The Gray Area: Exploring the Black-White Binary's Exploitation of the Multi-Racial Identity

LANDON MYERS*

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INTRODUCTION

As the United States developed as a nation, much of its history has been inundated with polarizing racial categories that have resulted in widespread racism. Even before the signing of the Declaration of Independence, America played host to various versions of subordination, ranging from indentured servitude[1] and convict leasing[2] to becoming the largest contributor of many of today's deep-seeded tensions throughout the nation and its people: slavery.[3] The common unifying factor that each instance has contributed to is the creation of the black-white binary.[4] Because this binary has become so ingrained in conversations about race in America, the binary

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1. Indentured servants are individuals who were unwilling or unable to pay for their own passage to America and subsequently became bond servants to a colonial master who, in exchange, paid for their cost of passage. ABBOT EMERSON SMITH, COLONISTS IN BONDAGE: WHITE SERVITUDE AND CONVICT LABOR IN AMERICA, 1607 - 1776 3 (1947).

2. "The heart of the system, though, lay not in the brute fact of incarceration, but in the leasing out of convicts as laborers." Ian F. Haney Lopez, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CAL. L. REV. 1023, 1041 (2010).

3. *See* Raymond T. Diamond; Robert J. Cottrol, *Codifying Caste: Louisiana's Racial Classification Scheme and the Fourteenth Amendment*, 29 LOY. L. REV. 255, 259 (1983).

4. *See* Rachel F. Moran, *Love with a Proper Stranger: What Anti-Miscegenation Laws Can Tell Us About the Meaning of Race, Sex, and Marriage*, 32 HOFSTRA L. REV. 1663, 1664 (2004).

frames the conversation around the conventions of black and white, even using this approach when referring to the experiences of those of Hispanic, Chinese, Asian/Pacific Islander, or any other racial or ethnic descent.[5] Although several classifications fall outside he binary, I intend to focus on the racial classification that developed alongside the binary but is oftentimes left out of the conversation: the multi-racial identity.

Recently, there have been increased conversations discussing multi-racial individuals and their ability (or inability) to benefit from the full and equal protections under the law. Currently, the ways in which individuals self-identify are intertwined with the state's monitoring of race and the distribution of assistance based on race. The implementation of Jim Crow laws,[6] anti-miscegenation laws,[7] and the "one-drop rule"[8] have all reinforced the backbone notions of the black-white binary and the dominant, yet detrimental philosophies of race within American culture. As a result, these harmful laws and practices have interfered with the development of the multi-racial identity. Therefore, a multi-step approach is necessary to combat the obstruction of the maturation of the multi-racial identity. Crucial to this approach is the idea that although the state's interest in race (and doctrine based on race) and an individual's interest in race are related interests, they are not identical, and the distinction between them must be made apparent.

In this paper, I will first explain how the black-white binary came into existence. I will then demonstrate how the development and solidification of that binary led to the exploitation of multi-racial individuals. In the third section, I will introduce the struggles multi-racial individuals face when trying to self-identify and argue how current legal classifications of race and judicial interpretation of the Equal Protection Clause fail to afford equitable rights to multi-racial people. And finally, I will offer a solution to this dilemma that comports with the goals of the multi-racial movement as a whole, including moments in history that severely diminished the possibility of a multi-racial category from forming. This solution includes the creation of a legally recognized multi-racial identity and a push for the courts to consider racial, social, and historical factors when reviewing anti-discrimination claims. The implementation of this solution would allow multi-racial individuals to put forth their own narrative when bringing a claim in a court of law and be afforded equal protection under the law. Additionally, I believe this resolution will benefit multiple minority groups, not just multi-racial individuals, and help to advance race relations as a whole within American society.

I. A LESSON IN HISTORY: THE BLACK-WHITE BINARY

The black-white binary underpins race conversations in America. As Professor Juan Perea puts it, the "black-white binary" is the concept that race in America only revolves, or almost exclusively revolves, around two distinct racial categories: black

5. *See generally* Juan F. Perea, *The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought*, 10 LA RAZA L.J. 127 (2015).

6. Diamond and Cottrol, *supra* note 3, at 264-65.

7. Jenifer L. Bratter & Heather A. O'Connell, *Multiracial Identities, Single Race History: Contemporary Consequences of Historical Race and Marriage Laws for Racial Classification*, 68 Social Science Research 102, 102 (2017).

8. F. JAMES DAVIS, WHO IS BLACK? 5 (1991).

and white.[9] These two categories are seen as the "real" races, and all "other"[10] people of color do not receive the same attention to their voices and history as do those of black and white racial background.[11]

When the American colonies were first settled, black people brought to North America were considered free laborers, similar to white servants.[12] But white people feared that the growing number meant a decrease in their control; the only thing they could do to prevent that from occurring was to restrict the rights of black individuals and enslave them as property.[13] Despite lingering reservations of owning other human beings,[14] money overcame morality, and "[b]lacks, inherently inferior and dependent, were deemed unfit to govern their own lives."[15] The legal approval of racial classifications, state-supported discrimination, and a caste system built upon racial identities marked the birth of the black-white binary. This idea of superior versus inferior became the oppositional descriptor for white and black people.[16] A line in the sand had been drawn and, to this day, that line still permeates throughout American culture and society.

Other detrimental categorical identifications also stemmed from the superior versus inferior complex. That simple demarcation "created race"; whites were associated with positive characteristics, while blacks with negative.[17] Because these categories had wide-reaching implications throughout society,[18] the racial hierarchy borne from these descriptors created social categories and unequal distribution of resources between white and black people.[19]

The elite spread their message of the subordination of black people so widely that even poor whites, who might not have fully agreed with the upper-class whites, could not escape the reality created by the rhetoric.[20] In the end, being poor and white was

9. Perea, *supra* note 5, at 133.

10. *See* F. FANON, BLACK SKINS, WHITE MASKS 188-89 (1967) (describing the West's view of Blacks as the antithesis of "whiteness" and their embodiment of the term "other").

