumission of slaves, and marriage.[1] They were studying relations between "white people" and "Negroes," as well as the possibility of an intermediate class of "mulattoes." But once we understand race itself to be *produced* by relations of domination, through several powerful discourses of which law is one, we are up against a more formidable challenge. We must compare the interaction of two things—legal processes and ideologies of race—in systems in which neither is likely to have a stable or equivalent meaning. Because "law" is likewise no longer as clear-cut a category as it once was; in addition to the formal law of statute books and common law appellate

1. Frank Tannenbaum, *Slave and Citizen: The Negro in America* (New York: Random House, 1946); and Carl Degler, *Neither Black Nor White: Slavery and Race Relations in Brazil and the United States* (New York: Macmillan, 1971).

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opinions, we now understand "law" to encompass a broad set of institutions, discourses, and processes produced by a larger cast of characters than solely jurists, legislators, and appellate judges.

In trying to comprehend law's role in the production of racial difference, a number of scholars have turned in recent years away from the study of statutes and high court opinions to trials in lower courts and other adjudicative processes.[2] My own recent book, *What Blood Won't Tell: A History of Race on Trial in America*, seeks to tell the history of race and racism in the United States through the lens of trials of racial identity; cases in which courts or other bodies sought to determine whether someone was black, white, or Indian.[3] I argued that these cases often turned less on legal definitions of race as percentages of blood or ancestry than on the way people presented themselves to society and demonstrated their moral and civic character. Cultural–legal histories of race and racism, which draw on trial records and other local sources, have helped to deepen our understanding of the meanings of race and racism in the everyday life of the law. Erika Bsumek's work on the production of Navajo identity through consumption of "Navajo culture," and the reification in law of a category of "Indian made"; Peggy Pascoe's illumination of modernist racial ideology through the development of anti-miscegenation law; and Thomas Guglielmo's research on the International Red Cross's policies of blood segregation during World War II, are all excellent examples of this trend toward particularity in excavating the micro-history of racial formation through law in the twentieth century.[4]

Trials of racial identity can be an especially fruitful focus of such study because, at least in the United States, drawing lines between "races" determined not only who could be free but also who could be capable of citizenship. Trials of racial identity became trials about the attributes of citizenship, and the imaginary connection between racial identity and fitness for citizenship was surprisingly durable, despite the enormous changes from a slave society that occurred through the twentieth century. In a number of twentieth-century contexts, I found that legal actors used

2. For discussion of this work, see Ariela Gross, "Beyond Black and White: Cultural Approaches to Race and Slavery," *Columbia Law Review* 101 (2001): 640–89. See also Alejandro de la Fuente and Ariela Gross, "Comparative Studies of Law, Race and Slavery in the Americas," *Annual Review of Law and Social Science* 6 (2010): 469–85.

3. Ariela J. Gross, *What Blood Won't Tell: A History of Race on Trial in America* (Cambridge: Harvard University Press, 2008).

4. Erika Bsumek, *Indian Made: Navajo Culture in the Marketplace, 1868–1940* (Lawrence, KS: University Press of Kansas, 2008); Peggy Pascoe, *What Comes Naturally: Miscegenation Law and the Making of Race in America* (New York: Oxford University Press, 2009); Thomas A. Guglielmo, "'Red Cross, Double Cross': Race and America's World War II-Era Blood Donor Service," *Journal of American History* 97 (2010): 63–90.

color-blind language to produce racial identities on the basis of cultural and civic performance (for example, "Mexicans" who were unqualified to be jurors because of their customs or language).[5] This suggests some important questions for comparative study: in what contexts does "color-blindness" emerge as a form of producing or perpetuating racial difference? How do local racial politics interact with legal processes such as jury trials—as compared to, for example, notarial, bureaucratic, or administrative systems of racial determination—to produce different regimes of race?

This forum places side by side three such instances of the litigation of racial identity in the twentieth century, in three very disparate cultural and legal locations. It therefore provides an excellent opportunity to think comparatively about the legal production of race in the twentieth century across cultures, and more generally about the possibility of comparative histories of race and law. Of course, anthropologists and sociologists have been writing about race comparatively—or at least in general terms—for over a century, but historians, concerned with contingency, have limited comparisons to a single region, such as the Americas, or two-country binaries such as the United States and South Africa. Comparative historical analyses hold out the promise of greater theoretical rigor, and the chance to explode myths of United States exceptionalism.[6] Yet there are also risks that superficial resemblances among phenomena will lead us to declare that racial categorization or racism transcend time and place, and even, perhaps, that they are inevitable. The risks may be particularly high when we compare intensive studies of single cases, rather than broader explorations of multiple dimensions of adjudication for each system being compared.

