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## (Im)mutable Race?

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## (IM)MUTABLE RACE?

*Deepa Das Acevedo*

**ABSTRACT**—Courts rarely question the racial identity claims made by parties litigating employment discrimination disputes. But what if this kind of identity claim *is itself* at the core of a dispute? A recent cluster of “reverse passing” scandals featured individuals—Rachel Dolezal and Jessica Krug among them—who were born white, yet who were revealed to have lived as members of Black, Indigenous, or Person of Color (BIPOC) communities. These incidents suggest that courts will soon have to make determinations of racial identity as a threshold matter in disputes over employment discrimination and contract termination. More specifically, courts will have to decide whether racial identity can *change*.

This Essay offers a framework for thinking about the legal disputes that will arise from accusations of reverse passing. It makes a normative sociological statement about how we should understand changes in racial identity, as well as a positive doctrinal statement about what that means for law. Social science and theory have long questioned the claim that race is a stable identity marker such that there can be a fixed, objective, and observable truth. Law, conversely, has generally rejected the possibility of racial transformation even as it grapples with the mutability of other seemingly immutable traits.

I show that, particularly in light of the Supreme Court’s 2020 decision in *Bostock v. Clayton County*, social science and law are not as far apart as we may think. The doctrinal foundations needed to account for racial identity transformation already exist, and the analytic means of doing so are largely there as well. What is left for courts to do is to *cultivate attentiveness* to race in a way that realizes these legal principles and social science insights. The Essay concludes with suggestions for how courts can cultivate a greater attentiveness to the ways in which race is performed and experienced: a kind of analysis that courts already conduct but could conduct better.

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## INTRODUCTION

A white man is accused of denying his Black<sup>1</sup> identity.<sup>2</sup> A Black woman is accused of denying her white identity.<sup>3</sup> A Black man is accused of *assuming* Latinx identity.<sup>4</sup> A white woman is accused of *assuming* Latinx and Black and German identity.<sup>5</sup>

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<sup>1</sup> In keeping with journal convention, this Essay has been adjusted to capitalize “Black” but not “white” when they are used as racial descriptors. For a thoughtful critique of this approach, see Kwame Anthony Appiah, *The Case for Capitalizing the B in Black*, ATLANTIC (June 18, 2020), <https://www.theatlantic.com/ideas/archive/2020/06/time-to-capitalize-blackand-white/613159/> [https://perma.cc/95ZF-TBPT].

<sup>2</sup> Simon Hattenstone, *Anthony Ekundayo Lennon on Being Accused of ‘Passing’ as a Black Man: ‘It Felt Like an Assassination,’* GUARDIAN (Sept. 7, 2019, 5:00 AM), <https://www.theguardian.com/world/2019/sep/07/anthony-lennon-theatre-director-accused-of-passing-as-black-interview-simon-hattenstone> [https://perma.cc/75U6-2T6Z].

<sup>3</sup> Adrian Piper, *Passing for White, Passing for Black*, 58 TRANSITION 4, 6–7 (1992).

<sup>4</sup> Paul Duggan, *Novelist H.G. Carrillo, Who Explored Themes of Cultural Alienation, Dies After Developing COVID-19*, WASH. POST (May 23, 2020, 3:52 PM), [https://www.washingtonpost.com/local/cuban-american-author-hg-carrillo-who-explored-themes-of-cultural-alienation-died-after-contracting-covid-19/2020/05/21/35478894-97d8-11ea-91d7-cf4423d47683\\_story.html](https://www.washingtonpost.com/local/cuban-american-author-hg-carrillo-who-explored-themes-of-cultural-alienation-died-after-contracting-covid-19/2020/05/21/35478894-97d8-11ea-91d7-cf4423d47683_story.html) [https://perma.cc/Y72T-DJUL].

<sup>5</sup> Karen Attiah, *Opinion: Jessica Krug Offers a Twisted Example of White Privilege*, WASH. POST (Sept. 6, 2020, 1:45 PM), <https://www.washingtonpost.com/opinions/2020/09/06/jessica-krug-offers-twisted-example-white-privilege> [https://perma.cc/JW7C-W4BK]; Lauren Michele Jackson, *The Layered Deceptions of Jessica Krug, the Black-Studies Professor Who Hid That She Is White*, NEW YORKER (Sept. 12, 2020), <https://www.newyorker.com/culture/cultural-comment/the-layered-deceptions-of-jessica-krug-the-black-studies-professor-who-hid-that-she-is-white> [https://perma.cc/U542-B3LX].

Most strikingly, a former chapter president of the National Association for the Advancement of Colored People (NAACP) and adjunct instructor of Africana Studies was revealed in 2015 to have none of the Black ancestry that she claimed.<sup>6</sup> Since her exposure, Rachel Dolezal has become emblematic of the phenomenon of “reverse passing”—where dark (or darkened) skin white individuals attempt to pass as members of a Black, Indigenous, or People of Color (BIPOC) community—so much so that her experiences and actions have inspired a new term, “Dolezalism.”<sup>7</sup> In turn, Dolezal, who has since changed her name to Nkechi Amare Diallo,<sup>8</sup> has responded that she is not *passing* as Black: she *is* now, even if she has not always been, a Black woman.<sup>9</sup>

On one level, these incidents raise important questions about the politics and ethics of reverse racial passing. They challenge longstanding assumptions about cultural and material privilege by demonstrating the occasional good sense it makes for some people to assume some nonwhite identities.<sup>10</sup> They further complicate a time of profound racial upheaval caused by the devaluation of Black lives. And the individuals at the center of these incidents are frequently antiheroes whose motives are hard to understand and often harder to forgive.<sup>11</sup> Unsurprisingly, most commentary

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<sup>6</sup> Beth Ethier, *President of Spokane NAACP Accused of Pretending to Be Black (Updated)*, SLATE (June 12, 2015, 12:55 PM), <https://slate.com/news-and-politics/2015/06/rachel-dolezal-naacp-official-college-professor-accused-of-pretending-to-be-black.html> [<https://perma.cc/MAH7-FP99>].

<sup>7</sup> #Dolezalism, TWITTER, <https://twitter.com/search?q=%23dolezalism> [<https://perma.cc/7V99-ZHJP>].

<sup>8</sup> Adeel Hassan, *Activist Who Identified Herself as Black Takes an African Name*, N.Y. TIMES (Mar. 7, 2017), <https://www.nytimes.com/2017/03/07/us/dolezal-activist-identifies-as-black-african-name.html> [<https://perma.cc/L6VW-7ZJV>]. Despite the name change, I use Dolezal’s birth name in this Essay because it is the name that I suspect most readers are familiar with and Dolezal herself has stated that she intends to continue using her birth name in public. Nicholas K. Geranios, *Rachel Dolezal Struggles After Racial Identity Scandal, Writes a Book About It*, CHI. TRIB. (March 24, 2017), <https://www.chicagotribune.com/nation-world/ct-rachel-dolezal-struggles-20170324-story.html> [<https://perma.cc/TL2W-BBD9>].

<sup>9</sup> Chris McGreal, *Rachel Dolezal: ‘I Wasn’t Identifying as Black to Upset People. I Was Being Me,’* GUARDIAN (Dec. 13, 2015, 1:00 PM), <https://www.theguardian.com/us-news/2015/dec/13/rachel-dolezal-i-wasnt-identifying-as-black-to-upset-people-i-was-being-me> [<https://perma.cc/NU22-SATA>].

<sup>10</sup> On reverse passing, see Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151, 2153–54 (2013); Camille Gear Rich, *Affirmative Action in the Era of Elective Race: Racial Commodification and the Promise of the New Functionalism*, 102 GEO. L.J. 179, 181 (2013); Khaled A. Beydoun & Erika K. Wilson, *Reverse Passing*, 64 UCLA L. REV. 282, 328 (2017); Randall Kennedy, *Racial Passing*, 62 OHIO ST. L.J. 1145, 1145 (2001). Moreover, the material value of nonwhite identity is, in no small sense, the inverse of an argument made nearly thirty years ago by Cheryl Harris. Cheryl I. Harris, *Whiteness As Property*, 106 HARV. L. REV. 1707, 1724–37 (1993).

<sup>11</sup> See *infra* Part I.

on these events—scholarly or otherwise—has remained caught up in the ethics and mechanics of reverse passing itself.<sup>12</sup>

But what if the NAACP had *fired* Dolezal?<sup>13</sup> What if, instead of simply declining to renew her contract, Eastern Washington University had tried to terminate it?<sup>14</sup> Put differently, what if Dolezal’s claim to have actually become a Black woman had led to the dissolution of an employment relationship?

For the moment this question is a hypothetical one, but it is unlikely to remain so. As incidents of reverse passing proliferate, more individuals are likely to argue that they too *are* what they claim to racially *be*. At least some of those individuals will be fired from their jobs or suffer other adverse employment actions. And when those developments occur, judicial determinations of racial identity—in particular of *changing* racial identity—will become inescapable.<sup>15</sup> However, the courts hearing these disputes will find themselves with surprisingly little conceptual and doctrinal guidance to rely on, because race—both during the recent scandals and at other times—has been widely considered to be the quintessential *immutable* trait.<sup>16</sup>

This Essay offers a framework for thinking about race immutability and legal disputes arising out of accusations of reverse passing.<sup>17</sup> It makes a normative statement about how we should understand changes in racial

<sup>12</sup> See generally Beydoun & Wilson, *supra* note 10 (describing the phenomenon of reverse passing); Christine Folch, *Performance Without Community Is Suspect, Hispanopía, and What the Jessica Krug Debacle Reveals About Academia*, CHRISTINE FOLCH (Sept. 11, 2020), <https://wp.me/p6Cshp-ie> [<https://perma.cc/9XHN-SRX6>] (explaining reverse passing in academia is due to a lack of diversity in academia).

<sup>13</sup> Nonrenewal for discriminatory reasons is, of course, itself a deeply problematic practice. Readers will also undoubtedly recognize that, as a branch president, Dolezal was a member-volunteer rather than an employee. For the purposes of this Essay, however, I will proceed as if Dolezal was one of the NAACP’s hundreds of employees, making her vulnerable to termination and eligible for Title VII protections.

<sup>14</sup> *EWU Removes Rachel Dolezal’s Online Biography*, KREM (June 15, 2015, 6:50 PM), <https://www.krem.com/article/news/local/spokane-county/ewu-removes-rachel-dolezals-online-biography/293-124154094> [<https://perma.cc/VDD3-W98W>].

<sup>15</sup> Admittedly, even these instances will likely be rare given federal judicial hostility to discrimination cases. Nancy Gertner, *Losers’ Rules*, 122 YALE L.J. ONLINE 109, 110 (2012).

<sup>16</sup> See Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 YALE L.J. 109, 126 n.41 (1998) (quoting Peggy Pascoe, *Miscegenation Law, Court Cases, and Ideologies of “Race” in Twentieth-Century America*, 83 J. AM. HIST. 44, 55 (1996)) (discussing the development of arguments surrounding race that cast race as “biology [which is insignificant]”); Victoria Anderson, *The Contradiction at the Heart of Rachel Dolezal’s ‘Transracialism,’* CONVERSATION (Apr. 11, 2017, 7:20 AM), <https://theconversation.com/the-contradiction-at-the-heart-of-rachel-dolezals-transracialism-75820> [<https://perma.cc/QUR7-QEDW>] (discussing the modern rise of “Black” and “white” as categorical racial descriptors).