11. Perea, *supra* note 5, at 133.

12. Diamond & Cottrol, *supra* note 3, at FN 65.

13. *See* Diamond & Cottrol, *supra* note 3, at 260.

14. Diamond & Cottrol, *supra* note 3, at 262.

15. E. Pollard, *Black Diamonds, in* SLAVERY DEFENDED: THE VIEWS OF THE OLD SOUTH 162, 162-68 (E. McKitrick ed. 1963). Some individuals even believed that slavery actually improved and civilized Africans. *See* M. CASSITY, LEGACY OF FEAR: AMERICAN RACE RELATIONS TO 1900, at 68 (1985).

16. *See* Kimberle Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1378 (1988). Other phrases used to underscore the relationship between white and black were: "Ordinary articles of merchandise"; intended to be "governed as subjects with absolute and despotic power"; "the black man is the symbol of Evil." *Dred Scott v. Sandford*, 60 U.S. 393, 408, 410 (1857); FANON, *supra* note 10, at 188-89.

17. Several white v. black contrasts include industrious v. lazy, intelligent v. unintelligent, and law-abiding v. criminal. *See* Crenshaw, *supra* note 16, at 1373.

18. Categorical delineations affected one's access to liberty, well-being, and other fundamental rights. *See id.*

19. These two categories make up Douglas Massey's theory of "racial stratification." *See* DOUGLAS S. MASSEY, CATEGORICALLY UNEQUAL: THE AMERICAN STRATIFICATION SYSTEM 5-6 (2007).

20. *See* GEORGE M. FREDERICKSON, THE BLACK IMAGE IN THE WHITE MIND: THE DEBATE ON AFRO-AMERICAN CHARACTER AND DESTINY, 1817, 1914, at 87 (1971).

still better than being black.[21] The opportunity to capitalize on racial privilege was a satisfactory compensation for class disadvantage.[22] Popular social beliefs of the dominant and elite class of whites coupled with political agendas and judicial decisions that further reinforced the superior versus inferior hierarchy solidified America into what would come to be known as a "Herrenvolk democracy"[23] and a hegemonic society.[24]

The Herrenvolk democracy describes an egalitarian society, rights-bearing society for the dominant class while subordinate groups are treated extremely undemocratically.[25] This form of racial politics went beyond the marginalization of blacks; it contended that blacks were anti-citizens and "blackness" was synonymous with dependence and servility, thus antithetical to white freedom.[26]

Most notoriously, Justice Taney's opinion in *Dred Scott v. Sandford*[27] makes it abundantly clear that black people are nothing more than articles of property meant to be bought and sold.[28] He also makes the bold statement that when the Declaration of Independence proclaims, "We hold these truths to be self-evident: that all men are created equal,"[29] the Framers could not possibly have meant men of all races. Surely, according to Taney, they were only referring to white people, which were the only group of people considered citizens when the Declaration and the United States Constitution were written.[30]

Hegemony in a race-filled context includes the political, sociological, and economic ideologies continuously professed by the dominant white society in an attempt to reinforce the social meanings inextricably linked to black people.[31] Dominant whites utilized physical coercion (including slavery and segregation), along with economic coercion over poorer whites to maintain the desired hierarchical order.[32] By protecting the rights of lower-class whites, the dominant class was able to ensure support for the subjugation of blacks.

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21. *See id.* at 76 (quoting Thomas P. Bailey: "[The] disenfranchisement of the negroes has been concomitant with the growth of political and social solidarity among the whites.").

22. Professor Harris explains that white individuals were legally granted a set of public and private benefits throughout society simply because of the color of their skin, thus allowing whites to utilize their race as a form of status property and entitlement. "Whiteness as property" protected established power dynamics and became a major barrier in creating any change in racial classifications; this concept still serves as a present-day obstacle in the legal arena. *See* Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993).

23. P. VAN DEN BERGHE, RACE AND RACISM: A COMPARATIVE PERSPECTIVE 17-18 (1967).

24. *See* Crenshaw, *supra* note 16, at 1351(referring to Antonio Gramsci's concept of "hegemony").

25. P. VAN DEN BERGHE, RACE AND RACISM: A COMPARATIVE PERSPECTIVE 17-18 (1967).

26. Roediger, David R. (1997). *The Wages of Whiteness*. Philadelphia: Verso. P. 172.

27. Dred Scott v. Sandford, 60 U.S. 393 (1857).

28. *Id.* at 408-410.

29. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

30. *See generally* Dred Scott v. Sandford, 60 U.S. 393 (1857) (held that Americans of African descent, whether free or slave, were not American citizens and could not sue in federal court).

31. *See, e.g.*, ANTONIO GRAMSCI, SELECTIONS FROM PRISON NOTEBOOKS 263 (1929); MICHAEL OMI AND HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES 66–69, 84, 115, 148 (Routledge, 3rd ed.) (2014).

32. *See id.* at 1360.

Taney's argument exemplifies the "impassable barrier"[33] that was meant to exist forever between white and black people. Etched in stone was the idea that no matter how much America grew and developed as a functioning society, anyone who was not white would never be equal to white individuals. A systematic process had been implemented to maintain and codify the black-white binary.

II. THE STATE'S EXPLOITATION OF THE MULTI-RACIAL IDENTITY

The development of the black-white binary led to the desire to maintain this established regime for as long as possible. Capitalizing on their power and influence, the white ruling class manipulated legislation to achieve their desired goals of maintaining absolute power and relegating blacks to complete subjugation.[34] These decisions set the groundwork for creating social stigmas that condemned the mixing of races, some of which still exist today. This section will describe how the multi-racial identity is only recognized by dominant whites when it serves to benefit them in some way.