Two lines of thought seem especially common in comparative studies of race, and each display both promise and pitfalls. One approach collapses concepts that once appeared separate and distinct; the other finds complexity where once was contrast. As an example of the first approach, an earlier generation of scholarship drew a clear distinction between "race" and "ethnicity." Today, comparative scholars are more likely to see the bleeding between these two concepts. The second approach marks many studies of mixed-race and hybridity, which hail the blurring of racial boundaries. When it comes to contrasts among processes of racialization or systems of racial classification in different societies, sharp national contrasts also appear to have given way to comparisons that emphasize similar phenomena across urban slave societies, for example, or the circulation of ideologies and practices throughout a multinational region.

5. Gross, *What Blood Won't Tell*, ch. 8.

6. See George M. Fredrickson, *The Comparative Imagination: On the History of Racism, Nationalism, and Social Movements* (Berkeley: University of California Press, 2000), 47–55.

Comparative legal history has a much less storied pedigree than that of comparative race relations as a field of scholarship. Because comparative law has remained a relatively formalistic subject in law schools, it sidestepped the socio-legal history revolution. To the extent that comparative legal studies are historical, they take an entirely internal, genealogical approach to the development of legal codes or institutions.[7] Likewise, most socio-legal histories have been rigorously local or regional, and certainly have remained within a nation–state framework. Indeed, the burrowing into local archives entailed by socio-legal and more recent cultural-legal histories fits uneasily into a comparative project. What, exactly, would or should we be comparing? Law on the books? Law on the ground? Comparing statutory racial classification systems was a hallmark of the old comparative race relations school, but it seems entirely inadequate to understanding the meaning of race in daily life in any society, and has been justly criticized. Is it possible to go beyond such studies to compare law and race on the ground, without being able to hold a single one of our variables constant?

The prevalent approach to the comparative study of race has been simply to compare metrics of classification. One society has two categories, another three, a third has multiple. Yet closer examination reveals that the first society in fact has intermediate categories, and that many of the categories in the last society collapse into one or two. Another approach is to attempt to look closely at the mechanisms of racial differentiation, and perhaps also the links between legal production of racial identity and other institutions or discourses, such as religious or political ones. For example, in the United States, the rise of white men's democracy in the 1830's reinforced and was reinforced by the expression of white supremacy in legal restrictions on free people of color, and increasing efforts to litigate a bright line between white and "negro." How does this development compare to other cultures without the same political ideology of white men's democracy? How much can it be seen as part of a worldwide "Age of Revolutions" or as an even more transhistorical phenomenon of race that might be found even in the ancient world? Or is it in fact specific to a particular legal, political, and ideological system?

7. For discussions of legal history and comparative law, see Reinhard Zimmermann, "Legal History and Comparative Law," speech at the University of Lleida on October 25, 2007, at http://www.udl.es/export/sites/UdL/organs/secretaria/.../zimmermann_discurs.pdf, last accessed December 2, 2010; "Comparative Law and Legal History in the United States," *American Journal of Comparative Law* 46 (1998):1; and Michele Graziadei, "Comparative Law, Legal History, and the Holistic Approach to Legal Cultures," // Rivista critica del diritto privato. 1999, Vol. XVII. No. 3. 1–28 / Electronic resource The Cardozo Institute[a] / http://www.jus.unitn.it/cardozo/Critica/Graziadei.htm.

Latin American comparisons were often the foil for United States historiography on race emphasizing the pernicious binarism of the United States racial system and its "one drop rule." The mid-twentieth century United States historians who compared the United States to Brazil or to Latin America generally characterized a rigid black–white binary in contrast to the racial fluidity and even "racial democracy" in Latin countries.[8] Carl Degler's "mulatto escape hatch thesis" posited that Brazil was less governed by white supremacy than was the United States because the offspring of Brazil's more frequent interracial marriages could escape the bottom rung of the social ladder. This stark contrast between the two regions helped explain, in Degler's view, the difference between Jim Crow America and racially democratic Brazil. Newer work suggests less of a contrast. There is now a substantial literature on the common origins of racial thought across Europe and the British Isles, and the shared effort of colonial powers to impose white–black hierarchy, borrowing heavily from one another's legal and religious codes to do so.[9] Historians of the United States (myself included) have shown that there has been substantial mixing and mobility on the United States side. Historians of Latin America have shown that Brazil was in fact marked by racial stratification and a white supremacist ideology of "whitening."[10] Yet different political and legal regimes do make a difference, especially to the possibilities for citizenship. This is the import of Rebecca Scott's brilliant book, *Degrees of Freedom*, which uses both a comparative and a transnational approach to Louisiana and Cuba to suggest the limits of citizenship claims in the United States as compared to in Cuba.[11]