<sup>17</sup> Of course, this kind of dispute is not limited to *reverse* passing, and conventional (nonwhite-to-white) passing is far from gone. However, because recent conversations over racial transformation have been occasioned by reverse passing scandals, I structure this Essay around them.

identity, as well as a positive statement about what that means for law. I show that existing employment discrimination doctrine can provide careful but compassionate guidance for courts when combined with an anthropologically informed interpretive posture called *cultivated attentiveness*.<sup>18</sup>

Part I describes and compares recent instances of reverse passing. This Part also considers the various contract law mechanisms by which parties like the NAACP and Eastern Washington University might try to extricate themselves from agreements in the aftermath of a reverse passing scandal. Although employment relationships are hardly the only circumstances that will be affected by the arguments put forward in this Essay, they offer an important and accessible entryway into broader issues of equality.

Part II identifies a particular type of scenario, exemplified by Dolezal and others, that is likely to be most challenging for courts. *This* scenario, rather than the events described in Part I, explains why we can and should acknowledge the mutability of race (and how, in some moments and contexts, we already have).

Part III outlines prevailing approaches to two key issues—judicial determinations of racial identity and the concept of trait immutability—in order to show why neither of them provides courts with satisfactory guidance regarding the scenarios outlined in Part II. Courts have largely emphasized ancestry over appearance and self-identification<sup>19</sup> despite empirical studies suggesting that all three cues inform interpersonal encounters.<sup>20</sup> They have also, almost without exception, held that racial identity cannot change.<sup>21</sup>

Even the most critical scholarship and case law on immutability has largely accepted that some traits, most notably race, are for all practical purposes unchangeable.<sup>22</sup> That is because most courts and scholars, whether

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<sup>18</sup> I owe the phrase and concept of “cultivated attentiveness” to Kaushik Sunder Rajan, *Anthropological Fieldwork Methods 1* (2015) (emphasis in original) (class syllabus, University of Chicago) (on file with author).

<sup>19</sup> See *Bennun v. Rutgers State Univ.*, 941 F.2d 154, 172–73 (3d Cir. 1991) (accepting Bennun’s identity as Hispanic because of his ancestry); *Perkins v. Lake Cnty. Dep’t of Utils.*, 860 F. Supp. 1262, 1272–73 (N.D. Ohio 1994) (discussing the impact of ancestry on determining race).

<sup>20</sup> See *infra* notes 102–106; Destiny Peery, *(Re)defining Race: Addressing the Consequences of the Law’s Failure to Define Race*, 38 CARDOZO L. REV. 1817, 1858 (2017).

<sup>21</sup> Anthony R. Enriquez, Note, *Assuming Responsibility for Who You Are: The Right to Choose “Immutable” Identity Characteristics*, 88 N.Y.U. L. REV. 373, 378–79 (2013); see *Garcia v. Gloor*, 618 F.2d 264, 269–70 (5th Cir. 1980); *Elien v. Ashcroft*, 364 F.3d 392, 396 (1st Cir. 2004); *Fatin v. Immigr. & Naturalization Serv.*, 12 F.3d 1233, 1239–40 (3d Cir. 1993); *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 452 (Conn. 2008).

<sup>22</sup> See *infra* notes 130–142; see, e.g., Jessica A. Clarke, *Against Immutability*, 125 YALE L.J. 2, 9–11 (2015) (describing how courts have interpreted immutability and how this approach still leaves room for bias).

they are proponents of the “old immutability,” the “new immutability,” or against immutability altogether, are less concerned with the normative question of how social phenomena should be interpreted than with crafting legal paradigms.<sup>23</sup> But as the events described here make clear, the one demands the other.

Part IV translates the normative sociological position that race is a mutable trait into a legal principle for courts to apply. It shows how that principle already exists with respect to sex. And it argues that part of the task at hand is for courts to cultivate attentiveness to the complex ways in which people perform and experience race—through clothing, speech, behavior, and other cues.<sup>24</sup> Cultivating attentiveness to race demands self-conscious efforts to avoid ignoring, naturalizing, valorizing, or fetishizing these cues: it is a kind of analysis that courts already conduct but could and should conduct better.<sup>25</sup>

Finally, Part V acknowledges some of the complicated sociopolitical considerations at play in disputes over racial identity transformation.

### I. REVERSE PASSING *REDUX*

Revelations of reverse passing are multiplying rapidly. In 2015, Rachel Dolezal’s genre-defining circumstances emerged to occupy a virtually empty stage.<sup>26</sup> In 2020 *alone*, at least six instances of reverse passing surfaced in the mainstream media.<sup>27</sup> This Part describes the proliferation of reverse

<sup>23</sup> See *infra* notes 102–103; Richard Thompson Ford, *Bias in the Air: Rethinking Employment Discrimination Law*, 66 STAN. L. REV. 1381, 1418–19 (2014); Enriquez, *supra* note 21, at 374–77; Ken Nakasu Davison, *The Mixed-Race Experience: Treatment of Racially Miscategorized Individuals Under Title VII*, 12 ASIAN L.J. 161, 186 (2005).

<sup>24</sup> See, e.g., Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1301–04 (2000) (discussing the various ways an employee might perform a different race so as to conform to a workplace environment).

<sup>25</sup> Sunder Rajan, *supra* note 18, at 1.

<sup>26</sup> Several law review articles dealing with race mutability discuss Dolezal but only in passing. See, e.g., Emily Lamm, *Flexibly Fluid & Immutably Innate: Perception, Identity, and the Role of Choice in Race*, 26 WM. & MARY J. RACE, GENDER & SOC. JUST. 525, 548–51 (2020) (mentioning Rachel Dolezal in her discussion of “racial fluidity”); John Tehranian, *Is Kim Kardashian White (and Why Does It Matter Anyway)? Racial Fluidity, Identity Mutability & the Future of Civil Rights Jurisprudence*, 58 HOUS. L. REV. 151, 167–77 (2020) (using Rachel Dolezal as an example of “elective race”).

<sup>27</sup> See *supra* notes 2–9 and *infra* notes 27, 30–38 (citing coverage of these events in venues ranging from the *Washington Post*, the *New York Times*, the *Guardian*, and the *Los Angeles Times* to *Slate*, *Inside Higher Ed*, and *Medium*). As the descriptions below suggest, most individuals at the center of recent reverse passing scandals have been white, cisgender women, and *all* of them were part- or full-time academics. Several commentators remarked on the intersection of these identities. Some hypothesized that adopting a Black persona rendered white intellectual interest in Black communities acceptable; others that it was an expression of transgressive white femininity; and still others that it was the result of a simple

passing scandals and teases out their common qualities, before going on to discuss existing legal mechanisms that may be used by employers who want to respond to allegations that their employees have engaged in reverse passing.

A. “*Black Like Me?*”<sup>28</sup>

In 2020, Jessica Krug, a former professor of history who studied African and Latinx societies, admitted to falsely assuming Black, Afro-Latinx, and German-Algerian heritage.<sup>29</sup> Shortly afterwards, CV Vittolo-Haddad, a Ph.D candidate, implied having a personal background that was variously Cuban, Black, or “*italo habesha*” (of Italian and Eritrean or Ethiopian heritage).<sup>30</sup> The late H.G. Carrillo, an author and professor whose award-winning fiction drew on his own ostensible past to explore the Cuban-American immigrant experience, was revealed to be the child of native Michiganders without any Latino heritage.<sup>31</sup> Carrillo’s husband and partner of many years discovered the truth of the author’s identity after Carrillo died in April 2020 due to complications caused by the novel coronavirus.<sup>32</sup> Kelly Kean Sharp, a professor at Furman University, turned out not to be Chicana, as she had been claiming online for several years.<sup>33</sup> And the individuals behind two prominent scientific Twitter personas turned out to not really be

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cost–benefit analysis by those outside academia’s white, male, heterosexual ideal. Erin Aubry Kaplan, *Opinion: What’s Going On with All the White Scholars Who Try to Pass as Black?*, L.A. TIMES (Oct. 8, 2020, 12:55 PM), <https://www.latimes.com/entertainment-arts/books/story/2020-10-08/when-scholars-and-activists-pretend-to-be-black-an-essay> [<https://perma.cc/YQ8P-J5V4>]; Robyn Autry, *Jessica Krug, Rachel Dolezal and America’s White Women Who Want to Be Black*, NBC NEWS: THINK (Sept. 7, 2020, 3:33 AM), <https://www.nbcnews.com/think/opinion/jessica-krug-rachel-dolezal-america-s-white-women-who-want-ncna1239418> [<https://perma.cc/B899-W2JY>]; Colleen Flaherty, *Even More White Lies*, INSIDE HIGHER ED (Oct. 29, 2020), <https://www.insidehighered.com/news/2020/10/29/unmasking-another-white-professor-allegedly-posing-person-color> [<https://perma.cc/QN3U-4BKQ>] (quoting Folch, *supra* note 12). On intersectionality more generally, see Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 149 (1989).

<sup>28</sup> JOHN HOWARD GRIFFIN, *BLACK LIKE ME* (Signet Books 1996) (1960).

<sup>29</sup> Jessica A. Krug, *The Truth, and the Anti-Black Violence of My Lies*, MEDIUM (Sept. 3, 2020), <https://medium.com/@jessakrug/the-truth-and-the-anti-black-violence-of-my-lies-9a9621401f85> [<https://perma.cc/CD8U-7YL2>]; see Jackson, *supra* note 5.

<sup>30</sup> CV Vitolo “Haddad”: *Another Academic Racial Fraud?*, MEDIUM (Sept. 4, 2020), [https://medium.com/@polite\\_keppel\\_dinosaur\\_57/cv-vitolo-haddad-another-academic-racial-fraud-c5c41fe32110](https://medium.com/@polite_keppel_dinosaur_57/cv-vitolo-haddad-another-academic-racial-fraud-c5c41fe32110) [<https://perma.cc/VBF3-ADB3>].

<sup>31</sup> Duggan, *supra* note 4.

<sup>32</sup> *Id.*

<sup>33</sup> Flaherty, *supra* note 27.



a queer BIPOC female<sup>34</sup> and a BIPOC female immigrant<sup>35</sup> as they had, respectively, self-identified. Indeed, they turned out to not be *real* at all: @Sciencing\_Bi was the creation of a white, cisgender woman named BethAnn McLaughlin, who killed off her virtual alter ego during the pandemic,<sup>36</sup> while @piney\_the was created by Craig Chapman, a white, cisgender man.<sup>37</sup>

Several reasonable criticisms follow from these scenarios.

First, reverse passers often adopt and affirm grotesque exaggerations of BIPOC dress, speech, and mannerisms. Krug, for instance, was notorious even before her confession for the clothing she wore in professional settings and for adopting a crude approximation of Afro-Latinx language styles. She would “show up to a 10am scholars’ seminar dressed for a salsa club,”<sup>38</sup> recalled one professor who had participated in a fellowship program with Krug from 2013 to 2014.<sup>39</sup>

Second, reverse passers violate the trust of those—like students—to whom they are supposed to offer leadership and mentorship. The anonymous individual who exposed Vittolo-Haddad explained their decision to speak up by saying that they “owe[d] it to share with Black scholars and organizers, because they deserve a chance to avoid placing their trust in people who are committed enough to Black struggle to appropriate a Black identity that gains them social capital, but not committed enough to just exist in solidarity without centering themselves.”<sup>40</sup>

Third, reverse passers selectively inhabit BIPOC identities, both in the sense of choosing when and what to appear as (and when to “return”) and by enjoying the advantages of class and colorism even when appearing in their

<sup>34</sup> Zoe Schiffer, *She Created a Fake Twitter Persona – Then She Killed It with COVID-19*, VERGE (Sept. 4, 2020, 10:35 AM), <https://www.theverge.com/21419820/fake-twitter-persona-covid-death-mun-chausen-metoostem-co-founder> [<https://perma.cc/2W8R-8PQG>].

<sup>35</sup> Colleen Flaherty, *Unmasking a Troll*, INSIDE HIGHER ED (Oct. 6, 2020), <https://www.insidehighered.com/news/2020/10/06/university-new-hampshire-suspends-professor-amid-investigation-online-persona> [<https://perma.cc/Q5U4-DDXJ>].