Anti-miscegenation laws made it illegal for white people to marry or cohabitate with anyone who was not white.[35] These laws were created because it was thought that individuals of "minority racial groups were physically, mentally, and morally inferior to members of the majority white group"[36] and the white race would be "corrupted, soiled, and degraded" if mixed with anyone not white.[37]

However, it was not uncommon for white slave owners to impregnate their black female slaves, who would then give birth to multi-racial children.[38] The state knew that this occurred but opted not to punish these slave owners. In order to accomplish the goal of ensuring the subordination of multi-racial offspring, the state classified them based on the theory of "hypodescent," the most extreme form being the "one-drop rule."

"Hypodescent" grouped all degrees of multi-racial offspring together: anyone who could not pass as white was assigned to the lower racial hierarchical status of non-white or colored,[39] all the way down to "one-drop"[40] of non-white ancestry. Whether one was technically a mulatto, quadroon, octoroon, or mustee,[41] hypodescent and "one-drop rule" allowed the dominant white class to group all non-white

33. *Id.*

34. *See* Moran, *supra* note 4, at 1664.

35. *See id.*; Bratter & O'Connell, *supra* note 7, at 106.

36. Tina Fernandes Botts, *Multiracial Americans and Racial Discrimination*, *in* 5 RACE POLICY AND MULTIRACIAL AMERICANS 81, 84 (2016).

37. *Id.*

38. *See* Moran, *supra* note 4, at 1665.

39. *Hypodescent: The "One-Drop" Rule*, PASSING BEYOND PASSING BLOG, http://pages.vassar.edu/passingbeyondpassing/hypodescent-the-one-drop-rule/ [https://perma.cc/S8EY-HBFA] (last visited on Feb. 16, 2020).

40. Lauren Sudeall Lucas, *Undoing Race? Reconciling Multiracial Identity with Equal Protection*, 102 CALIF. L. REV. 1243, 1252-54 (2014).

41. *See* C. DEGLER, NEITHER BLACK NOR WHITE: SLAVERY AND RACE RELATIONS IN BRAZIL AND THE UNITED STATES FN 53 (1971).

individuals into a subordinate class and ensure continued support from lower-class whites who had children of mixed descent.

The overarching goal of continued domination of the white race over all others remained, as did the established power dynamics that controlled society. This was also the first time that multi-racial individuals were recognized by the state. Unfortunately, this recognition was driven by all the wrong reasons and only for the benefit of the ruling class. Multi-racial individuals were exploited, and these government-defined definitions strengthened the "us versus them" and white versus "other"[42] mentality, thus furthering the existence of the black-white binary.

Anti-miscegenation statutes were finally deemed unconstitutional by the Supreme Court in 1967.[43] And although *Loving* ended *de jure* restrictions on marriages, white people still found a way to subordinate all those racially distinct from themselves in many other facets of life.[44] The lingering effects of the "one-drop rule" and history's dual-threat of physical coercion and ideological consent continue to haunt aspects of our society today.

III. STRUGGLING TO SIMULTANEOUSLY IDENTIFY AS MULTI-RACIAL AND EQUITABLY ACCESS THE LAW

Although imperfect, we have seen growth and expansion of the law in America's modern history ranging from an increase in rights for the L.G.B.T.Q.I.A.+ community[45] to a strong push for equality under the law for all genders.[46] Multi-racial individuals are a unique group of people who have found themselves caught between two equally important notions: the desire to self-identify and celebrate their multi-racial identity, and their inability to express this identity when attempting to access the law. Although some groups have seen an expansion of their rights under the law, multiracial individuals are not one of those groups.

In this section, I will demonstrate that the Equal Protection Clause, as currently interpreted by the courts, does not allow multi-racial individuals to equitably access the law. This is due to the unique nature of multi-racial individuals' desire to self-identify and the very limited group of people who can enjoy the remedies offered under the Equal Protection Clause.

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42. The "other" group is a lump-sum collection of those that are different in any way from the white race; its perceived existence creates a false sense of unity amongst those that have the privilege of identifying white as compared to those that cannot. *See* Crenshaw, *supra* note 16, at 1372; Trost, *Western Metaphysical Dualism as an Element in Racism*, in CULTURAL BASES OF RACISM AND GROUP OPPRESSION 51 (J. Hodge, D. Struckmann & L. Trost eds. 1975.

43. Loving v. Virginia, 388 U.S. 1 (1967).

44. *See* Moran, *supra* note 4, at 1665.

45. *See* Obergefell v. Hodges, 135 S.Ct. 2584 (2015).

46. *See, e.g.*, *Gender Equality and Women's Empowerment*, USAID: FROM THE AMERICAN PEOPLE, https://www.usaid.gov/what-we-do/gender-equality-and-womens-empowerment [https://perma.cc/HVP2-PM6U] (last visited May 2, 2019) (describing the work being done to improve women's empowerment, closing the gaps between men and women, and reducing violence against women); *Gender Equality*, UNITED NATIONS DEVELOPMENT PROGRAMME, https://www.undp.org/content/undp/en/home/gender-equality/transforming-workplaces-to-advance-gender-equality.html [https://perma.cc/NKG9-UE7D] (last visited May 2, 2019).

A. Multi-Racial Individuals' Interest in Self-Identification

The multi-racial movement, sometimes described as a social movement, can be broadly defined as multi-racial individuals' demand for recognition of their self-proclaimed identity from both the government and other people in society.[47] This effort, backed by organizations such as the Association of MultiEthnic Americans (AMEA), Project RACE (Reclassify All Children Equally), and A Place for US (APFU),[48] believes that multi-racial individuals have a right to claim this identity and to be recognized, just like any other person is able to do when they want to embrace their ancestry.[49] The term "multi-racial" implies "more than one race" and the overall purpose of the multi-racial movement is to have the opportunity to identify, at the same time, as all of the racial categories that make up a person and be respected for that choice.[50]

The multi-racial identity's unique complexities also serve as an obstacle for the movement to overcome when attempting to gain meaningful recognition from society, as well as equality under the law. There are various ways to personally self-identify as multi-racial. Studies have identified four main categories: "monoracial" "singular" identity;[51] "border" identity;[52] "protean" or shifting identity;[53] and "transcendent" identity.[54]

The studies show that when required to choose one race out of multiple, one may experience negative psychological effects,[55] "guilt,"[56] and lower self-confidence and motivation in everyday life.[57] The denial of the ability to fully embrace all of the parts that make up an identity is damaging, a misrepresentation, and a form of

47. *See* KIM M. WILLIAMS, MARK ONE OR MORE: CIVIL RIGHTS IN MULTIRACIAL AMERICA 7–9 (Univ. of Mich. Press, 2006).