8. See Tannenbaum, *Slave and Citizen*; and Alejandro de la Fuente, "Slave Law and Claims-Making in Cuba: The Tannenbaum Debate Revisited," *Law and History* Review 22 (2004): 339–69

9. Christopher Tomlins, *Freedom Bound: Law, Labor, and Civic Identity in English Colonizing America, 1580–1865* (New York: Cambridge University Press, 2010); James H. Sweet, "The Iberian Roots of American Racist Thought," *William & Mary Quartery* 54 (1997):143–66; Debra Blumenthal, *Enemies and Familiars: Slavery and Mastery in Fifteenth-Century Valencia* (Ithaca, NY: Cornell University Press, 2009); Alejandro de la Fuente and Ariela Gross, "Race Under Slavery in the Americas" (unpublished paper in possession of the author).

10. Edward E. Telles, *Race in Another America: The Significance of Skin Color in Brazil* (Princeton: Princeton University Press, 2006); Thomas Skidmore, "Racial Ideas and Social Policy in Brazil, 1870–1940," in *The Idea of Race in Latin America, 1870–1940*, ed. Richard Graham (Austin: University of Texas Press, 1990), 7–36; Denise Ferreira da Silva, "Facts of Blackness: Brazil is not (Quite) the United States ... And, Racial Politics in Brazil?" in *Social Identities* 4 (1998): 201–234.

11. Rebecca Scott, *Degrees of Freedom: Louisiana and Cuba after Slavery* (Harvard University Press, 2005).

Scott's work also exemplifies a shift from cross-national to Atlantic World histories; she has pioneered a technique of transnational micro-history. This approach has been extremely useful for examining the shifting legal status of individuals as slave or free as they made claims on different legal systems and moved in and out of multiple legal jurisdictions. But it has not yet been applied to racial identity in the same way, and it does raise the issue of generalizability. Furthermore, transnational micro-history seems particularly suited to regional studies, such as those of the early modern Atlantic world, which are bounded in both time and space, with a shared intellectual and institutional framework like the triangular slave trade. Comparisons with a broader temporal or geographic reach seem precluded by that approach.

What are the possibilities today for broader historical comparisons? How could we begin to think about integrating the three examples in this forum into one larger comparative history? Only a few historians have attempted to do so, most from the perspective of comparative racial ideology. Much of the effort involves defining "race" and "racism" in a way that can be broad enough for comparative purposes, yet narrow enough not to include "every form of inequality or injustice in the world." George Fredrickson, in *The Comparative Imagination* and *Racism: A Short History*, defines "racism" as "an ethnic group's assertion or maintenance of a privileged and protected status vis à vis members of another group or groups who are thought, because of defective ancestry, to possess a set of socially relevant characteristics that disqualify them from full membership in a community or citizenship in a nation–state."[12] Thomas Holt, in *The Problem of Race in the Twenty-First Century*, explores the "inter-articulation" of race, culture and nation.[13] Both historians downplay the race–ethnicity dichotomy, emphasizing the shared element of descent and dominance in both cases. Crucial to their definitions is that "racism" be understood as more than just a set of attitudes or beliefs about inherent difference. Instead, to have "racism"—and therefore "race"—the society must be ordered according to these beliefs. This understanding of race as something produced by forces of domination and subordination, or of exclusion and inclusion, means that most historians of the West have focused on racism as a modern phenomenon, with its origins in the institution of slavery. Yet, as Fredrickson urges us, "it would be more fruitful to expand the concept to include modes of thought and behavior that . . . do not involve the classic

12. Fredrickson, *The Comparative Imagination*, 80, 85; and George M. Fredrickson, *Racism: A Short History* (Princeton: Princeton University Press, 2002).

13. Thomas Holt, "The Problem of 'Race' in The Twenty-First Century" (The Nathan Huggins Lectures, Cambridge: Harvard University Press, 2008).

racist doctrine of biological logical inferiority signified by color."[14] Racism could, for example, include the belief that a group is *superior* in certain respects, as Jews have been racialized in complex ways, yet nevertheless this belief could be the basis for the exclusion of the group from a society.