<sup>36</sup> Colleen Flaherty, *Catfish: COVID-19*, INSIDE HIGHER ED (Aug. 4, 2020), <https://www.insidehighered.com/news/2020/08/04/apparent-death-hoax-rocks-science-twitter> [<https://perma.cc/P5VZ-NG26>].

<sup>37</sup> Flaherty, *supra* note 35.

<sup>38</sup> Laurel Wamsley, *GWU Investigating Whether White Professor Invented Her Black Identity*, NPR (Sept. 4, 2020, 11:54 AM), <https://www.npr.org/sections/live-updates-protests-for-racial-justice/2020/09/04/909617385/gwu-investigating-whether-white-professor-invented-her-black-identity> [<https://perma.cc/H2G3-KATK>].

<sup>39</sup> *Past Fellows: Schomburg Center Scholars-in-Residence Program*, N.Y. PUB. LIBR., <https://www.nypl.org/help/about-nypl/fellowships-institutes/schomburg-center-scholars-in-residency/past-fellows> [<https://perma.cc/HM43-57UP>].

<sup>40</sup> CV Vitolo “Haddad,” *supra* note 30.

BIPOC personas.<sup>41</sup> “Because Krug is light-skinned,” argued one critic, “her outlandish behavior was deemed passable and presentable.”<sup>42</sup> “Sharp,” noted another critic who identifies as Chicana, “created a costume that she put on for personal gain and removed when it suited her. And the costume that she chose was me.”<sup>43</sup>

Perhaps most concretely, reverse passers consume opportunities—scholarships, mentorships, jobs, grants, and awards—that, but for their actions, would have gone to someone who is viewed as genuinely belonging to the community in question. One scholar maintained that Krug “absolutely took up some of the very few—very few—resources and spaces that there are available to Black and Latino scholars and use[d] those to her advantage.”<sup>44</sup>

These, however, are the easy cases.

### B. *Easy Cases, Existing Law*

Individuals who confess to some form of deception regarding their racial identity raise profound ethical issues as well as dilemmas about the incentives created by race-based policies. But they do not present novel legal problems because contract and employment law already address a majority of the disputes that might arise in these circumstances. Moreover, despite the university affiliations of many recent reverse passers, neither the potential for legal dispute nor several of the legal principles that would apply are peculiar to academia.

Imagine that an employee knowingly misrepresents the employee’s racial identity and consequently gains some benefit that is explicitly tied to race—say, a postdoctoral fellowship intended to help diversify the

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<sup>41</sup> Syreeta McFadden, *Rachel Dolezal’s Definition of ‘Transracial’ Isn’t Just Wrong, It’s Destructive*, GUARDIAN (June 16, 2015, 1:30 PM), <https://www.theguardian.com/commentisfree/2015/jun/16/transracial-definition-destructive-rachel-dolezal-spokane-naacp> [<https://perma.cc/3J7Y-74KJ>].

<sup>42</sup> Yomaira Figueroa-Vásquez & Yarimar Bonilla, *A White Scholar Pretended to Be Black and Latina for Years. This Is Modern Minstrelsy*, GUARDIAN (Sept. 9, 2020, 11:16 AM), <https://www.theguardian.com/commentisfree/2020/sep/09/jessica-krug-white-scholar-black-latina> [<https://perma.cc/9YAB-QQCK>]. There is some legal literature exploring colorism and its relation to racism in equal protection law. See Vinay Harpalani, *Civil Rights Law in Living Color*, 79 MD. L. REV. 881, 890–92 (2020) (quoting Robert L. Reece, *Genesis of U.S. Colorism and Skin Tone Stratification: Slavery, Freedom, and Mulatto-Black Occupational Inequality in the Late 19th Century*, 45 REV. BLACK. POL. ECON. 3, 8 (2018) (“Professor Robert Reece notes that White people generally saw mixed-race slaves, who on average had lighter skin, as more intelligent and ‘more capable of being ‘civilized.’”)); *supra* notes 12–13.

<sup>43</sup> Lauren Araiza, *Me and Kelly Kean Sharp, or My Life as Someone’s Costume*, MEDIUM (Nov. 4, 2020), <https://laurenaraiza.medium.com/me-and-kelly-kean-sharp-or-my-life-as-someones-costume-ce16cf429908> [<https://perma.cc/Q7JW-MCEY>].

<sup>44</sup> Wamsley, *supra* note 38.

professoriate.<sup>45</sup> According to existing employment law, the aggrieved party (a university–employer) could simply and almost painlessly terminate or rescind the contract. Most employment relationships in the United States are “at will,” meaning that they can be terminated by either party for “good reason, bad reason, or no reason at all”—any reason except an illegal one.<sup>46</sup> Tenured faculty are an important exception to the at-will rule, but our postdoctoral fellow (and the vast majority of university instructors today) would not be protected by tenure. The university, like most employers in the private sector, could end the relationship without explanation.

If the employer was feeling loquacious, or if the employee sued demanding a legal ground for termination, it would not be hard to articulate one. The employer could activate a “morals clause,” should one of these exist in the contract.<sup>47</sup> Morals clauses are contract clauses that impose a certain behavioral standard on one contracting party in order to protect the other party’s reputation; they are most commonly found in the entertainment industry,<sup>48</sup> but they do regularly surface elsewhere.<sup>49</sup> In contracts with secondary and postsecondary educators, they even have the power to overcome the formidable protection of tenure.<sup>50</sup>

The power of morals clauses lies in their remarkable flexibility. “Immorality” is usually left undefined by legislation and case law,<sup>51</sup> so courts must determine its contours on a case-by-case basis and they tend to be particularly deferential to employers (especially educational employers) when doing so.<sup>52</sup> Even more appealingly, the clauses can encompass situations where the underlying deception does not rise to the level of being

<sup>45</sup> I am intentionally *not* assuming that the employee’s misrepresentation was undertaken to gain this particular benefit in order to capture a broader range of hypothetical scenarios.

<sup>46</sup> Nicole B. Porter, *The Perfect Compromise: Bridging the Gap Between At-Will Employment and Just Cause*, 87 NEB. L. REV. 62, 63 (2008); *At-Will Employment - Overview*, NAT’L CONF. OF STATE LEGISLATURES (Apr. 15, 2008), <https://www.ncsl.org/research/labor-and-employment/at-will-employment-overview.aspx> [https://perma.cc/S879-8KLB].

<sup>47</sup> See, e.g., *Scott v. RKO Radio Pictures, Inc.*, 240 F.2d 87, 88 (9th Cir. 1957); see also *Galaviz v. Post-Newsweek Stations*, 380 F. App’x 457, 459 (5th Cir. 2010) (describing a morals clause in an employee’s contract); Brief for Defendant-Appellee at 5–6, *Nader v. ABC Television, Inc.*, 150 F. App’x 54 (2d Cir. 2005) (No. 04-5034), 2005 WL 3948606, at \*5–6.

<sup>48</sup> Patricia Sánchez Abril & Nicholas Greene, *Contracting Correctness: A Rubric for Analyzing Morality Clauses*, 74 WASH. & LEE L. REV. 3, 6 (2017).

<sup>49</sup> *Id.* at 7 (noting that “[a]uthors, teachers, executives, board members, donors, franchisors, and even rank-and-file employees are often subject to contractual restrictions on off-duty behavior and potential ensuing embarrassment”).

<sup>50</sup> Marka B. Fleming, Amanda Harmon Cooley & Gwendolyn McFadden-Wade, *Morals Clauses for Educators in Secondary and Postsecondary Schools: Legal Applications and Constitutional Concerns*, 2009 BYU EDUC. & L.J. 67, 101–02 (2009); see Sánchez Abril & Greene, *supra* note 48, at 23 n.96.

<sup>51</sup> Fleming et al., *supra* note 50, at 73.

<sup>52</sup> *Id.* at 73–75.

material to contract formation or fulfillment. This is useful since most employers may not legally hire someone based on BIPOC identity and, consequently, cannot argue that race was material to their agreement or decision-making—even if it (illegally) was.<sup>53</sup>

Still, a majority of employees in the United States continue to be subject to the at-will rule, and their employers would not need to articulate any justification for terminating them. The real question for at-will employees and employers is whether a particular termination was made for an *illegal* reason—meaning, in the context of reverse passing, whether it was motivated by race discrimination.

Reverse passing incidents, which involve acknowledged deception, likely would not reflect this kind of illegal reasoning. Both parties agree as to the underlying social fact (the terminated employee’s true racial identity) and the actions it generated (misrepresentations regarding that racial identity). This, of course, means that they also agree that the employer did not initiate the termination because of the employee’s *true* identity, *adopted* identity, or *claim to transition* between identities, because neither party believes that any such transition occurred. But what if the two sides disagree on these preliminaries? What if at least one of them believes that the circumstances reflect—not reverse passing, but—racial transformation?

## II. HARD CASES

If existing law is well able to resolve the kind of disputes likely to arise from reverse passing, it is nonetheless *not* equipped to handle the two more complicated scenarios described below. As in the “easy cases” discussed above, no contract terminations took place in the real-life circumstances I describe here. But, had there been any terminations, the two sides would have found themselves in severe disagreement over matters that raise profound fairness concerns.

A few words about terminology: the two individuals in these scenarios have been accused of “reverse passing” at various times, but I do not use that term to describe their experiences. Instead, and as with the people discussed in Section I.A—Krug, Vittolo-Haddad, Sharp, and others—I take seriously how they describe their own actions and experiences. For similar reasons, I

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<sup>53</sup> 42 U.S.C. § 2000e-2(k)(1)(B)(ii) (allowing an employer defense in disparate treatment cases turning on gender, religion, or national origin discrimination). Executive Order 11246, signed by President Johnson in 1965, requires that federal contractors with more than 50 employees and contracts of more than \$50,000 must “develop and maintain a written affirmative action program.” Exec. Order No. 11246, 41 C.F.R. § 60-2 (1972). This brings most universities within the scope of affirmative action policies that allow some consideration of race, but it does not supersede the principle that race is not a bona fide occupational qualification (BFOQ).

do not refer to either of them as “transracial,” although, as Section II.B shows, their own avoidance of that language is less consistent. I do, however, refer to them using their most familiar names, which they themselves continue to use.

#### A. *Anthony Lennon*

Anthony David Lennon, a British man born to white Irish parents, has spent a lifetime responding to accusations that he is really Black, or at least that he is the mixed-race product of an extramarital affair.<sup>54</sup> An affair would explain both his blue eyes and his brown skin, as well as the tightly curling Black afro that grew naturally when he was a young man. Lennon spent his childhood in 1960s London being teased by classmates who considered him Black and being subjected to racial obscenities by school employees.<sup>55</sup> Nevertheless, both he and his mother have always vehemently denied that she had an affair, and Lennon has seemingly never, for official purposes, claimed anything but direct white Irish ancestry.<sup>56</sup>

Lennon’s story may seem all too familiar—a Black or mixed-race man grasping for the security and prestige of pure whiteness—but it has a twist. In 2018, news broke that Lennon was in the middle of an eighteen-month residency and leadership program with Talawa, Britain’s most prominent Black-led theater company.<sup>57</sup> The Talawa program is explicitly geared towards “black and minority ethnic” theater practitioners.<sup>58</sup> After years of being accused of passing as white, Lennon found himself suddenly, widely, and often viciously accused of passing as *Black*.<sup>59</sup>

Lennon’s accusers had considerable material to work with. Beginning in the 1990s, and a few times afterwards, Lennon changed his name to incorporate the African heritage that society kept ascribing to him. First, he became Soweto Alkebulan Ekundayo, then Taharka Ekundayo, and then, most recently, Anthony Taharka Ekundayo Lennon.<sup>60</sup> He also became more open about his belief that his racial ancestry was mixed.<sup>61</sup> In 2019, partly

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<sup>54</sup> Hattenstone, *supra* note 2.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> Michael Buffong, *Statement from Michael Buffong*, TALAWA, <http://www.talawa.com/articles/statement-from-michael-buffong> [<https://perma.cc/E5P9-HD9F>].

