

Reconstructing Race?

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Date : October 28, 2021

Deepa Das Acevedo, [\(Im\)mutable Race?](#), 116 *Nw. U. L. Rev. Colloquy* 88 (2021).

There's quite a fraught history of racial "passing" in the United States, until recently almost always of African Americans passing as white. In the past several years, however, the possibility of "reverse passing" has grabbed the headlines as individuals identified at birth as white have claimed Black or other racial identities. Rachel Dolezal and Jessica Krug are familiar examples, but not the only ones. The common reaction is to cry fraud and view the individuals as acting for some kind of economic advantage, freeriders on what is sometimes called "racial capitalism." Even absent that, such conduct necessarily entails cultural appropriation and may preempt opportunities of "real" members of the passed-for group.

It's not surprising, therefore, that such conduct has been widely condemned, a result reinforced by the questionable motives and conduct of some reverse passers. But what if a white person truly self-identifies as Black? And what if an employer seeks to terminate her because she is not "really" Black?

It's this highly-charged question that Deepa Das Acevedo addresses in *(Im)mutable Race*, which draws on *Bostock v. Clayton County* to ask whether self-identification of race is ultimately so different—legally speaking—from self-identification of gender. She explores what contract law and Title VII have to say about this scenario.

As with most Jots, it's impossible to capture the nuances of the piece in a short review, but it's important to stress that the author does not equate the experiences of transgender and transracial (a term she uses mostly for lack of a better one, despite potential confusion with literature on transracial adoption) individuals, and she in fact believes that most of the headline-grabbing cases of reverse passing in recent years are "easy" cases because they do not involve sincere claims. As the author notes, progressive commentators have "arrived at near-universal consensus" that "reverse passers are liars, and they *know* they are liars."

But many instances, or even most, is not necessarily all, and *(Im)mutable Race* takes seriously the "hard cases," that is, the possibility that some individuals authentically self-identify with a race or ethnicity different from that into which they were born. And "[t]o disagree with them, critics must affirm that race is objective, immutable, and largely unmistakable" and do so in the face of the sociological consensus that there is no such thing as "race," or, at least, that race as perceived in America is not merely a phenotype. After all, had Rachel Dolezal had even one great grandparent of undeniably Black background, it is very unlikely that we would label her as "passing" for Black.¹ Otherwise, troubling questions of whether an individual is "Black enough" arise, reminiscent of the repellent history of mixed-race grading.

Das Acevedo explores the legal question potentially relevant in the employment contract context asking whether racial claims could allow voiding a durational contract for fraud or even allow employers to invoke "morals clauses" (commonly framed nowadays as bringing disrepute to employers, regardless of whether the conduct is immoral). But as she notes, most American employment is at-will, allowing termination for claiming a racial identity, accurately or inaccurately. The more likely challenge, then, would be based on Title VII or §1981, and the threshold question would be whether an employer discriminates on the basis of race by acting on the basis of a discrepancy between self-identified race and "real" race.

That's where *Bostock* comes in. Das Acevedo recasts a now-famous passage of Justice Gorsuch's majority opinion to

make the point:

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

(Im)mutability wades into this largely uncharted territory with a sensitive exploration of race and law that well repays the reader's time. Far from a simple doctrinal piece, this article thoughtfully considers the meaning of race from both a social science and a legal perspective.

The article stresses that social science has “long questioned the claim that race is a stable identity marker such that there can be a fixed, objective, and observable truth.” But it also looks to recent legal scholarship arguing that law should reflect “‘the dignity concerns of individuals as they attempt to control the terms on which their bodies are assigned racial meaning.’ Prioritizing external assessments based on ancestry, phenotype, and behavior over more complex or fluid forms of self-identification is now widely viewed as defeating that mission.”

While the author is, like many others, skeptical of immutability arguments as a basis for justifying legal interventions, she argues that, if anything turns on the distinction, race is likely more changeable than sex. Nevertheless, Das Acevedo does not argue that “‘race and sex are the same’ or even that “‘being transracial and transgender are the same.’” Rather, she insists only that “our legal infrastructure can and should accommodate racial transformation” where it actually exists, that is, where an individual sincerely self-identifies as a race different from her birth race.

Das Acevedo spends time developing how to separate the two by deploying a technique called “cultivating attentiveness” which helps distinguish real instances of racial transformation from insincere ones. This is a Jot, so I'll forbear criticism of this solution but found it less useful than her exposition of the problem.

It seems like a long time ago now, but most readers can probably recall the debate as to whether Barack Obama was “really” Black. In part, that debate evaporated due to the racist reactions of many who opposed his election, not merely because of his political party but because of the color of his skin. Whatever else might be said, Das Acevedo should be recognized for seeking to shift the focus on race from racists to the individual and the possibility that, in a complicated and rapidly-changing world, racial self-identity may be more malleable than we are accustomed to think.

The article ends on a personal note. It acknowledges that some “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” while others might object to “*anyone* suggesting 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.” She's probably right on both counts. But still others, including me, appreciate this thoughtful scholarly analysis of a phenomenon that is both challenging and increasingly common.

1. This position finds both support and refutation in Das Acevedo's recounting of the complicated case of Anthony Lennon, who was accused, first, of passing as white and later as reverse passing as Black. Ultimately, a DNA test revealed genetic heritage from mostly white population groups but 32% west African.

Cite as: Charles A. Sullivan, *Reconstructing Race?*, JOTWELL (October 28, 2021) (reviewing Deepa Das Acevedo, *(Im)mutable Race?*, 116 *Nw. U. L. Rev. Colloquy* 88 (2021)), <https://worklaw.jotwell.com/reconstructing-race/>.