Both Frederickson and Holt, and almost all of the writers on comparative race and law, focus on race and racism as inventions of the modern world. Yet in the last two decades, ancient historians have begun to challenge this notion. In 1994, ancient historian Benjamin Isaac argued that racism (or at least "proto-racism") was invented in the ancient Mediterranean world, even if it did not take the biological form of modern scientific racism.[15] More recently, Susan Lape has elaborated the view that race anchored citizen identity in the classical Athenian democracy, even further back in time.[16] Although both of these authors anchor their view of race and racism in its relation to the social institution of slavery, and the notion that some people are naturally fit for slavery whereas others are fit to be citizens, the phenomenon they are examining is quite different, certainly in its relation to law, than the modern paradigm.

Similarly, new research on race coming out of Asia—Japan, Southeast Asia, and India—challenges the Western black–white paradigm and the assumption that "race" must mean white supremacy. Research on untouchable castes in Asia brings home the point that racism does not require physical difference or even cultural difference. Anthropologist Yasuko Takezawa and other scholars point to the *burakumin*, or untouchable caste of Japan, as an example of "invisible races"—groups at the bottom rung of Asian societies who are apparently phenotypically indistinguishable from other members of society but are marked in other ways (although often by imagined physical differences as well). Until recently, Japanese scholars denied that the *burakumin* were a racialized group, and resisted comparisons between the *burakumin* and racial minorities in other countries.

However, Takezawa and other scholars are now calling for a broadly comparative approach to racialization that does not assume either that race is a universal conception, or that race is an exclusively Western phenomenon only recently imported to the East. Archival research suggests that the *burakumin* were singled out as a race apart, with hereditary difference that justified separation and subordination, as early as the medieval

14. Fredrickson, *Comparative Imagination*, 81.

15. Benjamin H. Isaac, *The Invention of Racism in Classical Antiquity* (Princeton: Princeton University Press, 2004).

16. Susan Lape, *Race and Citizen Identity in The Classical Athenian Democracy* (New York: Cambridge University Press, 2010).

era, and that such discrimination was often accompanied and produced by a racial ideology that figured them as physically different and inferior.[17] For example, by law in mid-sixteenth century Japan, one could be punished for associating with, or even for failing to discriminate against, the "eta," as the *burakumin* were known in the pre-modern period (literally, "pollution").[18] There were similar groups in Southeast Asia, Yap Island, and Korea, whose low caste stemmed from engaging in "polluted work." These groups "have certain features in common. They are considered impure by society, are recognized by both themselves and others as having different descent, and the discrimination against them is institutionalized, involving land or other kinds of resources." Takezawa compares the racialization of these groups, which she calls "lower case race," to that of Jews in early modern Europe, or immigrants in the new Europe today. Takezawa uses "Race", capitalized, to denote the more familiar nineteenth- and twentieth-century phenomenon of biological racism.

There are substantial points of convergence between this research on "invisible races" and the history of race and racism in United States trials of racial identity, in which race did not depend necessarily upon appearance or ancestry, but at least as much on racial performance, associations, "character," and other "invisible" attributes. Even within the black–white paradigm, racial science has developed side-by-side with these other, equally insidious narratives about difference and subordination. Although this need not mean that racism is necessarily a universal feature of human societies, it does suggest that we can learn a great deal by widening our comparative perspective beyond the Atlantic world to other, less familiar cultures. Certainly, these cases far apart in space and time still fall within the definition of "race" posited by Fredrickson.

It may well be that the greater challenge for the comparative historian of race and law is not the shifting meanings of race, but the variation in legal and political systems. When all of our variables are different—political system, law, racial ideology, and "culture" —it may be hard to grasp the significance of a racial adjudication that looks superficially similar, but means something entirely different in a society because of the context in which it takes place.

For example, one apparent commonality among racial adjudications is the prevalence of legal rules allocating decision-making authority to local bodies or "community consensus," whether through jury discretion

17. In English, see Yasuko Takezawa, "Race Should Be Discussed and Understood Across the Globe," *Anthropology News* 47 (2006): 6–7; and "Transcending the Western Paradigm of Race," *Japanese Journal of American Studies* 16 (2005): 5–30.