<sup>59</sup> Hattenstone, *supra* note 2.

<sup>60</sup> *Id.*; see *London Irish Actor Accused of Scamming Theater Grant Claims He’s “Not a White Man,”* IRISHCENTRAL (Sept. 13, 2019), <https://www.irishcentral.com/news/anthony-ekundayo-lennon-dna> [<https://perma.cc/D8NT-WXBR>] (explaining that he chose the name Ekundayo which means “weeping becomes joy” to express himself “as [he] saw fit”).

<sup>61</sup> *London Irish Actor*, *supra* note 60.

motivated by the Talawa controversy, Lennon took a DNA test to determine his ancestry. The results seemed to bear out his approach in its entirety. He *was* white: 46% Irish and Scottish, 22% English, Welsh, and northwestern European. He was *also* Black: 32% West African.<sup>62</sup> “Some people call themselves a born-again Christian,” observed Lennon. “Some people call me a born-again African. I prefer to call myself an African born again.”<sup>63</sup>

Unlike most individuals accused of “reverse passing,” Lennon seems to have been merely adapting to inconsistent social perceptions and a complicated physiological reality. He never tried to alter his hair or skin and never spoke in a different accent or dialect. Although he did change his name and speculate about his mixed heritage, he seems to have never represented himself as *wholly* Black (or wholly white).<sup>64</sup> None of these things are true about Rachel Dolezal, and yet Dolezal represents a second kind of scenario that existing law is not equipped to handle.

### B. Rachel Dolezal

Rachel Anne Dolezal was born in Montana to parents of German and Czech origin.<sup>65</sup> While it is nearly impossible to construct a definitive story about her childhood because she and her relatives disagree on many points, this much seems clear: her parents were devout Christians who adopted several African children, Rachel was deeply attached to those children (one of whom she later assumed guardianship of), and she has long had a troubled relationship with her parents.<sup>66</sup> It is also worth acknowledging that, unlike Lennon, Dolezal has fabricated various verifiable aspects of her life unrelated to her race<sup>67</sup> and has engaged in quintessential “bad acts” like welfare fraud.<sup>68</sup>

After graduating from college in Mississippi, Dolezal received an MFA from Howard University. She later sued Howard for discrimination and

<sup>62</sup> Hattenstone, *supra* note 2.

<sup>63</sup> *London Irish Actor*, *supra* note 60.

<sup>64</sup> See generally Hattenstone, *supra* note 2 (documenting Lennon’s various experiences of racial identity).

<sup>65</sup> Jessica Elgot, *Civil Rights Activist Rachel Dolezal Misrepresented Herself as Black, Claim Parents*, GUARDIAN (June 12, 2015, 9:34 AM), <https://www.theguardian.com/world/2015/jun/12/civil-rights-activist-rachel-dolezal-misrepresented-herself-as-black-claim-parents> [https://perma.cc/8JXN-ULMW]; Dana Ford & Greg Botelho, *Who Is Rachel Dolezal?*, CNN (June 17, 2015, 5:30 PM), <https://www.cnn.com/2015/06/16/us/rachel-dolezal> [https://perma.cc/D34E-NBXA].

<sup>66</sup> Ford & Botelho, *supra* note 65.

<sup>67</sup> See, e.g., McGreal, *supra* note 9 (describing how Dolezal’s references to a Black man, Albert Wilkerson, as her father led to accusations that she had falsely claimed Black parentage).

<sup>68</sup> Associated Press, *Former NAACP Leader Rachel Dolezal Agrees to Plea Deal on Welfare Fraud Charges*, NBC NEWS (Apr. 5, 2019, 5:25 PM), <https://www.nbcnews.com/news/us-news/former-naacp-leader-rachel-dolezal-agrees-plea-deal-welfare-fraud-n991566> [https://perma.cc/3FPN-QB76].

retaliation based on, among other things, her identity as a *white* woman;<sup>69</sup> this fact would surface repeatedly in critiques of Dolezal as proof that she believed she was white all along. Dolezal eventually married and divorced a Black man, Kevin Moore, whom she met while both were studying at Howard and with whom she has a biological child.<sup>70</sup>

At least since her Howard days, Dolezal's professional choices have reflected her predilection for and identification with Black culture. Her master's thesis at Howard was a painting "based on the interior of the black man's mind."<sup>71</sup> Between 2008 and 2010, she was the education director at the Human Rights Education Institute (HREI),<sup>72</sup> a nonprofit organization offering "proactive education programs that teach human rights, acceptance, respect for diversity, and cultural humility."<sup>73</sup> The year she left HREI, she began working as an adjunct instructor of Africana Studies at Eastern Washington University.<sup>74</sup> In 2014, she became president of the NAACP chapter in Spokane, Washington, and in the same year, she was also appointed to a position in Spokane's Office of Police Ombudsman.<sup>75</sup>

Dolezal's aesthetic and grooming preferences are longstanding as well. Before she left for Mississippi, when she was a primary caregiver for her adopted siblings, she began braiding her own hair using conventionally Black styles.<sup>76</sup> Throughout her years in college and at Howard, she continued experimenting with Black hairstyles and also explored Black clothing and makeup.<sup>77</sup> None of these adjustments were costless, in her telling. "My husband didn't want me to wear any black hairstyles," she said, adding that

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<sup>69</sup> Decca Aitkenhead, *Rachel Dolezal: 'I'm Not Going to Stoop and Apologise and Grovel,'* GUARDIAN (Feb. 25, 2017, 4:00 AM), <https://www.theguardian.com/us-news/2017/feb/25/rachel-dolezal-not-going-stoop-apologise-grovel> [https://perma.cc/3URF-7EQ7].

<sup>70</sup> *Id.*

<sup>71</sup> Doreen St. Félix, "The Rachel Divide" Review: A Disturbing Portrait of Dolezal's Racial Fraudulence, NEW YORKER (Apr. 26, 2018), <https://www.newyorker.com/culture/culture-desk/the-rachel-divide-review-a-disturbing-portrait-of-dolezals-racial-fraudulence> [https://perma.cc/FR5E-3XK2].

<sup>72</sup> *Human Rights Education Institute Releases Statement on Former Employee Dolezal*, KHQ (June 13, 2015), [https://www.khq.com/news/human-rights-education-institute-releases-statement-on-former-employee-dolezal/article\\_b2423eff-3673-57a8-9ca9-b510b21ca546.html](https://www.khq.com/news/human-rights-education-institute-releases-statement-on-former-employee-dolezal/article_b2423eff-3673-57a8-9ca9-b510b21ca546.html) [https://perma.cc/W7SQ-KWLZ].

<sup>73</sup> *Mission*, HUM. RTS EDUC. INST., <https://hrei.org/mission/> [https://perma.cc/FL8S-QP4J].

<sup>74</sup> Stacey Patton, *Rachel Dolezal Case Leaves a Campus Bewildered and Some Scholars Disgusted*, CHRON. HIGHER EDUC. (June 17, 2015), <https://www.chronicle.com/article/rachel-dolezal-case-leaves-a-campus-bewildered-and-some-scholars-disgusted> [https://perma.cc/59L5-7Q5Q].

<sup>75</sup> Nina Culver, *Spokane Officials Investigating Rachel Dolezal's Behavior on Ombudsman Panel*, SPOKESMAN-REV. (June 14, 2015), <https://www.spokesman.com/stories/2015/jun/14/spokane-officials-investigating-rachel-dolezals> [https://perma.cc/C5B8-FC4A].

<sup>76</sup> McGreal, *supra* note 9.

<sup>77</sup> *Id.*; see Aitkenhead, *supra* note 69.

in other romantic relationships she was either “exoticised by a white man or seen as the light-skinned black girl by a black man.”<sup>78</sup> Police officers “mark[ed] ‘black’” on her traffic tickets. And when she applied for a position formerly held by a white man, she claims she was offered roughly half his salary for the same job description.<sup>79</sup>

A relatively sympathetic commentator declared that he was confident that Dolezal “fe[lt] fully committed to her black identity,” yet he could not help wondering “why she ha[d] gone to the trouble of living a lie for half of her life.”<sup>80</sup> Other responses have been biting. A review of the 2018 Netflix biopic, *The Rachel Divide*, described Dolezal’s house as a “garrison of delusion” in which Dolezal could hide and “fanc[y] herself a Dorian Gray figure, slowly painting a portrait of herself, brown-skinned and adorned in vague Afrocentric regalia.”<sup>81</sup> An opinion writer declared that, regardless of what she claimed, Dolezal “is still a white lady with fussy hair and a bad tan, trying to make fetch happen.”<sup>82</sup>

It is admittedly difficult to believe Dolezal with respect to many aspects of her life—not only the specifics of her childhood and her financial circumstances, but also regarding assertions of familial abuse that, while potentially accurate, are now sullied by her various fabrications.<sup>83</sup> But there is one area in which we should not disbelieve her, and yet the overwhelming public tendency has been to do just that: her race.

### C. Identifying Hard Cases

Dolezal’s understanding of her racial identity is complicated. She argues that race is not real, but that she nevertheless *is* Black.<sup>84</sup> Her critics, likewise, would be hard pressed to accept that race is biologically salient but nevertheless argue that Dolezal *is not* Black.<sup>85</sup> She has sometimes rejected the label “transracial,”<sup>86</sup> while at other times she has embraced it.<sup>87</sup> Her

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<sup>78</sup> McGreal, *supra* note 9.

<sup>79</sup> *Id.*

<sup>80</sup> Clarence Page, *Why I Accept Rachel Dolezal’s Commitment to Her African-American Identity*, CHI. TRIB. (May 8, 2018, 2:05 PM), <https://www.chicagotribune.com/columns/clarence-page/ct-perspective-rachel-dolezal-naacp-passing-for-black-20180508-story.html> [<https://perma.cc/AB4W-QJLK>].

<sup>81</sup> St. Félix, *supra* note 71.

<sup>82</sup> Denene Millner, *Why Rachel Dolezal Can Never Be Black*, NPR (Mar. 3, 2017, 4:15 PM), <https://www.npr.org/sections/codeswitch/2017/03/03/518184030/why-rachel-dolezal-can-never-be-black> [<https://perma.cc/S6JA-N6NU>].

<sup>83</sup> *See, e.g.*, Aitkenhead, *supra* note 69 (describing the various claims Dolezal has made about her upbringing and experiences).

<sup>84</sup> *Id.*

<sup>85</sup> Anderson, *supra* note 16.

<sup>86</sup> McGreal, *supra* note 9.

<sup>87</sup> Aitkenhead, *supra* note 69.



critics argue that she is not transracial,<sup>88</sup> either because the term carries a specific meaning that is inapplicable to Dolezal,<sup>89</sup> or because the sense in which she uses the term is impossible,<sup>90</sup> or both. She distinguishes between being African-American and being Black, a distinction that is widely accepted,<sup>91</sup> and claims only the latter for herself<sup>92</sup> (although some critics began to question this too after she changed her name).<sup>93</sup> And, unlike Anthony Lennon, she has gone out of her way to acquire a physical appearance, professional path, and personal relationships that center around a single chosen racial identity.<sup>94</sup>

Nevertheless, Dolezal and Lennon trouble popular and legal understandings of race for much the same reason. To disagree with them, critics must affirm that race is objective, immutable, and largely unmistakable. To resolve employment disputes *against* them, courts must do likewise—otherwise there may be an illegal (because racially motivated) reason for termination that would be impermissible even in the context of at-will employment. Legally, treating race as an immutable trait in the face of sincere identity claims to the contrary requires us to say that race, long considered the crux of the United States’ “original sin” and the bedrock of its most potent divisions,<sup>95</sup> is an area in which individual choice does not matter but blood ancestry does.

