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Eteena A. Tadjioqueu
Washington University School of Law

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Fifty Shades of Black: Challenging the Monolithic Treatment of “Black or African American” Candidates on Law School Admissions Applications

Eteena J. Tadjioqueu*

I. INTRODUCTION

Law school applicants who identify as “Black or African American” are afforded little opportunity to identify more specifically their ancestral or cultural heritage, if it is known, on law school admissions applications.¹ Seemingly, some law schools have not found it necessary to allow certain groups, such as Haitian Americans, Black Britons, second-generation Nigerians, Black American nationals, and others, to designate their ethnic identity in the same manner that Chinese Americans, second-generation Koreans, naturalized Vietnamese citizens, and other Asians are able to within the “Asian” racial category on some law school admissions applications.² Despite identifiable, important, and growing differences within the “Black or African American” racial category, individuals who identify with this group are treated as members of a

* J.D. Candidate (2014), Washington University School of Law; B.S. (2007), Boston University. This Note is dedicated to my mother, Jacqueline, and is in memory of my late father, Etienne Tadjioqueu.

1. See Kevin Brown, *Should Black Immigrants be Favored Over Black Hispanics and Black Multiracials in the Admissions Processes of Selected Higher Education Programs?*, 54 *HOW. L.J.* 255, 256 (2011) (noting that “higher education institutions have generally lumped all blacks into a unified Black/African/African American” category).

2. On Cornell Law School’s Fall 2011 application, candidates who selected “Hispanic/Latino” were able to select from six designations: (1) Central American; (2) Chicano/Mexican; (3) Cuban; (4) Other Hispanic/Latino; (5) Puerto Rican; and (6) South American. “Caucasian/White” applicants were able to select from four designations: (1) European; (2) Middle Eastern; (3) North African; and (4) Other Caucasian/White. “Asian” applicants had eleven choices. “Black or African American” applicants had one choice: Black or African American. CORNELL UNIV. LAW SCH., APPLICATION FOR ADMISSION TO THE JURIS DOCTOR PROGRAM 1 (2011), available at http://www.lawschool.cornell.edu/admissions/apply/upload/JD_app_2014.pdf (last visited Oct. 30, 2013).

monolithic unit.³ This Note argues that this categorization, like the “one-drop rule,” reinforces a social construction developed to demonize and demoralize a sizeable segment of the American population, and that the singular treatment of Black law school applicants is a potential threat to diversity initiative programs.⁴

The Supreme Court has upheld the use of race and ethnicity⁵ as factors to be considered in college admissions decisions, because diversity is valued in higher-education settings.⁶ The American Bar Association (ABA) echoes this sentiment and seeks to increase racial diversity within the profession.⁷ Some academic institutions,

3. See Kevin Brown & Jeannine Bell, *Demise of the Talented Tenth: Affirmative Action and the Increasing Underrepresentation of Ascendant Blacks at Selective Higher Educational Institutions*, 69 OHIO ST. L.J. 1229, 1233 (2008) (noting that candidates select the monolithic “African American/African/Black” category although they likely have distinct cultural heritages).

4. See Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151, 2156 (2013) (noting that race was used as a method to assign value to Black slaves and to transfer Black slaves among white people as commodities). The United States is unique in defining “Black or African American” as any individual with any known African Black ancestry. This rule forces individuals, regardless of centuries of “mixing” with other races, to designate themselves as “Black or African American.” The categorization scoops a large segment of the population into an overly generalized racial category that has been subjected to institutionalized discrimination. See F. JAMES DAVIS, *WHO IS BLACK?: ONE NATION’S DEFINITION* 5 (2d ed. 2002).

5. The author often treats the words “race” and “ethnicity” as synonyms although they are often used together. See Alex M. Johnson, Jr., *The Re-Emergence of Race as a Biological Category: The Societal Implications—Reaffirmation of Race*, 94 IOWA L. REV. 1547, 1585 (2009) (noting that “[r]ace and ethnicity are increasingly used as synonyms causing some confusion and leading to the hybrid terms race/ethnicity”).

6. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 313 (1978) (stating that “our tradition and experience lend support to the view that the contribution of diversity is substantial”). See also Paula Lustbader, *Painting Beyond the Numbers: The Art of Providing Inclusive Law School Admission to Ensure Full Representation in the Profession*, 40 CAP. U. L. REV. 71, 78–79 (2012) (listing as diversity factors “persons with diverse ethnic and racial compositions; persons with socioeconomic disadvantages; persons who are first-generation college graduates or immigrants; persons with international citizenship; persons with physical or learning disabilities; persons with non-traditional backgrounds; and persons who have experienced discrimination”). And the list continues to grow. Other diversity factors include sexual orientation, religion, fluency in a foreign language, an extensive record of community service, and a successful career prior to enrolling in law school. See Kevin R. Johnson, *The Importance of Student and Faculty Diversity in Law Schools: One Dean’s Perspective*, 96 IOWA L. REV. 1549, 1566 (2011).

7. For example, the American Bar Association Office of Diversity Initiatives notes that the goal of the office is “to increase minority participation in the legal profession.” A.B.A. LEADERSHIP, OFFICE OF DIVERSITY INITIATIVES (Oct. 20, 2013), <http://www.Americanbar.org/groups/leadership/diversity.html> [hereinafter ABA LEADERSHIP].

however, are not, in fact, enrolling a critical mass of Black applicants. This may be because some applicants take advantage of the generic “Black or African American” category by claiming membership when they should not, and Black applicants with recent ties to the United States are treated similarly to Black applicants whose families have faced decades of institutional discrimination. If diversity initiatives were designed to assist victims of historic institutional discrimination, then misrepresentation and lumping foreign-born and first-immigration Blacks with American Blacks threatens these programs by diluting the number of Black individuals who matriculate.

Individuals who identify as “Black or African American” on account of their race or ethnicity contribute to in-class and extracurricular dialogue on legal and non-legal matters by offering a different point of view based on a different background.⁸ Racial and ethnic diversity is likely to positively impact the post-graduate professional experiences of law students,⁹ as well, and racially and ethnically diverse law school graduates will engage with, serve, and represent America’s racially diverse citizens.¹⁰ The ABA, in its Model Rules of Professional Conduct, urges its members to “seek improvement of the law, access to the legal system, the administration of justice, and the quality of service rendered by the

The author uses the term “diversity initiative” in place of “affirmative action” to avoid the highly politicized nature of the latter term.

8. See *Grutter v. Bollinger*, 539 U.S. 306, 319 (2003) (stating that law schools seek “students with diverse interests and backgrounds to enhance classroom discussion and the educational experience both inside and outside the classroom”).

9. Law school diversity “better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.” *Id.* at 330 (quoting Brief for American Educational Research Association et al. as Amici Curiae at 3, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241)).

10. See Charles R. Calleros, *Patching Leaks in the Diversity Pipeline to Law School and the Bar*, 43 CAL. W. L. REV. 131, 132 (2006) (stating that “the number of attorneys of color is disproportionately low compared to the current minority population in the United States, [and] the population of people of color is growing at a disproportionately high rate compared to general population growth”). During the Supreme Court’s 2012–13 term, only one Black lawyer appeared before the justices for a little more than eleven minutes. The Court heard a total of seventy-five hours of arguments during its 2012–13 term. See Mark Sherman, *In Entire Court Term, Justices See 1 Black Lawyer*, SALON (May 12, 2013), http://www.salon.com/2013/05/12/in_entire_court_term_justices_see_1_black_lawyer/.

legal profession.”¹¹ Racial diversity at law schools, and subsequent post-graduation diversity within the legal profession, represents one important factor that can promote achievement of this ideal.