18. Takezawa, "Transcending the Western Paradigm," 11.

or reputation-based, performative norms for racial identity. If we take the view that "law" is expressed by statute or code, or by formal institutions, then the phenomenon we see is community norms trumping law, or a "shift from formal analysis of law to a nonformal examination of 'life' itself," as Peter C. Caldwell so elegantly expresses it.[19] But as Caldwell also shows us, this apparent similarity is not a uniform trend. Instead, the political projects—and trajectories—of these legal systems are quite different. The interpenetration of "community norms" and formal legal rules is the hallmark of the common-law jury system as it developed in the United States, and the rhetorical deference to community consensus was a convenient way to enshrine performative norms for "blood" categories that effectively prescribed the laws of white supremacy. Such fuzzy standards (as compared to bright-line rules) were not necessarily a sign of fluidity; what appear to us to be unclear or conflicted standards may have simply been unstated and obvious to the participants.

As I have argued at length in *What Blood Won't Tell*, trials of racial identity in the United States turned less on legal definitions of race as percentages of "blood" or ancestry than on the way people presented themselves to society and demonstrated their moral and civic character. Race had shifting bases over time and across geography: in practice, degree-of-blood rules were not as important as other forms of racial knowledge, especially evidence of racial performances and associations, and certain kinds of racial "science" and expertise. Despite the medical profession's claims to the mantle of expertise on racial identity, of equal power in the courtroom was an understanding of race as common sense, a matter for community decision making. Although these were always in some tension, often these two aspects of race worked in tandem: community members learned the language of science and qualified as experts based on slaveholding; and medical "experts" drew on reputation and gossip. "Common sense" could bolster scientific and legal discourses, and vice versa.

This forum does not involve any explicitly comparative history. Instead, it implicitly suggests that the reader may be able to draw conclusions from micro-histories of racial adjudications from three very disparate regions set alongside one another. Can we learn from their commonalities or contrasts? Are there any larger theoretical constructs capacious enough to explain the phenomena at work in all these cases? Each article, in different ways, looks closely at what I have called racial identity trials—cases in which courts, for a host of reasons, are trying to determine someone's

19. Peter C. Caldwell, "When the Complexity of Lived Experience Finds Itself Before a Court of Law," *Law and History Review* 29 (2011): 567–72, at 571.

racial identity: white or non-white; native or non-native; Jew or non-Jew. We may quarrel with the designation of "racial" here. I think it is fair to say that in all three cases "race" is at stake, although other things may be as well. In each case— the South Carolina court looking at a Croatan Indian, the Nazi court looking at the illegitimate child of a Jewish or non-Jewish father, and the British colonial court looking at the half-caste Anglo-African— the trials present an opportunity to unpack the cultural meaning of these categories at a particular twentieth-century moment, whether by reference to the kind of evidence presented to prove a certain identity, the ideological framing of the claims, or the way judges sought to re-tell the "facts" to privilege a particular racial understanding. Each one offers the opportunity for a legal–cultural history based on thick description of these cases.

Two of the articles, Wertheimer et al.'s on South Carolina and Lee's on South Africa, are also case studies of single trials. The risks of comparison seem to me to be particularly high with single case studies, because of the difficulty of generalizing even within a given regional legal culture from a single case, and because the possibility of comparing systematic differences in legal regimes seems correspondingly low. In the South Carolina case, the authors compensate for the limitations of a single case with deep research into the social and political context; in the African case, the individual lawsuit is used as an example for a theoretical excursus into the meaning of race in the postcolonial state.

All three authors are writing against a historiography that has sought to erase complexity— the United States historiography collapsing the past into a black–white story; the Holocaust literature collapsing National Socialist racial laws into the extra-legal administration of racial extermination; the colonial historiography collapsing contested categories into resistant natives vs. dominant colonizers. In each case, the trial gives a lens to view not only strategies from below, but also to explore the technologies of rule in a more complex way. At the most general level, therefore, there is the commonality of complexity.[20]

But is there another overarching theme? In his introduction, John Wertheimer has suggested the links between racial adjudication and modern nation-making, but here we must take care. The legal systems that gave

20. John W. Wertheimer, Jessica Bradshaw, Allyson Cobb, Harper Addison, E. Dudley Colhoun, Samuel Diamant, Andrew Gilbert, Jeffrey Higgs, and Nicholas Skipper "The law recognizes racial instinct": *Tucker v. Blease* and the Black–White Paradigm in the Jim Crow South," *Law and History Review* 29 (2011): 471–495, at 476. For a discussion of "complexification," see Ariela Gross, "Beyond Black and White"; Walter Johnson, "Inconsistency, Contradiction, and Complete Confusion: The Everyday Life of the Law of Slavery," *Law and Social Inquiry* 22 (1997): 405–33.

rise to these trials were quite different. One is the judicial arm of the Nazi regime, one is the independent judiciary of a state within a federal republic, and the third is the court administered by an imperial power in a colonial outpost. Although each institution can be called a "court," and each proceeding a "trial," they undoubtedly played different functions, exercised different kinds of power, and meant different things in each polity. Of course, we could see each as a different expression or effect of a larger, overarching phenomenon of twentieth-century race-making, and even explore the links among them. For example, the Nazis took some inspiration from the racial laws of the United States South in formulating their Code with regard to Jewish identity, as indeed did the apartheid regime in South Africa.