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<sup>88</sup> See St. Félix, *supra* note 71 (“Nonsense terms like ‘transracialism’ and ‘cirsacialism’ had to be entertained by the likes of both Savannah Guthrie and Melissa Harris Perry.”).

<sup>89</sup> See Kevin Noble Maillard & Janis L. McDonald, *The Anatomy of Grey: A Theory of Interracial Convergence*, 26 MINN. J. LAW & INEQ. 305, 308 (2008) (using the term “transracial” to describe adoption across racial lines).

<sup>90</sup> See St. Félix, *supra* note 71.

<sup>91</sup> *NABJ Style Guide A*, NAT’L ASS’N OF BLACK JOURNALISTS, <https://www.nabj.org/page/styleguideA> [<https://perma.cc/5EY9-CU3V>]; see also Appiah, *supra* note 1 (noting that, according to some usages, “*Black* may be more inclusive than *African American* by encompassing recent African immigrants” and that “[a]t the time, the term didn’t necessarily sit well with many black Americans, especially older ones, used to insisting correctly that they did not personally come from Africa”).

<sup>92</sup> Georgina Lawton, *Is This ‘Black’ Theatre Director Actually Using White Privilege?*, GUARDIAN (Nov. 6, 2018, 5:21 AM), <https://www.theguardian.com/commentisfree/2018/nov/06/black-anthony-lennon-theatre-director-white-mixed-race> [<https://perma.cc/8Z2Z-YN7P>].

<sup>93</sup> Awesomely Luvvie, *We, the Nigerians, Do Not Accept Rachel Dolezal’s New Name*, AWESOMELY LUVVIE (Mar. 1, 2017), <https://awesomelyluvvie.com/2017/03/rachel-dolezal-new-name.html> [<https://perma.cc/ET8D-GDWC>].

<sup>94</sup> McGreal, *supra* note 9 (noting that Dolezal has adopted Black hair-braiding styles and darkened her skin); Aitkenhead, *supra* note 69 (noting that Dolezal has long worn African clothing like dashikis and headwraps).

<sup>95</sup> See ISABEL WILKERSON, *CASTE: THE ORIGINS OF OUR DISCONTENTS* 39–53 (2020).

This, as a matter of fact, is exactly how most Americans tend to understand race.<sup>96</sup> Shortly after the Dolezal scandal erupted in 2015, the sociologist Rogers Brubaker noted that “[p]aradoxically, while sex is a biological category in a way that race is not, sex and gender are understood to be more open to choice and change than are race and ethnicity”—and, furthermore, that “[t]his holds even more strongly in North America, where racial classification has historically depended not only on phenotype but also, crucially, on ancestry.”<sup>97</sup> Indeed, historians have noted how laws that turned on racial difference both reflected and constructed an understanding of race as biologically determined.<sup>98</sup>

But historians have also shown how even at the height of race-as-biology ideology, the work of actually determining racial identity rested on factors like behavior that are far more fluid.<sup>99</sup> For its part, the Supreme Court “has not held . . . racial status to be biological” and has instead consistently “treated that status as the product of institutions that were necessarily social and political.”<sup>100</sup> We might question the Court’s sincerity on this point, but in its explicit articulations on the subject, the Supreme Court has been unmistakably opposed to the notion of race-as-biology.<sup>101</sup>

Social scientists, meanwhile, are also reluctant to accept the concept of unchanging, biologically determined racial identity. In the early twentieth century, American anthropologists worked hard to undermine the scientific

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<sup>96</sup> See, e.g., Alvin B. Tillery, Jr., *The First-Ever National Survey on Race and Genetics Finds Americans Have a Nuanced Understanding of Race*, CTR. FOR THE STUDY OF DIVERSITY & DEMOCRACY (Aug. 17, 2018), <https://csdd.northwestern.edu/research/csdd-23andme-race-and-genomics-survey-2018.html> [<https://perma.cc/WSX9-RXWX>] (noting that fifty-three percent of respondents in a nationally representative survey sample believed that biology “somewhat” or “totally” determines racial identity).

<sup>97</sup> ROGERS BRUBAKER, TRANS: GENDER AND RACE IN AN AGE OF UNSETTLED IDENTITIES 6 (2016).

<sup>98</sup> See, e.g., ALEJANDRO DE LA FUENTE & ARIELA J. GROSS, BECOMING FREE, BECOMING BLACK: RACE, FREEDOM, AND LAW IN CUBA, VIRGINIA, AND LOUISIANA 7 (2020) (describing *partus sequitur ventrum*, a rule that tied the racial and legal status of children to that of their mothers); F. JAMES DAVIS, WHO IS BLACK?: ONE NATION’S DEFINITION 4–6 (10th anniversary ed. 2001) (discussing the “one drop rule,” according to which a single drop of Black blood made one Black).

<sup>99</sup> See Gross, *supra* note 16, at 118.

<sup>100</sup> Donald Braman, *Of Race and Immutability*, 46 UCLA L. REV. 1375, 1446 (1999). For similar arguments, see Natasha L. Minsker, “*I Have a Dream—Never Forget*”: *When Rhetoric Becomes Law, a Comparison of the Jurisprudence of Race in Germany and the United States*, 14 HARV. BLACKLETTER L.J. 113, 114–17 (1998) (explaining that the Supreme Court operates on the notion that “race must disappear from the American legal landscape”); Christian B. Sundquist, *The Meaning of Race in the DNA Era: Science, History and the Law*, 27 TEMP. J. SCI., TECH. & ENV’T. L. 231, 232–33 (2008) (explaining that race has complex social meaning and is always in flux).

<sup>101</sup> Khiara M. Bridges, *The Dangerous Law of Biological Race*, 82 FORDHAM L. REV. 21, 24–25 (2013); see also IAN HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 64 (10th anniversary ed. 2006) (discussing *United States v. Thind*, 261 U.S. 204 (1923), where the Court ceased to determine race based on scientific evidence).

justifications for race-as-biology that were then in vogue.<sup>102</sup> Famously—although perhaps apocryphally—Boasian anthropology, along with Du Boisian sociology, was essential to the social science arguments made by the NAACP-LDF in *Brown v. Board of Education*.<sup>103</sup> Today, anthropologists simultaneously reject the notion of biological race *and* engage in searing critiques of racism.<sup>104</sup> They achieve this balance by moving towards a synthesized position that acknowledges how “socially identified race *becomes* biologically meaningful.”<sup>105</sup>

Dismissing the mutability of race thus requires us to understand racial identity as biological despite considerable legal and social science opinion to the contrary, to say nothing of biological science itself.<sup>106</sup> It also contrasts uncomfortably with the antiracist mandate to foster awareness of how legal and social infrastructures facilitate oppression; many of these racist systems have drawn their power from the commingling of race, genetics, and negative stereotypes in order to involuntarily racialize and marginalize BIPOC communities.<sup>107</sup>

As matters stand, if the NAACP or Eastern Washington University had fired Dolezal, or if an American equivalent of the Talawa program had rescinded its fellowship offer to Lennon, courts would have to conflate easy cases of reverse passing with hard cases of racial transition because, right now, our judicial practice can only comprehend the former. A court would

<sup>102</sup> Robert Oppenheim, *Revisiting Hrdlička and Boas: Asymmetries of Race and Anti-Imperialism in Interwar Anthropology*, 112 AM. ANTHROPOLOGIST 92, 100–01 (2010).

<sup>103</sup> LEE D. BAKER, FROM SAVAGE TO NEGRO: ANTHROPOLOGY AND THE CONSTRUCTION OF RACE, 1896–1954, at 6 (1998) (arguing for a connection between Boasian anthropology, race studies at Howard University, and the social science arguments featured in the NAACP-LDF position).

<sup>104</sup> Jennifer K. Wagner, Joon-Ho Yu, Jayne O. Ifekwunigwe, Tanya M. Harrell, Michael J. Bamshad & Charmaine D. Royal, *Anthropologists’ Views on Race, Ancestry, and Genetics*, 162 AM. J. PHYSICAL ANTHROPOLOGY 318, 325–26 (2017); see also Jonathan Rosa & Vanessa Díaz, *Racintologies: Rethinking Anthropological Accounts of Institutional Racism and Enactments of White Supremacy in the United States*, 122 AM. ANTHROPOLOGIST 120, 127–28 (2019) (discussing how racially minoritized scholars understand racism through their lived experiences); Michael Partis, *The Making of Racial Caste in Post-truth America*, 121 AM. ANTHROPOLOGIST 170, 170–71 (2019) (explaining that racism is a result of “racialization”); Folch, *supra* note 12 (observing racism in academia due to racial categorization).

<sup>105</sup> Jayne O. Ifekwunigwe, Jennifer K. Wagner, Joon-Ho Yu, Tanya M. Harrell, Michael J. Bamshad & Charmaine D. Royal, *A Qualitative Analysis of How Anthropologists Interpret the Race Construct*, 119 AM. ANTHROPOLOGIST 422, 429 (2017) (emphasis added) (citations omitted).

<sup>106</sup> See *New AMA Policies Recognize Race as a Social, Not Biological, Construct*, AM. MED. ASS’N (Nov. 16, 2020), <https://www.ama-assn.org/press-center/press-releases/new-ama-policies-recognize-race-social-not-biological-construct> [https://perma.cc/8JR9-YVLV]; *The Racist History of Race Science*, UNION OF CONCERNED SCIENTISTS (Oct. 6, 2020), <https://www.ucsusa.org/resources/racist-history-race-science> [https://perma.cc/W2YC-V885].

<sup>107</sup> Kirsten Ivey-Colson & Lynn Turner, *10 Keys to Everyday Anti-Racism*, GREATER GOOD MAG. (Sept. 8, 2020), [https://greatergood.berkeley.edu/article/item/ten\\_keys\\_to\\_everyday\\_anti\\_racism](https://greatergood.berkeley.edu/article/item/ten_keys_to_everyday_anti_racism) [https://perma.cc/VW2K-9MNP].

have to characterize Dolezal and Lennon's self-identifications as nonsense (because race is immutable) and their actions as deceptive (thus potentially within the scope of a morals clause). It would have to find that their terminations did not reflect illegal discrimination on the basis of race because, after all, no racial identity was truly abandoned, no new identity was adopted, and no transition from one to the other occurred. And in doing all this, the court would almost definitely have to find against Dolezal and Lennon if they chose to contest their terminations. Conversely, to find *for* Dolezal or Lennon, the court would have to accept their view that racial identity is at least partly subjective, mutable, and fluid.

The final Part of this Essay argues in favor of the latter approach and explains how the doctrinal infrastructure for adopting it already exists. But first, Part III explains why existing approaches fall short.

### III. RACE | IMMUTABILITY

Courts currently lack the conceptual and doctrinal vocabulary to grapple with hard cases of race-claiming. If they look to the contract law mechanisms described above, they risk collapsing the distinction between people engaged in reverse passing and people who sincerely believe that they are what they present themselves to be. Other bodies of case law to which courts might turn overwhelmingly focus on misperceived, miscategorized, or mixed-race identity,<sup>108</sup> none of which adequately describe circumstances like those of Dolezal and Lennon. This Part explores the two areas of jurisprudence—on determining racial identity and regarding trait immutability—that might seem to be the most promising sources of help for courts adjudicating hard cases of race-claiming but that actually, as I show, offer judges little guidance.

#### A. *Determining Racial Identity*

Three things are worth noting at the outset: first, courts have largely emphasized ancestry over appearance and self-identification in the determination of race; second, they rarely accept that racial identity can change; and third, employers rarely challenge employees' membership in a particular race.<sup>109</sup> A central assumption of this Essay is that the last of these statements will become less true over time as revelations of reverse passing

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<sup>108</sup> See D. Wendy Greene, *Categorically Black, White, or Wrong: "Misperception Discrimination" and the State of Title VII Protection*, 47 U. MICH. J.L. REFORM 87, 89–91 (2013); Nancy Leong, *Judicial Erasure of Mixed-Race Discrimination*, 59 AM. U. L. REV. 469, 490–91 (2010); Peery, *supra* note 20, at 1846–60.