48. *Id.*

49. Lucas, *supra* note 40, at FN 80.

50. *See* WILLIAMS, *supra* note 47, at 2 (referring in part to a statement made by former NAACP president, Kweisi Mfume).

51. Someone who is multi-racial but chooses to identify as "monoracial" chooses to identify as just one of the two or more races that places them in the multi-racial category. Lucas, *supra* note 40, at 1264 (citing Davis L. Brunsma & Kerry Ann Rockquemore, *What Does "Black" Mean? Exploring the Epistemological Stranglehold of Racial Categorization*, 28 CRITICAL SOC. 101, 110 (2002)).

52. Border identity encompasses the more well-known categories of "biracial" or "multi-racial." *See, e.g.*, Lucas, *supra* note 40, at 1264.; Evelina Lou et al., *Examining a Multidimensional Framework of Racial Identity Across Different Biracial Groups*, 2 ASIAN AM. J. PSYCHOL. 79, 81 (2011).

53. "Shifting identity" is identifying as one racial category in one or more contexts and as another racial category (or perhaps as biracial or multiracial) in another context or contexts. *See, e.g.*, Brunsma & Rockquemore, *supra* note 51, at 111 and Lou et al., *supra* note 52, at 82.

54. This means that they view themselves as occupying a space where racial categories do not apply and, in effect, reject any racial identity. *See* Brunsma & Rockquemore, *supra* note 51.

55. *See* Angela R. Gillem et al., *Black Identity in Biracial Black/White People: A Comparison of Jacqueline Who Refuses to Be Exclusively Black and Adolphus Who Wishes He Were*, 7 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCHOL. 182, 194 (2001).

56. *Id.* at 183.

57. *See* Sarah S. M. Townsend et al., *Being Mixed: Who Claims a Biracial Identity?*, 18 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCHOL. 91, 91 (2012).

oppression.[58] While not all multi-racial individuals may feel this impact,[59] those who desire to identify as their entire racial identity should have the opportunity to explore the multiple sides of their heritage and develop positive coping mechanisms to deal with others' perception of them.

B. The Insufficiency of the Current Equal Protection Approach

The Equal Protection Clause of the Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws."[60] The Supreme Court has interpreted the Due Process Clause of the Fifth Amendment to include an equal protection guarantee; therefore, these clauses prohibit all levels of government from treating individuals or classes of individuals differently under similar circumstances without sufficient justification.[61] Equal protection of race has always presented a significant challenge to legislators and the judicial system, especially the Supreme Court.[62]

Modern American jurisprudence currently addresses race through an "anticlassification"[63] approach. Anticlassification is synonymous with the concept of "colorblindness"[64] and means that distinctions between people should never be based on race.[65] As seen in *Regents of University of California v. Bakke*,[66] *Parents Involved in*

58. Analia F. Albuja et al., *Identity Denied: Comparing American or White Identity Denial and Psychological Health Outcomes Among Bicultural and Biracial People*, 45(3) PERSONALITY AND SOCIAL PSYCHOLOGY BULLETIN 416, 416 (2019).

59. This is because some multi-racial individuals choose to identify as only one race or reject any racial identity altogether. *See infra* notes 77 and 80 (and accompanying text).

60. U.S. CONST. amend. XIV, § 1.

61. *See* Brian T. Fitzpatrick & Theodore M. Shaw, *The Equal Protection Clause*, NATIONAL CONSTITUTION CENTER, https://constitutioncenter.org/interactive-constitution/interpretation/amendment-xiv/clauses/702 [https://perma.cc/DV35-CU2A] (last visited May 11, 2020) (explaining the original purpose of the Equal Protection Clause as well as how the Supreme Court has expanded its use of the Equal Protection Clause to prohibit various types of discrimination).

62. *Compare* Grutter v. Bollinger, 539 U.S. 306 (2003) (ruling that although race is a suspect classification, the state law school's use of affirmative action and use of race as a positive factor in determining whether to admit applicants was narrowly tailored to further the compelling interest of obtaining the educational benefits of a diverse student body, and therefore, constitutional), *with* Gratz v. Bollinger, 539 U.S. 244 (2003) (ruling that although obtaining a diverse student body is a compelling government interest, a state college's process of automatically awarding minority candidates 20 points toward their 150-point admission scale was a use of race that resembled a quota system that failed to consider each applicant as an individual, and thus, the point system was not narrowly tailored to achieve the state's compelling interest, and was deemed unconstitutional).

63. Lucas, *supra* note 40, at 1272.

64. *Id.* at 1272; *See generally* Ian F. Haney-López, *"A Nation of Minorities": Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985 (2007).

65. Several cases even make reference to their interpretation of the "central purpose" of the Equal Protection Clause of the Fourteenth Amendment: Washington v. Davis, 426 U.S. 229, 239 (1976) ("The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race."); Shaw v. Reno, 509 U.S. 630, 642 (1993) (". . .[l]aws that explicitly distinguish between individuals on racial grounds fall within the core of that prohibition"). The prohibition referred to here is the prohibition of the consideration of race to discriminate between individuals.

66. 438 U.S. 265, 310 (1978) (referring to Justice Powell's blunt explanation that no matter the group being targeted or the purpose of the discrimination, differential treatment to remedy past societal discrimination was not a valid excuse to employ racial classifications either).