Yet it remains a real challenge for comparative histories of racial adjudication to figure out how to take stock of the very different roles a legal system may be playing in a society. Are verdicts being reached by juries or judges alone? Are judges elected or appointed? Is the larger political system democratic or dictatorial? Is it a colonial system imposed by an absentee power? Is there a federal hierarchy of courts or other forms of multiple or overlapping jurisdiction? Peter C. Caldwell's insightful commentary addresses these issues in greater depth than I will here, but the questions are difficult ones, and they go to the problem of misidentifying superficially similar phenomena across cultures as the same ones if they are taken out of context.[21]

The article by John Wertheimer and his students uses a close reading of a single case, *Tucker v. Blease*, to excavate the micro-history of law, race, and slavery in the Carolinas, and in particular the history of what mid-twentieth-century anthropologists called "racial islands" or "tri-racial isolates." This article shows how not only lawyers, but also contemporary historians, have covered over the story of individuals and entire communities of what I have called "racially ambiguous people," converting them into "free Negroes" or people on the line between black and white, when in fact their status was considerably more complicated than that.

The Croatans were one of these communities with outposts not only in Robeson County, North Carolina, where they were a considerable portion of the population, but also in Dillon County, South Carolina, where they were a small pocket. Such pockets existed not only all over the Southeast but in the Northeast as well, well into the twentieth century. These included the Melungeons, Red Bones, Croatans, Brass Ankles, White Negroes, Jackson Whites, and Narragansett Indians. Once one learns this history, a variety of cases that were once read as black–white cases

21. Caldwell, "When the Complexity of Lived Experience."

must be seen differently. For example, for the first article that I wrote about racial identity trials, called "Litigating Whiteness," I read the records of a number of North Carolina cases supposedly about the status of "free blacks," many of them cases about the right of a person to carry firearms—a crime for a "free person of color."[22] When I came back to these cases later when I was working on my book, I noticed and could now find meaning in the names of the defendants in these cases—Locklear, Chavis, and so on—who were not "black" but "Croatan." By identifying them in this way, I do not mean to signify anything about the details of these individuals' ancestry; only about how they were understood in their own social world. Of course the question of how "mixed blooded" they were was at issue in these cases, but to see them as only black and white was to miss a much more complicated social— and legal— history.

I was neither the first nor the last to oversimplify their histories. Much of the difficulty began when Carter G. Woodson, the venerable African-American historian of a previous generation, published his extraordinarily useful compendium of "Free Negroes" culled from manuscript census records. But the elision from "free people of color" to "free Negroes," which went almost unnoticed when later historians drew on Woodson's work, is an important one. Many today assume that "people of color" is a contemporary coinage, but in fact it was the common term in that era, and it meant something other than a synonym for "Negro" or "black." Much more recently, Daniel Sharfstein published an essay in the *Yale Law Journal* about a case called *Spencer v. Looney,* in twentieth-century Virginia, and investigated the social context of this family feud in an Appalachian town. But the family names of the racially ambiguous pocket mentioned in the testimony— Collins and Ratliff— suggest another group of Melungeons or Croatans, not isolated individuals on a black–white border, but a community of people understood by their neighbors to be something else, not exactly black or white or Indian, sometimes admitted to the privileges of whiteness, but easily exiled "whenever they made someone mad," as one witness explained in one of the Melungeon cases I write about. A surprising number of cases, especially involving children's expulsion from schools, arise out of these communities. Wertheimer and his students, like good archival detectives, have reconstructed this lost social world.[23]

22. Ariela J. Gross, "Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South," *Yale Law Journal* 101 (1998):120.

23. Carter G. Woodson, *Free Negro Owners of Slaves in the United States in 1830* (Westport, CT: Negro Universities Press, 1924, reprint); and Daniel Sharfstein, "The Secret History of Race in the United States," *Yale Law Journal* 112 (2003): 1473.

But are the legal records just a source for reconstructing the life of this community? What difference did law make in this fascinating social history of mixing and ambiguity? Wertheimer et al. argue that law pushes multiracial realities into a biracial categorization, and I think they are absolutely right. All of the racially ambiguous communities I studied (Melungeons, Croatans, and Narragansett) faced increasing pressure to fall on one or the other side of a black–white divide after the Civil War.

