

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

JUSTIN FITZSIMMONS*

Landon Myers' article explains how and why multi-racial people have been forced to identify as Black in the Black-White binary, denying them the agency of owning their identities while at the same time denying them the protection of civil rights laws. Myers seeks to remedy the psychological oppression suffered by multi-racial people in having their identity forced onto them by making modest changes to the U.S. census. Myers proposes changing the "two or more races" category to "multi-racial" with a "follow-up section to further specify [with] which racial categories this multi-racial person identifies." Beyond allowing the opportunity for the multi-racial individual to self-identify, these changes could potentially encourage federal courts to believe the civil rights claims of multi-racial people.

While Myers identifies a key issue in describing the discrimination against multi-racial people under the Black-White binary, his analysis misses a key aspect of multi-racial discrimination and with that, his proposed solution will not meaningfully contribute to remedy multi-racial discrimination.

Though Myers identifies that multi-racial individuals suffer from "hypodescent," his analysis misses that multi-racial discrimination is not only discrimination against the Black identity, but also discrimination against the multi-racial person *by virtue of their being multi-racial*. Not only can multi-racial people be discriminated against for each of the constituent parts of their racial identity, but they can be discriminated against for the fact that they have multiple constituent parts. For example, in the case Myers cites, *Callicutt v. Pepsi Bottling Group, Inc.*, the discrimination against the "biracial" plaintiff was not only that he was called both "FUBU" and "not black," but that he was called both. Realization of this specific discrimination against multi-racial people; does not limit claims of discrimination against the constituent parts of the identity of the multi-racial person; instead, recognizing this discrimination both allows for the multi-racial person to bring additional claims of discrimination and more accurately describes the discrimination against multi-racial people for the fact of their being multi-racial. Multi-racial people are discriminated against because it took *Loving v. Virginia* to invalidate decades of anti-miscegenation laws that sought to prevent "mongrel" children of such marriages.

This multi-racial discrimination is not widely understood, likely because the number of multi-racial people is only now increasing. Discrimination against multi-racial people for the fact of their being multi-racial may be dismissed by saying that the person is not seen as fully belonging to the constituent parts of their identity or that the person is better situated because they are not fully a part of that race. As the numbers

* Staff Editor, GEO. J.L. & MOD. CRIT. RACE PERSP. (VOL. 12); J.D. Candidate, Georgetown University Law Center (L'21), © 2020, Justin Fitzsimmons.

of mixed-race people continue to grow, so will scholarship and understanding of multi-racial discrimination.

However, due to the nature of civil rights claims, Myers' proposed fix will be ineffective to protect the legal rights of multi-racial people. Changes to the census will be too small to affect the reasoning of federal judges and juries in civil rights lawsuits. Possibly more than the general public, federal judges likely do not know or understand that the discrimination suffered by multi-racial people is sufficiently impactful to be cognized by civil rights protections. Without precedent, judges will have to rely on their own experiences. While a change to the census is a step towards legitimizing the discrimination felt by multi-racial people, it does not represent a sufficient leap for society's understanding of discrimination against multi-racial people. Because the census changes will not help federal judges to believe the impact of the discrimination against multiracial individuals, Myers proposed remedy will not help multi-racial people to have their claims of discrimination honored.

There are still many upsides to enacting Myers' proposed changes to the census. I have no doubt (especially as a multi-racial person) of the importance of self-identification. Further, the changes to the census are modest and cost-efficient, making it more likely to be enacted through executive or administrative action. Additionally, this proposed change moves away from the harmful colorblind interpretation of the Constitution to an anti-subordination principle. Plus, Myers answers the concern about the tension between the anti-subordination principle and multiracial identity by helpfully seeking to split the interests of the government and the individual.

All this being said, census changes are not significant enough to affect federal civil rights litigation for multi-racial people. While Myers does well to identify and articulate the problem of multi-racial people trapped in the Black-White binary, his missing a key aspect of multi-racial discrimination and his remedy make it unlikely that changes to the census will be an adequate solution.