Community Schools v. Seattle School District No. 1,[67] and other cases, the Supreme Court often employs the anticlassification approach. As a result, historical and social influences are also denied consideration within the equal protection doctrine. The result: facially neutral laws that have a distinct impact on different individuals simply because of their race are deemed to be legal.[68]

This approach[69] is antithetical to the multi-racial desire to "transcend" existing racial classifications. Professor Naomi Mezey states that "[a] person can only sustain her identity if others recognize her as she recognizes herself and . . . she is only included in the national community to the extent that the government classifies her in a recognizable way."[70] Similar to being forced into a pre-existing racial category, the removal of racial classifications would also lead to feelings of invisibility.

The multi-racial movement was developed mostly as a way to combat the very limiting and externally imposed classifications exerted upon people. But activists of the multi-racial movement seek the goal of all people being able to classify themselves as they see fit,[71] hence "self-identification." Many multi-racial individuals want to both appreciate the racial identities that they encompass and be appreciated for who they are when compared to others.[72] In other words, the goal is not to ignore race completely,[73] as the anticlassification approach suggests.[74] The aspiration to avoid an externally imposed classification by the state upon an individual's identity does not mean that someone's self-identification has to be externally ignored by the state. Many multi-racial individuals desire the ability to embrace their identity to the fullest extent while also being able to define themselves however they desire.

The anticlassification approach ignores race as a factor when individuals face discrimination. It views these instances in a bubble and treats race as an individualized phenomenon, rather than as a result of institutional and systemic constructs, unconnected to social realities. Attempts to remedy discrimination usually revolve around protecting "discrete and insular minorities,"[75] thus shaping the law along with easily

67. 551 U.S. 701 (2007) (denying the use of racial classifications even to achieve a stated goal of racial diversity).

68. *See* Lucas, *supra* note 40, at 1273.

69. "Although the colorblind approach makes explicit racial categories unlawful, this does not mean they no longer exist, nor does it change their meaning." *See* Tanya K. Hernández, *"Multiracial" Discourse: Racial Classifications in an Era of Color-blind Jurisprudence*, 57 MD. L. REV. 97, FN 56 (1998) (quoting Charles R. Lawrence III, *Race, Multiculturalism, and the Jurisprudence of Transformation, Forward* to Symposium, *Race and Remedy in a Multicultural Society*, 47 STAN. L. REV. 819, 836 (1995)).

70. *See* Lucas, *supra* note 40, at FN 250 (quoting Naomi Mezey, *Erasure and Recognition: The Census, Race and the National Imagination*, 97 NW. U. L. REV. 1701, 1750 (2003)).

71. WILLIAMS, *supra* note 47, at 4 (establishing that it was "inaccurate and unacceptable to force multiracial Americans into monoracial categories").

72. *See* WILLIAMS, *supra* note 47, at 124–25.

73. This is exemplified by the multiple references made to the attempt to have a multiracial category added to the 2000 Census. *See* Bijan Gilanshah, *Multiracial Minorities: Erasing the Color Line*, 12 LAW AND INEQ., 183, 184 (2017); Bratter & O'Connell, *supra* note 7, at 103; Shalini R. Deo, *Where Have All the Lovings* Gone?: The Continuing Relevance of the Movement for a Multiracial Category and Racial Classification After Parents Involved in Community Schools v. Seattle School District No. 1***, 11 J. OF GENDER, RACE, AND JUST. 409, 409 (2008); *See generally* WILLIAMS, *supra* note 47.

74. Lucas, *supra* note 40, at 1272.

75. *See* U.S. v. Carolene Products Co., 304 U.S. 144, n. 4 (1938).

demarcated categorizations. The multi-racial identity is made up of multiple races, and therefore not "discrete." Individuals who identify as multi-racial can pass fluidly through various racial categories, embracing one race at one moment, another in a different context, and even enjoy multiple racial categories at the same time.[76] This unique aspect of the multi-racial identity also undermines the doctrinal vision of race as being "stable" and "fixed."[77] Additionally, it disrespectfully ignores the lived experiences and implications that come with race.

1. An Example of the Equal Protection Clause's Failure

The number of multi-racial plaintiffs who have brought discrimination claims within the judicial system is extremely few and far between.[78] The following case illustrates the difficulties multi-racial individuals face when bringing an anti-discrimination or Title VII claim under current laws and frameworks.

In *Callicutt v. Pepsi Bottling Group, Inc.*,[79] five plaintiffs consolidated their individual Title VII claims into one lawsuit. Four of the plaintiffs suffered racial slurs only targeting black people, but the fifth plaintiff suffered epithets that crossed racial lines.[80] In one instance, he was referred to as "FUBU," an African-American line of clothing, while another told him "he was not black."[81] The court, failing to explore the uniqueness of this fifth plaintiff and his seemingly more complex identity, described all five plaintiffs as "African American,"[82] and ultimately denied the fifth plaintiff's (who was multi-racial) summary judgment motion because "the instances of discrimination he suffered were not sufficiently severe to support a Title VII claim."[83] This decision is alarming for three reasons.

The first injustice that the fifth plaintiff suffered, seen throughout history,[84] was the denial of his narrative to be heard and accurately represented by the court. "Narrative is a source of power"[85] and when that power is stripped away by the court's imposition of its own narrative for a litigant, that litigant loses his or her sense of self.

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76. *See supra* notes 51-54.

77. *Supra* note 53.

78. *See* Nancy Leong, *Judicial Erasure of Mixed-Race Discrimination*, 59 AM. U. L. REV. 469, FN 190 (2010) (indicating that in a targeted Westlaw search to find cases involving multi-racial equal protection or Title VII claims, only 8 out of 329 federal cases determined whether the plaintiff in the case was identified as multi-racial).

79. Callicutt v. Pepsi Bottling Group, Inc., No. CIV. 00-95DWFAJB, 2002 WL 992757 (D. Minn. May 13, 2002).

80. *Id.* at *4.