Research on this subject, in my view, however, should not end with the overdetermined story of the rise of a black–white paradigm, which Wertheimer et al. show is coming under pressure almost as soon as it is imagined. Instead, we need to ask what that binary *does*. What creates the pressure to push all of these people into the white or non-white category? What work does it do? And we should not assume, as United States historians have a tendency to do, that a racial binary is necessarily worse or more racist than its alternatives. For example, in Robeson County, Croatans achieve the "third way," successfully enforcing three racial categories, but black is still on the bottom. In many places racial islands survive, but it is not clear that those societies are more just or less hierarchical. The Croatans of North Carolina, incidentally, win in the legislature because their advocate sells their "romantic origins" story, which says that they are in fact descendants of the Lost Colony at Roanoke. All of the recent literature on race in Brazil suggests that a proliferation of intermediate categories has gone hand in hand with the ideology of white supremacy. Likewise, the "colored" category in South Africa did not obviate racial hierarchy.

Especially interesting is the question of what kind of comparisons can be drawn about law and intermediate racial categories. The most common contrast drawn is one between binary and multiple systems of categorization. But much of the closer, archival work tends to show that the binary system is more multiple and that the multiple system is more binary than they each appeared at first glance. That is why I think the more fruitful comparative questions are the "how" and "why" questions. What function did an intermediate group play in a particular society? There is probably a very different answer to this question in a colony within the British imperial system than in the rural United States South. To go deeper, what function did the *adjudication* of borderline identities for intermediate groups play in that society? Whereas trials of borderline identities may prove to us the porousness of categories, their contemporary function may have been to teach the community a powerful lesson about the dangers of racial boundary-crossing.

The Nazi case raises the fascinating problem of an illegitimate political and legal system in which all trials may be show trials; what meaning can

adjudication have in such a setting? It is an interesting comparative question when we consider the United States South, a society based on the illegitimate institutions of slavery and Jim Crow, politically committed to their perpetuation, but constrained in their administration by a legal system not entirely of its own making. Was there any degree to which this was true of the Nazis? As Peter C. Caldwell suggests, what once appeared to be a "dual state" of extralegal practices of violence existing alongside holdovers from the earlier legal system constraining judges, "appears in retrospect to be an 'order' in the process of dissolution." Is there any way we can say that the judges who found for plaintiffs in paternity cases, and "raised" their racial status, were resisting the Nazi regime—or remaining true to traditional legal values in a system in which they were rapidly being destroyed? I leave these questions to more knowledgeable experts, but anyone wanting to undertake comparative adjudication would have to reckon with them first.

The Nazi cases about paternity also raise many interesting questions about the role of sexuality and gender in the preservation of racial order. Here as well, the comparisons are suggestive. Kaplan gestures, for example, at negative stereotypes of Jewish male sexuality without elaborating. In the United States South, stereotypes of black male predatory sexuality and the fetishization of white female purity were key ideological buttresses to the maintenance of a Jim Crow legal regime. Yet some early post-Civil War paternity suits certainly put pressure on those stereotypes. Several cases were argued in southern state courts involving babies alleged to have been fathered by the former slaves of mistresses whose husbands had gone to battle, in apparently consensual relationships. In the cases Kaplan examines, women are renouncing the paternity of fathers who at one time must have looked like a good bet, being higher in class status and education than the non-Jews these women had chosen at the time of the trial. I wanted to know much more, if it is possible to learn, about the social status of these women and their relationships with the men involved, as well as about their place in their communities. Kaplan does a beautiful job of analyzing the discursive strategies of the plaintiffs who draw on Nazi racialist ideology to reject an unwanted Jewish father for their child. I wonder about the role gender plays in the courts' decisions to reclassify some of these children as non-Jewish, and what separates those that win from those that lose. What kind of evidence seems determinative?

Chris Lee's article discusses a case involving the status of Anglo-Africans—also known as half-caste. He shows that "native" was not a predetermined category, and that it was determined as much by people's social performances and associations (which Lee terms "lifestyle") as by "blood" or descent. Lee characterizes these social aspects

of identity implicitly as "not-race" by contrasting them throughout with "race"—by which he appears to mean descent or ancestry. In doing so, he perhaps unintentionally reproduces the race–culture dichotomy that so characterized twentieth-century anthropology, but that, it seems to me, cultural–legal histories of racial adjudication have called into question. Lee uses the case as a jumping-off point to examine the fascinating debate across different parts of the British Empire about the status of "half-castes." Three categories are at work here—race, origin, and nationality—and it remains unclear what the participants in these trials mean by any one of these terms. Whereas "origin" appears to mean birthplace, "race" and "nationality" in this context seem fairly up for grabs.