By 2050, if not sooner, minority groups will account for nearly 50 percent of the American population, but minorities are expected to represent less than 20 percent of law students.¹² Racial and ethnic diversity within law schools and the legal community is a lofty, often politicized, yet warranted aim.¹³ Although the United States Supreme Court is increasingly reluctant to allow schools to use race and ethnicity in admissions decisions, as seen in its recent decision *Fisher v. University of Texas*,¹⁴ nearly every other non-legal sector holds a non-skeptical view regarding the substantive benefits of diversity.¹⁵

11. MODEL RULES OF PROF'L CONDUCT Preamble 6, available at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope.html (last visited Jan. 26, 2013). Each factor is linked to increasing and sustaining racial and ethnic diversity within the legal profession.

12. See ABA LEADERSHIP, *supra* note 7 (noting that the “disparity between the legal profession and the general population is increasing” and not expected to attain parity in the foreseeable future). See also Genaro C. Armas, *America's Face is Changing*, ASSOCIATED PRESS, Feb. 11, 2009, available at http://www.cbsnews.com/2100-201_162-607022.html.

13. See Lustbader, *supra* note 6, at 82–84. Although minorities comprise roughly 25 to 30 percent of the population, they make up less than 16.4 percent of the legal profession. *Id.* at 84. The legal profession also has the lowest representation of minorities compared to any other profession. *Id.* at 84–85. Commentators have noted that not only is the number of minority lawyers disproportionately low compared to the number of minorities in the U.S. population but that the number of “people of color” in the general population is growing at a faster rate. Calleros, *supra* note 10, at 132. See also Eli Wald, *A Primer on Diversity, Discrimination, and Equality in the Legal Profession or Who is Responsible for Pursuing Diversity and Why*, 24 GEO. J. LEGAL ETHICS 1079, 1101 (2011) (“Exactly because law is the social glue of our society, because it is premised on the fundamental values of equality, fairness, and the rule of law, the legal profession ought to be a leader in the quest for diversity.”); see also Andrew LeGrand, *Narrowing the Tailoring: How Parents Involved Limits the Use of Race in Higher Education Admissions*, 21 NAT'L BLACK L.J. 53, 54 (2009) (contending that “[t]he most difficult challenge facing the American education system today is how to recognize and embrace the rapidly increasing racial and ethnic diversity transforming the country, while remaining within the bounds of the law”).

14. 133 S. Ct. 2411 (2013).

15. In his concurring opinion in *Fisher v. University of Texas*, the most recent Supreme Court case on the subject of affirmative action in higher education, Justice Thomas stated that “there is nothing ‘pressing’ or ‘necessary’ about obtaining whatever educational benefits may flow from racial diversity.” *Id.* at 2424 (Thomas, J., concurring) (emphasis added). He confirmed his skepticism regarding the link between diversity and educational benefits by commenting that such benefits—“assuming they exist”—are not a compelling state interest. *Id.* Justice Scalia used his short concurrence to reiterate his opinion in *Grutter v. Bollinger* that the

This Note will discuss proposals to reform the “Black or African American” category on law school admissions applications, and will argue that proposals to include greater and more precise options for identification within the “Black or African American” category should be adopted. This inclusion will enable applicants to self-identify in a manner similar to other racial groups, thus enhancing the accuracy of identifications and decreasing the demoralizing effect monolithic treatment has on Black applicants. Reform will also reduce incidences of misrepresentation. This Note examines arguments that law school applications should be reformed to better target individuals who could benefit from diversity initiatives, namely, Black students who have lengthy ties to historic and institutionalized racism in the United States. This Note then argues that creating a “benefit hierarchy” would be detrimental to efforts to achieve a critical mass of Black students, given declining law school enrollment.¹⁶

Part II of this Note examines the common law history of race and higher education admissions, as well as the development of constitutionally valid diversity initiatives employed in higher education settings, including law schools. It explores the concepts of race, ethnicity, and diversity, and the techniques employed by law schools, the Department of Education (DOE), and others to collect race and ethnicity information from law school applicants. Part III examines diversity within the “Black or African American” category,