81. *Id.*

82. *Id.* at *1.

83. *Id.* at *11.

84. *See* Korematsu v. United States, 323 U.S. 214 (1994); Gerald Torres & Kathryn Milun, *Translating Yonnondio by Precedent and Evidence: The Mashpee Indian Case, 1990* DUKE L.J. 625, 630 (1990) (explaining that the purpose of the piece is to shed light on the limitations of the "legal idiom" and the possibility that this structure of legal story-telling might foreclose one version of a story in favor or another).

85. *See* Torres & Milun, *supra* note 84, at 627 (explaining that, in the context of the Mashpee Indian case, "as with most narratives, its very telling is an expression of power").

The court's decision also solidified existing identities and perpetuated social and cultural norms, thereby severely restricting the existence of any other possible identities. The court reinforced that it is completely acceptable to lump individuals into monoracial groups and not acknowledge their uniqueness. Additionally, these norms' infiltration perfectly illustrates the notion that no matter how neutral a system claims to be, it does not function within a vacuum.

The third major effect of this decision is that it continues the existing precedent, both in an additive, and subsequently, subtractive manner. The court had the opportunity to add to the already scant case law involving an explicitly identified multiracial plaintiff, hence the detracting precedent being set. The detrimental effect is that future plaintiffs will continue to re-frame their narrative into monoracial terms instead of embracing their multi-racial identity, either because there is so little case-law with which to analogize their situation, or because they recognize there is a slight chance of success when bringing a claim as a multi-racial individual.[86] In the same vein, one of the most common litigation strategies is to draw parallels between one's client's case and previous cases. Because of the lack of existing precedent coupled with the court's limited willingness to assess cases that chart into unfamiliar territory, it would seem logical that attorneys would advise their clients to re-frame their narrative into one more recognizable to the court. In other words, an attorney is likely to suggest a framework coinciding with monoracial categorizations, where precedents are abundant.[87] An exponential increase of multi-racial children has been recorded on the census since 1970,[88] yet there remains a troublingly low number of cases that directly identify plaintiffs as "multi-racial." As such, it seems probable that at least some plaintiffs are actively choosing not to identify as multi-racial.

This case shows that it is highly unlikely that a multi-racial individual could convince a court that he or she is wrought with disabilities, politically powerless, or has been subjected to a history of purposeful and unequal treatment. Therefore, it is likely that he or she would fail to meet any of the common factors used to qualify as "discrete and insular."[89] Without the ability to define one's self as one's whole being, it sounds eerily familiar to the Court's opinion in *City of Richmond v. J.A. Croson Co.*,[90] where evidence of discrimination needed to be "isolated and distinct."[91] "Isolated and distinct," when addressed to a multi-racial individual, means "choose

86. This is similar to what was seen in *Walker v. University of Colorado Board of Regents*, Civ. A. No. 90-M-932, *1, 1994 WL 752651 (D. Colo. Mar. 30, 1994). It is also no secret that historically, courts like the case in front of them to "fit into a box they have seen before," thus making their job much easier.

87. *See* Leong, *supra* note 78, at 537-38 (although Professor Leong offers no statistical evidence is offered to support this possibility).

88. *See* Lucas, *supra* note 40, at FN 45 (citing Susan Saulny, *Census Data Presents Rise in Multiracial Population of Youths*, N.Y. TIMES, Mar. 25, 2011, at A3.).

89. *See Discrete and Insular Minorities*, ENCYCLOPEDIA.COM, https://www.encyclopedia.com/politics/encyclopedias-almanacs-transcripts-and-maps/discrete-and-insular-minorities [https://perma.cc/FH9J-JG58].

90. City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

91. *See* Naomi Murakawa & Katerine Beckett, *The Penology of Racial Innocence: The Erasure of Racism in the Study and Practice of Punishment*, 44 LAW & SOC'Y REV. 695, 712 (2010) (quoting Richmond v. J.A. Croson).

one or the other, but not both." A different approach by the courts is necessary if multi-racial individuals are going to have a chance of being afforded any protections under the Equal Protection Clause.

IV. THE POSSIBLE SOLUTION

Antidiscrimination and equal protection law have largely failed to evolve over time, especially in regard to multi-racial individuals. In 1997, Tiger Woods was a guest on the *Oprah Winfrey Show* and on live television, he stated that he was "Cablinasian."[92] Tiger coined the term himself to represent his multiple heritages: "Caucasian," "Black," "American Indian," and "Asian."[93] Racial categories are descriptors to illustrate that identity, but there are a number of ways to use those descriptors to describe an individual. If Tiger Woods were to bring a Title VII claim for racial discrimination, however, there would be multiple obstacles in his path.[94] A multi-step approach is necessary to achieve the goal of providing multi-racial individuals with the ability to fully embrace who they are while also achieving equal protection under the law. When applied, this approach[95] may even help advance race relations in a number of ways beyond the context of multi-racial individuals.

The first step in this approach is legislative: "multi-racial" must be added to the list of five already-recognized racial categories and definitions on the census.[96] This also requires a follow-up section to further specify with which racial categories the multi-racial person identifies.[97] This addition will demonstrate state recognition of the multi-racial identity and all that accompanies it, including the trials and tribulations of multi-racial people throughout history. The second step in this approach is judicial: the Court must transition from viewing discrimination claims through an anti-classification lens to reviewing these claims through an antisubordination lens.

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92. Tyrone Nagal, *Multiracial Americans throughout the history of the US*, *in* 1 RACE POLICY AND MULTIRACIAL AMERICANS 13, 24 (2016).

93. *Id.*

94. Possible obstacles might be how Tiger Woods would bring his claim in a court of law. Would he claim he was discriminated against based on just one of his multiple races? Would he claim he was discriminated against based on more than one of his races? What proof would he be able to provide?