There is much here that echoes what we know about the determination of racial identity in other contexts—Lee draws on the scholarship of anthropologist Ann Stoler, who has written about the mobility of race and racism and the way its shifting bases strengthen rather than weaken racism. My own work has argued that the performance of identity was as important as racial science in the determination of race—and in particular, in the United States context, civic performance or acting like a citizen. In Latin America, class played a big role in determining racial status. What Lee refers to as "lifestyle" but his sources talk about as "manner" or "mode" of life, appears to have elements of class (e.g., "being well to do") but also of cultural assimilation, abandoning traditional ways and westernizing. Here I see a close analogy with the designation of "mixed-blooded" for American Indians, which had more to do with their political and cultural assimilation than with descent.

Lee's work begins to address the intriguing question of how the colonial context compares to post-colonial societies, whether a settler society like the United States or those of Latin America. We could draw the contrast from a functional perspective: a colonial government needs to sort people in different ways than other "racial states." We could focus on the comparative-law question of how colonial legal regimes operate differently from other legal systems in terms of the interaction between metropole and periphery. Lee seems less interested in this aspect, although it is increasingly a focus of legal historical scholarship.[24]

Finally, Lee does not mention slavery here, but of course racial adjudications in the New World all stemmed from status decisions based in a slave society. Although there were still racial identity trials under Jim Crow, as Wertheimer et al. have shown us, the terms were to some extent

24. See, for example, the essays collected in *Theoretical Inquiries in Law: Legal Histories of Transplantation* 10:2 (2009); and Lauren A. Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400–1900* (New York: Cambridge University Press, 2002).

set under slavery. What historical role did slavery play in the societies Lee is talking about? And what cultural role do such adjudications play in this society? Settling scores? Teaching public lessons? Creating status hierarchies with regard to land? For example, Lee's story of colonial bureaucracies and assemblies debating racial definitions reminds me a great deal of the debates over Native Hawai'ian blood quantum in the Hawai'ian Territorial legislature and the United States Congress in the early 1920s, in which legislators and lobbyists were quite explicit about the connections between racial definition and land rights; a larger quantum of "native blood" requirement for land allotment meant more land for the sugar and ranch companies. The "conundrum" of native identity in the British African colonies at some moments seemed to relate, like native Hawai'ian status, to protectionist privileges, yet there were other consequences as well.

Although all three of these case studies have to do in the broadest sense with "race" and the uses of law to create and police racial categories, especially through the regulation of racial "mixing," they took place in radically different political and legal regimes. They share certain features—an emphasis on social and performative criteria as well as ancestry or "blood"—and a tension between expertise and "common sense." Yet while the "how" of racial adjudication can appear quite similar in disparate circumstances, the "why" is often quite different. Ultimately, we will have a better idea of both "how" and "why" when we can draw the transnational connections as well as the cross-national comparisons among these case studies.

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The late George Fredrickson, who was my teacher as well as Chris Lee's, introduced many students of American history to the energizing possibilities of a comparative perspective. Aspects of racism—whether ideological or structural—looked less unique when the United States and South Africa were explored together. Fredrickson's work on white supremacy and the black freedom struggle not only highlighted similarities and differences but also showed the crosscutting influences, especially of ideas, across distant borders. Fredrickson's was ultimately a history of ideas, although he always showed the ways ideas were embedded in structures of politics and economy. His research and his teaching showed that history should be about big questions. Racial justice was the burning issue of the day for him, and all of his work returned to the big questions of racial justice.

The history of law, too, is in many ways a history of ideas, and can show us how ideas like "race" can be created and perpetuated through institutional structures, processes and discourses that are related to, but not identical to, the political world. As cultural–legal historians accrue more

and more nuanced and subtle micro-historical explorations across time and space, we will have more opportunities for the kind of comparisons Fredrickson urged historians to attempt. Although they may not afford us either one grand narrative about twentieth-century nation-making, or a single paradigm for racial formation in the modern world, such comparisons can at least highlight the aspects of political and legal systems that made particular forms of racial policing important at particular moments in time and space. If we can keep the big questions of racial justice—not only the how but the why— before us at all times, comparative histories of race and law may eventually allow us to write the long history of racism.