<sup>109</sup> There are exceptions to each of these statements, of course. See Peery, *supra* note 20, at 1855–56; Rich, *supra* note 10, at 194–95.

continue to unfold. Destabilizing the first two, however, will take some work.

Laws that require courts to consider race rarely tell them how to *identify* race.<sup>110</sup> Title VII of the Civil Rights Act of 1964, the massive employment discrimination statute operating in the background of many conversations on race determination and immutability, does not define “race” or suggest how someone’s racial identity can be determined.<sup>111</sup> Likewise, Title VIII—the Fair Housing Act—prohibits housing discrimination, but it, too, does not define race.<sup>112</sup> Even the infamous hypodescent laws of the American South, which classified individuals according to minute quanta of blood ancestry, often left it up to decision-makers to decide how to best “make the leap from what was knowable about a person to what was unknowable, or at least only imperfectly ascertainable.”<sup>113</sup>

Because of this missing guidance, judges and jurors—like the public more generally—have relied on other factors to determine a person’s racial identity when her ancestry is unknown, unclear, or in dispute. Phenotype, or the interaction between a person’s genes and her environment to produce observable characteristics, is the single most influential of these factors.<sup>114</sup> Where phenotype is ambiguous, behavior becomes especially relevant: does the individual in question have mannerisms, habits, tastes, or acquaintances that suggest a particular identity?<sup>115</sup> Self-identification comes last in this list of possible cues: only where ancestry is unknown and phenotype as well as behavior are unenlightening do courts and laypersons tend to draw inferences from the way an individual chooses to identify herself.<sup>116</sup>

Scholars increasingly critique the use of these factors (save self-identification) to involuntarily assign individuals specific racial identities. There is a growing sense that law should “attend to the dignity concerns of individuals as they attempt to control the terms on which their bodies are

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<sup>110</sup> An important partial exception to this rule is for state programs allotting government contracts to members of particular communities. See David E. Bernstein, *The Modern American Law of Race*, 94 S. CAL. L. REV. (forthcoming 2021) (manuscript at 36–47) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3592850](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3592850) [<https://perma.cc/8Y38-LEW9>]. However, the documentary proofs required by these programs (birth certificates, drivers’ licenses, etc.) are less helpful when the parties disagree as to the accuracy of those proof forms.

<sup>111</sup> Civil Rights Act of 1964, 42 U.S.C. § 2000e. Note that Title VII does define “religion,” § 2000e(j), and the phrase “because of sex,” § 2000e(k).

<sup>112</sup> Civil Rights Act of 1968, 42 U.S.C. § 3601.

<sup>113</sup> Gross, *supra* note 16, at 118.

<sup>114</sup> See Peery, *supra* note 20, at 1858–59.

<sup>115</sup> See Gross, *supra* note 16, at 156.

<sup>116</sup> Peery, *supra* note 20, at 1859.

assigned racial meaning.”<sup>117</sup> Prioritizing external assessments based on ancestry, phenotype, and behavior over more complex or fluid forms of self-identification is widely viewed as defeating that mission. To the extent that we want law to take racism and discrimination seriously, this literature argues, we need to take people seriously when they describe themselves and their experiences of race.<sup>118</sup>

And yet, there is curiously little support for the idea that race itself is mutable. This is partly the effect of historical contingency: support for racial self-determination is heavily indebted to advocacy for and by multiracial Americans who have experienced considerable discrimination but who, in a readily accessible (because biological) sense, *already are* what they claim to be.<sup>119</sup> It is also a reflection of imaginative shortcomings on the part of scholars, judges, and legislators who have simply not believed that sincere claims of racial identity transformation are possible. Even the most envelope-pushing analyses tend to consider the challenges faced by *other* types of individuals: biracial, multiracial, racially liminal persons, persons who are “conscientious objector[s] to American norms regarding rac[e],” and, of course, passers who present themselves as something they know they are not.<sup>120</sup> All of which is to say that case law and scholarship on racial self-determination do not help courts grapple with hard cases of race-claiming.<sup>121</sup> A similar attitude and lacuna emerge in the case law and literature on immutability.

### B. Old, New, and Anti-Immutability

The concept of trait immutability entered Supreme Court jurisprudence via the 1973 case *Frontiero v. Richardson*.<sup>122</sup> The federal statutes at issue in *Frontiero* placed uneven burdens of proof on enlisted men and women who wanted to claim medical and housing subsidies for their spouses.<sup>123</sup> The

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<sup>117</sup> Camille Gear Rich, *Elective Race: Recognizing Race Discrimination in the Era of Racial Self-Identification*, 102 GEO. L.J. 1501, 1505 (2014).

<sup>118</sup> Leong, *supra* note 108, at 535–36; Rich, *supra* note 117, at 1570; *see also* Richard Delgado, *Rodrigo’s Eleventh Chronicle: Empathy and False Empathy*, 84 CALIF. L. REV. 61, 92–93 (1996) (explaining that since most judges are not racial minorities, courts are currently ill-equipped to deal with questions of discrimination).

<sup>119</sup> *See* Leong, *supra* note 108, at 493–94.

<sup>120</sup> Rich, *supra* note 117, at 1547–50, 1570 n.190.

<sup>121</sup> *But see id.* at 1569 (describing a framework that “assumes that racial identity will be fluid for many social actors”); John Tehranian, *Changing Race: Fluidity, Immutability, and the Evolution of Equal-Protection Jurisprudence*, 22 U. PA. J. CONST. L. 1, 9 (2019) (calling for “a more robust understanding of the Fourteenth Amendment that moves beyond the myopic and ill-conceived fetishization of immutability”).

<sup>122</sup> 411 U.S. 677, 686 (1973).

<sup>123</sup> *Id.* at 678–79.

American Civil Liberties Union (ACLU) joined the *Frontieros* as amicus and used the perceived immutability of sexual identity (and accompanying sex stereotypes) to novel and powerful effect.<sup>124</sup>

Before *Frontiero*, the assumption that sex was biological and therefore immutable made it seem only natural that sexual identity should be the basis for classification. The ACLU, however, argued that the immutable nature of sexual identity was precisely what made it all the more invidious and unconstitutional as a basis for classification where “no necessary relationship” existed between sex and an individual’s relevant abilities.<sup>125</sup> After *Frontiero*, it became increasingly accepted that immutable characteristics—traits one is born with and cannot change—should not inform classification in the absence of relevant differences.<sup>126</sup> This principle is now widely called the “old” immutability.<sup>127</sup>

The “new” immutability is more expansive. Courts applying this version of the principle view some traits as “so central to a person’s identity that it would be abhorrent for government to penalize a person for refusing to change them, regardless of how easy that change might be physically.”<sup>128</sup> New immutability has gained traction in recent years because it is seen as responsive to changing ideas about gender identity and, especially, sexual orientation. *Obergefell v. Hodges*, the landmark 2015 case that legalized same-sex marriage, briefly referenced the immutability of sexual orientation (although it did not specify what role, if any, immutability played in the Court’s analysis).<sup>129</sup>

What scholarship and case law have overwhelmingly failed to consider is the extent to which *racial* identity is immutable.<sup>130</sup> New immutability

<sup>124</sup> Braman, *supra* note 100, at 1451–52.

<sup>125</sup> *Id.* at 1452–53 (citing Transcript of Oral Argument, *Frontiero v. Richardson*, 411 U.S. 677 (1973) (No. 71-1694)).

<sup>126</sup> *Michael M. v. Superior Ct.*, 450 U.S. 464, 478–81 (1981) (Stewart, J., concurring).

<sup>127</sup> Clarke, *supra* note 22, at 4–6, 6 n.8.

<sup>128</sup> *Id.* at 25 (quoting *Watkins v. U.S. Army*, 875 F.2d 699, 726 (9th Cir. 1989) (Norris, J., concurring)).

<sup>129</sup> *Id.* at 23 n.109.

<sup>130</sup> For a step in this direction, see Justin Desautels-Stein, *Race as a Legal Concept*, 2 COLUM. J. RACE & L. 1, 73 (2012) (criticizing how race as a legal concept perpetuated racism and calling for reconsideration of race as a trait). By contrast, many of law’s cognate disciplines have long questioned the idea that identity markers like race are stable, such that there *is* an objective, observable truth of the matter. In the late 1980s, for instance, James Clifford documented the struggle of a federal district court to deal with the prospect of race mutability as it applied to a Native American community in Massachusetts. JAMES CLIFFORD, *THE PREDICAMENT OF CULTURE: TWENTIETH-CENTURY ETHNOGRAPHY, LITERATURE, AND ART* 277–348 (1988).

scholarship is overwhelmingly concerned with sexual orientation<sup>131</sup> and, to a lesser extent, with gender identity.<sup>132</sup> Immutability has also been discussed in the context of immigration status,<sup>133</sup> parental status,<sup>134</sup> criminal history,<sup>135</sup> disability,<sup>136</sup> pregnancy,<sup>137</sup> weight,<sup>138</sup> attractiveness,<sup>139</sup> hair and clothing styles,<sup>140</sup> and even political affiliation.<sup>141</sup> But even when any of these characteristics share some nexus with racial identity, race itself is rarely the focus of analysis or the grounds on which immutability analysis is either approved or rejected. Whenever the question of racial transformation *does* arise, race is overwhelmingly held to be immutable.<sup>142</sup>

None of this should be surprising. Race is the *ur*-category<sup>143</sup> of the United States, and it is difficult to imagine that something so impactful and immovable at a systemic level may nonetheless be fluid at the level of individuals. That, however, is precisely what law must—and *can*—acknowledge.

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<sup>131</sup> See Edward Stein, *Immutability and Innateness Arguments About Lesbian, Gay, and Bisexual Rights*, 89 CHL.-KENT L. REV. 597, 598–601 (2014); Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 507–16 (1994); Jeremiah A. Ho, *Once We're Done Honeymooning: Obergefell v. Hodges, Incrementalism, and Advances for Sexual Orientation Anti-Discrimination*, 104 KY. L.J. 207, 244–49 (2015).

<sup>132</sup> See Lisa M. Diamond & Clifford J. Rosky, *Scrutinizing Immutability: Research on Sexual Orientation and U.S. Legal Advocacy for Sexual Minorities*, 53 J. SEX RSCH. 363, 364–65 (2016).

<sup>133</sup> Joseph Landau, “Soft Immutability” and “Imputed Gay Identity”: *Recent Developments in Transgender and Sexual-Orientation-Based Asylum Law*, 32 FORDHAM URB. L.J. 237, 238 (2005); Nicholas Serafin, *In Defense of Immutability*, 2020 BYU L. REV. 275, 314–15 (2020).

<sup>134</sup> Sharona Hoffman, *The Importance of Immutability in Employment Discrimination Law*, 52 WM. & MARY L. REV. 1483, 1533–35 (2011).

<sup>135</sup> Clarke, *supra* note 22, at 76–85.

<sup>136</sup> See Spencer Rand, *Creating My Client’s Image: Is Case Theory Value Neutral in Public Benefits Cases?*, 28 WASH. U. J.L. & POL’Y 69, 77 (2008) (arguing that in Supplemental Security Income (SSI) and Social Security Disability cases, clients must effectively testify as to the immutability of their disabilities and failings in order to demonstrate genuine need).

<sup>137</sup> Clarke, *supra* note 22, at 62–75.

<sup>138</sup> *Id.* at 53–61; Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CALIF. L. REV. 1, 8–9 (2000).

<sup>139</sup> Hoffman, *supra* note 134, at 1531–32.