95. This approach is attempted to provide a solution for the multi-racial identity, but as the argument unfolds, it will become apparent that the ones who will benefit the most from it are those whose identity is made up of two or more races (according to the racial classifications the state already uses) and wishes to identify as "biracial," "multi-racial," or "protean." It will be less applicable to those who identify as "monoracial" or "transcendent." *See supra* notes 51-54 and accompanying text.

96. The U.S. Census Bureau must adhere to the 1997 Office of Management and Budget (OMB) standards on race and ethnicity. According to these same standards, an individual can choose one or more of the following five races when checking the boxes that describe their racial identities and/or writing in these identities on the spaces provided: White; Black or African American; American Indian or Alaska Native; Asian; Native Hawaiian or Other Pacific Islander. *See Race*, UNITED STATES CENSUS BUREAU, https://www.census.gov/topics/population/race/about.html [https://perma.cc/645F-YC7J].

97. Various options for this follow-up specification have also been proposed by David Hollinger, Kenneth Prewitt and Camille Rich. *See* DAVID A. HOLLINGER, POSTETHNIC AMERICA 179–82 (2006); KENNETH PREWITT, WHAT IS *YOUR* RACE? THE CENSUS AND OUR FLAWED EFFORTS TO CLASSIFY AMERICANS 133, 196, 202-04 (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, 185 (2013).

This approach will provide multi-racial individuals with the ability to fully embrace who they are while also achieving equal protection under the law.

A. Step 1: A Change to the Census

Most individuals have an interest in their racial identity. The government's broad interest in classifying people by race is for data collection and quantification purposes, particularly through the Census.[98] Professor Lauren Lucas proposes that all too often, "the interest in defining one's own identity and the state's interest in providing equal protection of the law" are erroneously seen as equal and identical interests, when really they are only related.[99]

This mistaken equality is detrimental to multi-racial individuals. Therefore, the first step in the "multi-step approach" is to break this perceived link between an individual's interests and the Government's. I propose adding "multi-racial" to the list of five already-recognized racial categories and definitions on the census,[100] including a follow-up section to further specify with which racial categories this multi-racial person identifies as (such as choosing black and white),[101] and revoking the portion of the 2007 Final Guidance on Maintaining, Collecting and Reporting Racial and Ethnic Data ("Guidance") that requires people who check more than one racial category to be placed in a "Two or More Races" category.[102] Being placed in a "two or more races" category only allows for a cursory recognition of one's identity: it still has a familiar semblance to an "other" category, a place where the leftovers go.[103] A distinct multi-racial category would offer one the opportunity to fully embrace his or her multi-racial identity, and the specificity question would serve a dual purpose of furthering self-identification, as well as satisfying the government's desire in acquiring the numbers necessary to properly allocate resources and address equal protection concerns.

98. The Census is a count of every person who claims their primary residence as the United States that asks respondents a multitude of personal questions. The government then uses this data to apportion seats in the United States House of Representatives, allocate funds, and afford legal protections to specific groups of people based on the number of responses racial and ethnic categories received. I will not delve further here into whether or not the processes or formulas used to drive these decisions are fair or appropriate. I just intend to show that there are several decisions made that are directly based off of the responses provided on the census. *See The 2020 Decennial Census: Overview and Issues*, CONGRESSIONAL RESEARCH SERVICE, https://fas.org/sgp/crs/misc/IF11015.pdf. [https://perma.cc/ZH2V-UQHY] (last visited March 25, 2019).

99. *See* Lucas, *supra* note 40, at 1292.

100. *See* UNITED STATES CENSUS BUREAU, *supra* note 96.

101. *See, e.g.*, HOLLINGER, *supra* note 97.

102. Kevin Brown & Tom I. Romero II, *The Social Reconstruction of Race & Ethnicity of the Nation's Law Students: A Request to the ABA, AALS, and LSAC for Changes in Reporting Requirements*, 2011 MICH. ST. L. REV. 1133, 1136 (2011). This requirement does not help anyone: Not groups like the NAACP who don't want to see their numbers diluted, not the government who loses out on meaningfully using those responses to address discrimination and equal protection, and certainly not multi-racial individuals who want to be recognized and not shuttered away.

103. "Arguably, identification with 'Some Other Race' tells us more about how people do *not* identify racially than how they do." WILLIAMS, *supra* note 47, at 119.

B. Step 2: A Change in the Lens

There is no denying that externally imposed racial classifications have repeatedly negatively impacted minorities over time due to the everlasting presence of historical dynamics. The second step in this solution is judicial: to address wrongdoings suffered by individuals and engage in corrective measures, the courts must adopt an antisubordination approach.

This group-based approach could combat externally imposed racial classifications (a form of "benign discrimination") and lead to equity under the law by righting the wrongful historical injustices suffered by non-whites, and particularly, multi-racial individuals.[104] If adopted, affirmative action programs, which were created to level the playing field, would accomplish this goal; simultaneously, racial classifications used to promote the subjugation of a particular group would not be acceptable.

The antisubordination approach looks to dismantle social structures based on race. One of the main tenets of the multi-racial movement is the desire to self-identify, an individualized goal. Currently, the only way multi-racial individuals could benefit from an antisubordination lens would be to 1) allow society to externally classify one's multi-racial identity into a specific class, or 2) abandon part of one's self and align with a single racial group. Either of these actions would result in forced assimilation likely to cause extreme harm to the psyche of multi-racial individuals while simultaneously running counter to the intent of the multi-racial movement.

However, if this change in review of anti-discrimination cases by the courts was accompanied by my proposed change to the Census, multi-racial individuals could be afforded true protections under the law. The change in the Census would allow multi-racial individuals to not only self-identify, but also enjoy equitable relief under the Equal Protection Clause. The new focus of the courts when reviewing anti-discrimination and Title VII claims would be, "Has a fundamental right been violated," as opposed to "Does the person who has been discriminated against qualify as 'discrete and insular'."