U.S. Constitution “proscribes government discrimination on the basis of race, and state-provided education is no exception.” *Id.* at 2422. The majority opinion went to great lengths to emphasize that universities will have a high bar to overcome if their admissions policies use racial categories or classifications. Universities bear the burden of proving their diversity initiatives are “clearly identified and unquestionably legitimate.” *Id.* at 2413. Universities must further show it is necessary “to use race to achieve the educational benefits of diversity,” and must do so in a manner that leaves the Court satisfied that no workable race-neutral alternative exists. *Id.* at 2414. Outside of the judicial branch, however, there exists a “pervasive trend” of valuing and recognizing the substantial benefits of diversity: the legal community advocates for increased diversity; scholars study the subject; and businesses have developed diversity initiatives. *See* Leong, *supra* note 4, at 2166–67.

16. A critical mass is the “variable number or percentage of individuals from a particular group who must be present for their presence to be meaningful.” Meera E. Deo et al., *Struggles & Support: Diversity in U.S. Law Schools*, 23 NAT’L BLACK. L.J. 71, 74 (2010). “There is no number, percentage, or range of numbers or percentages that constitute critical mass.” *Grutter*, 539 U.S. at 318.

the changing demographics within this group of law school applicants, and how immigration affects, and is in fact driving, the need to reevaluate preconceived notions about the “Black or African American” racial category. It then discusses reform proposals, and argues that it is detrimental to “Black or African American” individuals and diversity initiatives to continue to characterize Black law school applicants in a monolithic manner.

II. HISTORY

A. The Constitutionality of Diversity Initiatives in Higher Education

A fitting starting point for this discussion—particularly in light of *Fisher v. University of Texas*—is *Sweatt v. Painter*, the United States Supreme Court’s first evaluation of race as a factor in higher education admissions at the University of Texas.¹⁷ In *Sweatt*, the plaintiff applied for admission to the University of Texas Law School for the February 1946 term and was rejected solely because he was a “Negro.”¹⁸ The Court held the Equal Protection Clause of the Fourteenth Amendment required the University to admit the plaintiff.¹⁹

Nearly a quarter-century later, the Court considered a case about a law school diversity initiative in *DeFunis v. Odegaard*.²⁰ In 1971, Marco DeFunis, Jr., a white American, applied for admission to the University of Washington Law School.²¹ When he was denied admission, DeFunis sued, contending the university

17. 339 U.S. 629 (1950). See Garrick B. Pursley, *Thinking Diversity, Rethinking Race: Toward a Transformative Concept of Diversity in Higher Education*, 82 TEX. L. REV. 153, 168 (2003).

18. *Sweatt*, 339 U.S. at 631.

19. *Id.* at 636. The plaintiff ultimately withdrew from the University of Texas Law School after “bravely enduring cross-burnings, tire slashings, and racial slurs from students and faculty” on a near daily basis. William C. Kidder, *The Struggle for Access from Sweatt to Grutter: A History of African American, Latino, and American Indian Law School Admissions, 1950–2000*, 19 HARV. BLACKLETTER L.J. 1, 4 (2003).

20. 416 U.S. 312 (1974).

21. Sara Jean Green, *Marco DeFunis, Student in 1971 UW Bias Suit, Dies at 52*, SEATTLE TIMES, Jan. 18, 2002, available at <http://community.seattletimes.nwsources.com/archive/?date=20020118&slug=marco18m0>.

unconstitutionally discriminated against him on account of his race.²² While the Supreme Court dismissed the lawsuit as moot,²³ Justice Douglas dissented, poignantly arguing that the Equal Protection Clause did not prohibit law schools from taking race into account in admissions decisions if they were, for instance, “evaluating an applicant’s prior achievements in light of the barriers that he had to overcome.”²⁴ Justice Douglas clarified the limits of his position, however, noting his disapproval of the University’s implied quota system, which he viewed as impermissible.²⁵