<sup>140</sup> *Willingham v. Macon Tel. Publ’g Co.*, 507 F.2d 1084, 1091–92 (5th Cir. 1975).

<sup>141</sup> Hoffman, *supra* note 134, at 1536–37.

<sup>142</sup> Zachary A. Kramer, *The New Sex Discrimination*, 63 DUKE L.J. 891, 949 (2014); Ann E. Tweedy, *Polyamory as a Sexual Orientation*, 79 U. CIN. L. REV. 1461, 1475 (2011); Michael A. Helfand, *The Usual Suspect Classifications: Criminals, Aliens and the Future of Same-Sex Marriage*, 12 U. PA. J. CONST. L. 1, 34 (2009); Hoffman, *supra* note 134, at 1508. *But see* Tiffany C. Graham, *The Shifting Doctrinal Face of Immutability*, 19 VA. J. SOC. POL’Y & L. 169, 185–86, 86 n.76 (2011) (explaining that modern scientific evidence overwhelmingly rejects the notion that race is immutable); Stein, *supra* note 131, at 619–20, 620 n.88 (explaining that there is “significant evidence” rejecting the popular notion that race is biologically based).

<sup>143</sup> *Ur-*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/ur-> [<https://perma.cc/Y7Y8-9HCB>].



## IV. ACCOUNTING FOR RACIAL TRANSFORMATION

Although law has struggled to account for the fluidity of racial identity, the framework for doing so already exists. In fact, our case law has *never* required that we treat race as biological and therefore immutable. Likewise, our federal antidiscrimination statutes have always been capable of distinguishing between incidents of reverse passing and harder cases of racial transformation. Since many state statutes borrow significantly from their federal counterparts, they too have this capacity. This Part sketches the broad outlines of a legal principle and an interpretive posture to implement what is already possible by drawing on the Supreme Court’s 2020 decision in *Bostock v. Clayton County*.<sup>144</sup>

## A. From Race to Sex and Back Again

*Bostock* consolidated three separate cases to ask whether “an employer can fire someone simply for being homosexual or transgender.”<sup>145</sup> The Court, in a 6–3 split and majority opinion written by Justice Gorsuch, concluded that Title VII forbids this.<sup>146</sup> *Bostock* has elicited widespread commentary, both for the protections it affords transgender individuals and for Justice Gorsuch’s approach to textualist interpretation.<sup>147</sup> The discussions about what *Bostock* means for textualism are important and ongoing, but they are not the focus of this Essay.

The majority’s analysis in *Bostock* makes clear that it is not beyond the doctrinal scope of our law or the institutional capacity of our courts to account for transformations within a seemingly immutable and biologically determined characteristic. Consider the following lines from Justice Gorsuch’s opening paragraphs, with the relevant terms replaced and italicized:

Today, we must decide whether an employer can fire someone simply for being *transracial*. The answer is clear. An employer who fires an individual for being *transracial* fires that person for traits or actions it would not have questioned in

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<sup>144</sup> 140 S. Ct. 1731 (2020).

<sup>145</sup> *Id.* at 1737.

<sup>146</sup> *Id.* at 1754.

<sup>147</sup> See Nancy C. Marcus, *Bostock v. Clayton County and the Problem of Bisexual Erasure*, 115 NW. U. L. REV. ONLINE 223, 226–27 (2020); William N. Eskridge Jr., Brian G. Slocum & Stefan Th. Gries, *The Meaning of Sex: Dynamic Words, Novel Applications, and Original Public Meaning*, 119 MICH. L. REV. 1503, 1519–20 (2021); Tara Leigh Grove, Comment, *Which Textualism?*, 134 HARV. L. REV. 265, 268–71 (2020); Nelson Lund, *Unleashed and Unbound: Living Textualism in Bostock v. Clayton County*, 21 FEDERALIST SOC’Y REV. 158, 158–61 (2020).

members of a different *race*. *Race* plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.<sup>148</sup>

Before *Bostock* was released, commentators noted that the Court could affirm Title VII's application to sexual orientation and gender identity in multiple ways. For example, using the sex-stereotyping logic of *Price Waterhouse v. Hopkins*,<sup>149</sup> the Court could have found that "a person's failure to conform to sex stereotypes cannot be the basis for denying them equal employment opportunity."<sup>150</sup> In the end, however, the *Bostock* majority chose a different route. It determined that "[f]or an employer to discriminate against employees for being homosexual or transgender, the employer must intentionally discriminate against individual men and women in part because of sex."<sup>151</sup>

*Bostock's* logic applies with equal force to race. The conceptual link between race and racial identity is at least as strong as the one between sex and gender identity. Sex was once legally considered to be a fixed, objective, and observable trait in a way that made the very concept of gender identity superfluous and the possibility of sex transformation unthinkable.<sup>152</sup> If anything, the concept of immutable and inherited race ought to have *less* gravitational pull than that of comparable perspectives regarding sex, given the scientific consensus that the former is less biologically meaningful than the latter.<sup>153</sup>

Analogizing between race and sex for equality law purposes is a tricky and frequently criticized endeavor.<sup>154</sup> But arguing that our legal infrastructure can and should accommodate racial transformation is not the same thing as saying that "race and sex are the same" or even that "being transracial and transgender are the same." This Essay is only making the first of these three claims.

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<sup>148</sup> *Bostock*, 140 S. Ct. at 1737. I use the word "transracial" here for ease of reading and not because it is accepted by any particular individual discussed in this Essay or because I advocate its use more generally.

<sup>149</sup> 490 U.S. 228, 250 (1989).

<sup>150</sup> Vanita Gupta & Sharon McGowan, *Symposium: Let's Talk About Sex: Why Title VII Must Cover Sexual Orientation and Gender Identity*, SCOTUSBLOG (Sept. 5, 2019, 3:53 PM), <https://www.scotusblog.com/2019/09/symposium-lets-talk-about-sex-why-title-vii-must-cover-sexual-orientation-and-gender-identity> [<https://perma.cc/7P3S-XCJZ>].

<sup>151</sup> *Bostock*, 140 S. Ct. at 1743.

<sup>152</sup> See *Frontiero v. Richardson*, 411 U.S. 677 (1973).

<sup>153</sup> See BRUBAKER, *supra* note 97, at 43.

<sup>154</sup> Braman, *supra* note 100, at 1457–60 (arguing that the "old" immutability's emphasis on unalterable biological factors derives from an "incautious" reading of the Supreme Court's *Frontiero* analysis).

The legal principle made clearer by *Bostock* is that sincere transformations within a protected and seemingly immutable trait can and should be protected themselves. But the true lesson of the decision is that our most foundational assumptions about identity and personhood are themselves hardly immutable.

### B. *Cultivating Attentiveness to Race*

Acknowledging the possibility of racial transformation is one thing; according it legal protections is another altogether. Fortunately, and rather like the doctrinal foundation on which it rests, we already have something to build on.

Legal decision-makers habitually engage in intensively fact-based analysis. This is all the more true in the kind of employment discrimination cases most immediately relevant to this Essay. Courts and juries read documents, hear testimony, consult records, listen to experts, and absorb relevant minutiae in a dozen other ways during the course of litigation. They judge credibility by weighing some statements against other statements and measuring declarations by actions. In other words, they already engage in many of the bare acts that are part of cultivating a greater attentiveness to race. But they could do them better.

What makes for good analysis in this context (as in many others) is that the decision-maker is capable of *attending to* things in ways that others might attend to differently—ignore, naturalize, fetishize, valorize, and so on.<sup>155</sup> Attentiveness can be cultivated, and there are different ways of being attentive: “One can learn to slow down, listen deeply, listen further, converse, elicit, observe nuance, piece things together, interpret, map, connect dots, situate, historicize, contextualize, improvise.”<sup>156</sup> As in all things, some people will be better at cultivating certain kinds of attentiveness, while others will be more successful in their efforts at cultivating *every* kind of attentiveness. The distribution of these skills need not track educational attainment or professional training: judges are just as capable of being inattentive as jurors are of attending closely.

Cultivating a greater attentiveness to race allows us to resolve disputes over race-claiming with compassion, but also with care. It acknowledges that changes within so-called immutable characteristics are possible—even within that most persistently immutable trait, race—while also

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<sup>155</sup> Anna Tsing calls for greater commitment to “arts of noticing.” Maija Lassila, *Interview with Anna Tsing*, 42 SUOMEN ANTROPOLOGI 22, 28 (2017).

<sup>156</sup> Sunder Rajan, *supra* note 18, at 1.

acknowledging that not all such changes are equal. Put differently, it gives us a way to distinguish the hard cases from the easy ones.

Here's how it goes.

Had the NAACP or Eastern Washington University fired Rachel Dolezal, she would sue for wrongful termination under Title VII.<sup>157</sup> Title VII would be understood to prohibit adverse employment actions arising from racial transformation, just as *Bostock* established that principle for transgender status. The only question remaining for the decision-maker—let's call it a court, although other decision-makers are possible—would be whether or not Dolezal sincerely sought to change her race.

We worry about judicial interrogations of sincerity in other areas of the law for good reason. Sincerity analysis in the context of religious freedom claims risks having courts get sidetracked into determinations of validity or veracity that are antithetical to our most basic constitutional commitments. But courts have developed ways to question religious sincerity without weighing religious beliefs, and they can act similarly when it comes to race-claiming.<sup>158</sup> They should simply do so with heightened and cultivated attentiveness.

A court that is attentive to race would acknowledge Dolezal's German and Czech ancestry and the many photographs of Dolezal's youth and early adulthood in which she is unquestionably phenotypically white.<sup>159</sup> But the same court would also acknowledge the myriad ways in which Dolezal had intentionally acquired attributes and obligations reflecting her claimed Black identity.<sup>160</sup> Her hair, her clothing, her makeup and pigmentation, as well as her education, work history, and her marriage and childcare—all of these reflect a longstanding, if not perfectly consistent, construction of self.<sup>161</sup> In keeping with the exhortation to attend to things differently than others might, the court would consider whether or not it was at risk of *ignoring* one set of facts for the sake of another.

A court that is attentive to race would acknowledge that Anthony Lennon has never claimed anything but white parentage as well as many of the privileges that went along with it in 1960s London. But it would also acknowledge his lived experiences of anti-Black racism and his longstanding, if again imperfectly consistent, struggle to become

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<sup>157</sup> 42 U.S.C. § 2000e-2(a)(1).

<sup>158</sup> Ben Adams & Cynthia Barmore, *Questioning Sincerity: The Role of the Courts After Hobby Lobby*, 67 STAN. L. REV. ONLINE 59, 64–65 (2014); Rich, *supra* note 10, at 186.

<sup>159</sup> See Elgot, *supra* note 65.

<sup>160</sup> See *supra* Part II.B.

<sup>161</sup> On inconsistent narratives and how courts should react to them, see Rich, *supra* note 117, at 1566.

comfortable with his race and even with his name.<sup>162</sup> The court's attentiveness to these matters would help it avoid *fetishizing* the results of a DNA test that, in the end, happened to coincide with what Lennon himself had been saying all along.

Finally, a court that is attentive to race would *explain* how it is being attentive to race. Legal scholars are adept at noting shortcomings in substantive law, but we sometimes de-emphasize the importance of judicial habit or custom. Yet the judicial practice of only writing decisions in summary judgement motions when the *defendant* wins (and not when the plaintiff survives) has much to do with the stunted nature and lopsided development of antidiscrimination law.<sup>163</sup> A court that is attentive to race would create a record of its analysis at the summary judgement stage that provides information for trial and precedent for future litigants.