In their current forms, racial classifications and the Equal Protection Clause do not afford multi-racial individuals the same protections as other minority groups. The multi-step approach suggested would advance the multi-racial movement and provide justice under the law.

C. Will There be Drawbacks to a Distinct Multi-Racial Category?

As the multi-racial movement gained supporters, it also drew the ire of some opponents as well. Several civil rights groups, including the NAACP, feared that the creation of a multi-racial category would dilute the number of individuals identifying as a distinct monoracial minority.[105] They claimed that lower numbers would disrupt antidiscrimination law and reduce the allocation of resources these minority populations receive from the state.[106]

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104. *See* Lucas, *supra* note 40, at 1274-75.
105. *See* WILLIAMS, *supra* note 47, at 5.
106. *See* Lucas, *supra* note 40, at 1263.

Some merit has to be given to this apprehension towards another defined category because when it comes to the allocation of resources, with fear that the "pie" won't increase, another recipient of those resources means less to go around for the already established groups. When individuals who select more than one race on the Census are simply placed in a "two or more races" catchall, it is not clear which specific races these individuals identify as. Because they are placed in this category, and no specific races have been identified, this affects the allocation of resources that result from the Census.[107]

The approach I am proposing fixes that dilemma: marking multi-racial and then choosing which races make up a person through a second-step specificity question will provide insight into which minority groups those people identify with, and thus resources can be allocated to those groups. This is similar to a previous Office of Management and Budget ("OMB") directive that accompanied the 2000 census stated: "Mixed-race people who mark both White and a non-White race will be counted as the latter for purposes of civil rights monitoring and enforcement."[108] Some might claim that this runs counter to the multi-racial movement's desire to self-identify, but I do not believe it does.

The goal of the movement is for multi-racial people to avoid the pressure of having to make the either/or identity choice.[109] This directive does not violate that goal because people are still able to self-identify; the qualm with the approach stems from the fact that the government is placing a multi-racial individual into a minority group. My proposal eliminates being forced to choose to assimilate into a minority group in order to claim discrimination as well as being externally placed into a minority category with the goal of providing resources to that group. An individual's interest in defining his or her race is not the same as the government's interest in defining individuals' race(s);[110] therefore people must be given the opportunity to choose how they identify without facing the risk of pulling resources away from other minority groups.

The multi-racial movement also presents a unique opportunity to bridge gaps between people in society, and in particular, the black community. Over time, racial complexities of the black community have been defined by the white majority: white people have perpetuated black homogeneity. But for blacks to continue to support the rigidity of the black-white binary and consent to the narrative that whites have professed throughout history is only feeding into the hegemonic society about which Kimberle Crenshaw warns us.[111] The multi-racial movement will help the civil rights movement overall because it is presenting a chance for individuals to actively push back and not be complicit in the restrictions of defining personal identities. The

107. *See* Kevin Brown, *Should Black Immigrants Be Favored Over Black Hispanics and Black Multiracials in the Admissions Processes of Selective Higher Education Programs?*, 54 HOW. L.J. 255, 264, 267 (2011).

108. *See* Lucas, *supra* note 40, at FN 257.

109. Gilanshah, *supra* note 73, at 190.

110. *See supra* Part IV.A.

111. *See* Crenshaw, *supra* note 16, at 1335, 1351, 1360.

multi-racial movement is complex, and will no doubt require careful handling, but that does not mean it should be ignored.

CONCLUSION

According to projected rates of growth, the number of self-identified multi-racial individuals will triple by 2060.[112] To read this prediction and then think back to all of the instances in history where the mere existence of multi-racial individuals was admonished, it would appear that a pretty remarkable feat has occurred; and one has, but there is still progress to be achieved.

This Note also recognizes that some of the difficulties the growth of the multi-racial identity faces is because of the nature of the identity itself. Although it should be praised for the breadth of inclusiveness it encompasses, the multi-racial identity has multiple categories within itself. Those who identify as multi-racial can still vary in how they define themselves, either internally or externally, and this introduces a lot of variables and a sense of unpredictability into how the identity will move forward in the future.

Taking all of this into consideration, an official "multi-racial" designation will be the first step in breaking up this "revolving door" of racism and racial stereotyping. The legal recognition of the "multi-racial" identity with the ability to self-identify pushes back on the notion that race needs to be removed from the conversation, as the "colorblindness" approach or risk assessment tools[113] would have one believe. If the courts address instances of discrimination through an antisubordination lens, the whole individual will be taken into account, race included, and justice will result. This approach would prevent courts from continuing to force people into monoracial categorizations; someone's narrative would not be denied because it would be legally recognized and systematically recorded. Once courts are forced to recognize all individuals' narratives and not cast them aside as insignificant, a chain reaction will occur. Recognition within the judicial system might begin to grow, positive precedent for multi-racial individuals may come to fruition, and a chance to obtain equal protection under the law might actually begin to come within reach for multi-racial individuals.

The government does not have an affirmative duty to protect one's identity, so long as it does not act in a way to bring about direct harm to one's identity. This action versus inaction dilemma is merely a scapegoat. The government should be required to acknowledge the needs and desires of all individuals and address equal dignity amongst all. The black-white binary ultimately led to the notion that in order to fix race, we cannot talk about it; that approach is wrong. Throughout history, many obstacles have obstructed the development of the multi-racial identity. By shedding light on how unique the multi-racial identity can be, both personally, and

112. Tanya Katerí Hernández, *Racially-Mixed Personal Identity Equality*, 15 LAW CULTURE & HUM. 1, FN 2 (2017).

113. *See* Murakawa, *supra* note 91, at 695.

within the larger context of the law, my goal has been to generate conversations and spark change, both within the multi-racial discourse and beyond.

Multi-racial individuals are not properly protected under the Equal Protection Clause and Title VII. However, if the changes I have suggested are made by the legislative and judicial system, I believe that multi-racial individuals will no longer be exploited and forgotten, and instead, all will be afforded equal protection under the law.