Cultivating an attentiveness to race is what keeps the acknowledgement of racial transformation from turning into a rejection of either the salience of race or the persistence of racism. What I have said here no more necessitates a dangerous slide into nihilism regarding race than *Bostock* signaled the end of sex as a category relevant to social action or legal thought. Grotesque incidents like blackface parties on college campuses, for instance, remain the vile and dehumanizing phenomena they always were, and a court that is attentive to the experience and performance of race will find it all too easy to explain why.<sup>164</sup>

Some readers may object that cultivating this kind of attentiveness merely involves doing what courts already do: thoughtfully assessing the facts laid before them. But a careful, self-conscious, and systematic approach is often all that separates the things we all do sometimes from those who do them all the time—the reader of books from the historian or the friendly

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<sup>162</sup> Paying attention to the kind of behavioral identity work that Carbado and Gulati discuss would be useful here. See generally Carbado & Gulati, *supra* note 24 (explaining how social pressures and outside incentives shape one's identity and behaviors). For a similar argument in the case of transgender identity, see Robin Conley, "At the Time She Was a Man": *The Temporal Dimension of Identity Construction*, 31 POLAR 28, 29 (2008) (noting that "legal identity construction is nested in the courts' 'ardent belief in a smooth narrative of normalcy'" and that this kind of "narrative 'smoothness' depends in part on historical and temporal erasure").

<sup>163</sup> Gertner, *supra* note 15, at 113–15.

<sup>164</sup> See generally Richard Fausset & Campbell Robertson, *Beyond College Campuses and Public Scandals, a Racist Tradition Lingers*, N.Y. TIMES (Feb. 8, 2019), <https://www.nytimes.com/2019/02/08/us/northam-blackface-virginia.html> [<https://perma.cc/VC94-RGMV>] (describing racist incidents at a variety of college campuses). It takes only minimal attentiveness to appreciate the flamboyantly and intentionally temporary, derisive, and generic nature of the "transformation" on display in these circumstances. And it takes similarly minimal effort to draw on advertising before the event as well as activities and appearances during it to express that attentiveness in terms that are common to legal analysis.

stranger from the anthropologist. A court that cultivates attentiveness to race in the way I have described here *is* doing what courts (and indeed, all of us) do when confronted with divergent understandings of complex social phenomena. But it is, I want to argue, doing it better.

#### V. CRITIQUES AND (FURTHER) CONSIDERATIONS

This Essay began by discussing recent incidents of reverse passing and ended by proposing a principle and an interpretive posture to account for hard cases of racial transformation. Along the way, it argued that we need to question our reliance on an understanding of race as fixed, objective, and observable because this does not cohere with social-scientific, biological, or, indeed, legal notions of race. And, finally, the Essay suggested that even though existing approaches to racial identity and trait immutability do not offer courts sufficient guidance, the necessary tools—doctrinal and interpretive—are readily available.

This is a difficult time to have any conversation about race, but it is an especially difficult time to consider the possibility that racial identity—with all its attendant privileges and cruelties—may be more or less alterable at will. Individuals committed to antiracist work may and do resist this idea, particularly given the hurtful and frequently insulting behavior of the central characters in recent reverse passing scandals.<sup>165</sup>

Moreover, although this Essay challenges the logic of race immutability that prevails inside and outside the courtroom, I do not mean to suggest that demands for authenticity are mere “identity-policing.” They are not. On the contrary, in the context of an unstable society like the United States, such demands reflect a concern for political mobilization efforts that are both necessitated *and* legitimated by the premise of racial fixity. They also acknowledge that claims of racial transformation, whether sincere or not, are inextricable from the “identity capitalism” that commodifies otherness as surely as it once commodified whiteness.<sup>166</sup>

Despite these concerns, there are good reasons to proceed as I’ve suggested here. The wholesale equation of racial transformation with reverse passing rests on assumptions about the nature of race that are, at best, problematic. It also generates concerns about individual motivation or merit that are familiar and familiarly troubling. Worries about opportunistic race-claiming, for instance, while not incomprehensible, bear more than a passing resemblance to fears of the “disability con,” a widespread suspicion that able

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<sup>165</sup> See *supra* Part II.C.

<sup>166</sup> NANCY LEONG, *IDENTITY CAPITALISTS: THE POWERFUL INSIDERS WHO EXPLOIT DIVERSITY TO MAINTAIN INEQUALITY* 2–3 (2021); Harris, *supra* note 10, at 1724.

individuals fraudulently seek disability accommodations even in the absence of any proof that they do so.<sup>167</sup> This suspicion forces disabled individuals to engage in endless and public justification of their status and undermines the social legitimacy of the protections accorded to them. It assumes that identity-based protections or accommodations encourage strategic manipulation, particularly when the identity is not easily and externally verifiable.

Similar caveats apply to the worry about further advantaging persons not born into a BIPOC identity by using their “transformed” status as the basis for legal protections.<sup>168</sup> Yet, the idea that doing so undermines or disrespects the intent behind those protections sits uncomfortably with the notion, now rapidly gaining steam, that transgender women should not be excluded from measures and institutions supporting cisgender women.<sup>169</sup> For instance, in the years since the Dolezal incident, twenty-six of the approximately forty women’s colleges in the United States have expanded their admissions policies to include some transgender individuals.<sup>170</sup> Those changes have not gone uncriticized, and similar efforts—most commonly, the push to allow all individuals bathroom access in accordance with their stated gender identity—have also been frequently met with resistance.<sup>171</sup>

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<sup>167</sup> See generally Doron Dorfman, *Fear of the Disability Con: Perceptions of Fraud and Special Rights Discourse*, 53 LAW & SOC’Y REV. 1051 (2019) (introducing the “disability con” and describing the complex sociolegal background behind this phenomenon).

<sup>168</sup> As others have argued, any approach to racial identity determination may have different levels of applicability depending on the statutory purpose in question. See, e.g., Peery, *supra* note 20, at 1875. I do not dispute that possibility here, although given the scope of the Essay, I also do not explore it.

<sup>169</sup> Cisgender (adj.): “of, relating to, or being a person whose gender identity corresponds with the sex the person had or was identified as having at birth.” *Cisgender*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/cisgender> [<https://perma.cc/JFC5-DSDU>]; see, e.g., Robin Fretwell Wilson, *The Nonsense About Bathrooms: How Purported Concerns over Safety Block LGBT Nondiscrimination Laws and Obscure Real Religious Liberty Concerns*, 20 LEWIS & CLARK L. REV. 1373, 1388–91 (2017); Elizabeth Sepper & Deborah Dinner, *Sex in Public*, 129 YALE L.J. 78, 136–43 (2019); Gillian R. Brassil & Jeré Longman, *Who Should Compete in Women’s Sports? There Are Two Almost Irreconcilable Positions*, N.Y. TIMES (Apr. 12, 2021), <https://www.nytimes.com/2020/08/18/sports/transgender-athletes-womens-sports-idaho.html> [<https://perma.cc/W6V8-AUQK>].

<sup>170</sup> Anna North, *Can Transgender Students Go to Women’s Colleges? Across the Country, the Answer Is Evolving*, VOX (Sept. 22, 2017, 11:17 AM), <https://www.vox.com/identities/2017/9/21/16315072/spelman-college-transgender-students-womens-colleges> [<https://perma.cc/TY6X-KZZG>].

<sup>171</sup> Monica Potts, *Why Women’s Colleges Still Matter in the Age of Trans Activism*, NEW REPUBLIC (Feb. 16, 2015), <https://newrepublic.com/article/121071/women-colleges-still-matter-age-transactivism> [<https://perma.cc/Q468-VMVC>]; Julie Moreau, *Advocates Tracking over 200 Active State Bills Targeting LGBTQ Americans*, NBC NEWS (Feb. 4, 2020, 9:58 AM), <https://www.nbcnews.com/feature/nbc-out/advocates-tracking-over-200-active-state-bills-targeting-lgbtq-americans-n1129711> [<https://perma.cc/LPS7-BN8W>].

Nevertheless, there is growing agreement that gender identity is fluid, nonobvious, and deserving of public recognition.<sup>172</sup>

There is, finally, an argument to be made that race is exceptional in the American context, so that our thoughts about it should not be influenced by changes in how we understand and respond to other personal characteristics. But this is a curious kind of exceptionalism to espouse. It requires us to affirm that the truly antiracist position is one in which race is an immutable and objectively determined trait—that, in effect, race is the lone identity marker that *others decide for us*. That position is one that is becoming harder and harder to credibly maintain. Fortunately, as this Essay has argued, our laws do not demand that we do so.

### CONCLUSION

I will close on a personal note because the two bodies of scholarship from which this Essay most draws inspiration—anthropology and Critical Race Theory—both recognize and value the deeply subjective nature of all scholarship. It is likely that some readers will find it inappropriate that a cisgender, medium-hued South Asian American (really, Canadian) woman from an unquestionably privileged background is discussing matters of reverse passing or the tribulations of Black and not-quite-Black folk.<sup>173</sup> It is also likely that some readers will find it inappropriate for *anyone* to suggest that racial transformation can be genuine, or to discuss it in the same breath as the nature and challenges of being transgender in the United States.<sup>174</sup>

I understand these concerns. I also entertain other concerns, given the sometimes vicious attacks encountered by scholars who have engaged in similar work before me. But I have proceeded with this project for both professional and personal reasons.

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<sup>172</sup> Dianne Otto, *International Human Rights Law: Towards Rethinking Sex/Gender Dualism*, in THE ASHGATE RESEARCH COMPANION TO FEMINIST LEGAL THEORY 197, 210–11 (Margaret Davies & Vanessa E. Munro eds., Routledge 2016) (2013); Denise Grady, *Anatomy Does Not Determine Gender*, *Experts Say*, N.Y. TIMES (Oct. 22, 2018), <https://www.nytimes.com/2018/10/22/health/transgender-trump-biology.html> [<https://perma.cc/26WG-G66W>].

<sup>173</sup> Of course, South Asians are hardly inexperienced when it comes to conventional passing. See generally KAREN ISAKSEN LEONARD, MAKING ETHNIC CHOICES: CALIFORNIA'S PUNJABI MEXICAN AMERICANS (1992) (describing the flexibility of ethnic identities through a study of Punjabi men who married Mexican women in the early 20th century).

<sup>174</sup> When the feminist philosophy journal *Hypatia* published an article titled *In Defense of Transracialism* in 2017, the article's author was subject to an internet onslaught that was later called a "modern-day witch hunt." Jesse Singal, *This Is What a Modern-Day Witch Hunt Looks Like*, N.Y. MAG: INTELLIGENCER (May 2, 2017), <https://nymag.com/intelligencer/2017/05/transracialism-article-controversy.html> [<https://perma.cc/9UCG-5TRK>] (citing Rebecca Tuvel, *In Defense of Transracialism*, 32 HYPATIA 263 (2017)).



Professionally, ideas that may be worth sharing do not always deliver themselves to a reader's preferred vessel. As an anthropologist, I am also inherently suspicious of arguments suggesting that certain types of ideas are for certain people; this reasoning has usually been deployed to the detriment of nonwhite and female scholars, who are either told what they should properly study or what, if they know what's best for them, they should avoid.<sup>175</sup>

Personally, and despite my privilege, I do not inhabit a world that is immune from the complexities and the problems discussed in this Essay. That my heritage frequently works to my advantage is troubling to me, as their privilege is troubling to many white people. The possibility that my mixed-race son may confound those around him and perhaps even invite censure because of that confusion is too relevant to go unmentioned.

The reverse passing scandals with which this Essay began strike many as offensive, silly, or both. They may well be all of these things—indeed, they frequently are. Nevertheless, they also point to a specific and incredibly complex set of circumstances concerning race in the United States that, as we are learning, is not all that uncommon. Sooner or later, our legal infrastructure will be called on to grapple with the issues discussed here, and it is my hope that this will happen with a careful and cultivated attentiveness.

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<sup>175</sup> Kirin Narayan, *How Native is a "Native" Anthropologist?*, 95 AM. ANTHROPOLOGIST 671, 676–78 (1993).