The constitutionality of diversity initiatives by law school admissions departments was firmly established in 1978 in *Regents of the University of California v. Bakke*.²⁶ In *Bakke*, Justice Powell, writing for the majority, stated that the United States’ historical “tradition and experience” supported the conclusion that racial and ethnic diversity provided a substantial contribution to higher education settings.²⁷ The Court advised universities to consider race as one of many diversity factors, and to exercise an individualized determination of which candidates should be offered admission.²⁸ The Court reiterated that protection of individual rights, granted under the Fourteenth Amendment, must not be disregarded.²⁹

22. *DeFunis*, 416 U.S. at 314.

23. The Court dismissed the suit as moot because the petition came before the Court while the plaintiff was in his last semester of law school, and the Court figured he would complete his studies regardless of any decision the Court might reach. *Id.* at 319–20.

24. *Id.* at 331 (Douglas, J., dissenting).

25. *Id.* at 332 (Douglas, J., dissenting) (writing “it is apparent that because the Admissions Committee compared minority applicants only with one another, it was necessary to reserve some proportion of the class for them, even if at the outset a precise number of places were not set aside”). See also LeGrand, *supra* note 13, at 55 (suggesting the narrow tailoring required after *Bakke* prohibits the use of quotas).

26. 438 U.S. 265 (1978). See also Barbara Lauriat, *Trump Card or Trouble? The Diversity Rationale in Law and Education*, 83 B.U. L. REV. 1171, 1174 (2003) (“*Regents of the University of California v. Bakke* was a landmark case, the first to address the use of affirmative action in the context of higher education. It also introduced the notion of student-body diversity as a potential compelling government interest that justifies the use of race-based classifications.”).

27. *Bakke*, 438 U.S. at 293. Justice Powell’s majority opinion states that “it is not unlikely that among the Framers were many who would have applauded a reading of the Equal Protection Clause that . . . is responsive to the racial, ethnic, and cultural diversity of the Nation.”

28. *Id.* at 314–15.

29. *Id.*

The Supreme Court had the opportunity to interpret the *Bakke* holding in *Gratz v. Bollinger*³⁰ and *Grutter v. Bollinger*.³¹ The Court reached different results in these companion cases, which concerned diversity initiatives at the University of Michigan's undergraduate university and at its law school. The Court upheld the law school's diversity initiative, because it was not constructed to admit a certain percentage or number of minorities (i.e., it was not a quota).³² Rather, the initiative considered a candidate's race as one of many diversity factors—an acceptable strategy according to *Bakke*.³³ At the same time, the Court rejected the university's undergraduate diversity initiative, because it assigned twenty points to applicants who were members of an “underrepresented racial or ethnic group.”³⁴

After *Grutz* and *Grutter*, admissions committees were permitted to factor racial and ethnic diversity into admissions policies, so long as the diversity initiative followed the parameters established by Justice Powell in *Bakke*.³⁵ For the following decade, the Court did not render another decision regarding the validity of the use of race as a factor of diversity initiatives in higher education.³⁶ The Court broke its

30. 539 U.S. 244 (2003) (holding the University of Michigan's undergraduate admission system violated the Equal Protection clause).

31. 539 U.S. 306 (2003) (upholding the diversity initiative of the University of Michigan Law School as constitutionally permissible).

32. *Id.* at 343–44.

33. *Id.* The Court noted that African Americans, Hispanics, and Native Americans were groups that have historically been discriminated against, and that these groups were the target of the university's diversity initiative. *Id.* at 316.

34. *Gratz*, 539 U.S. at 270. Chief Justice Rehnquist repeated Justice Powell's rationale from *Bakke*: “Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake.” *Id.* (quoting *Bakke*, 438 U.S. at 307).

35. *Grutter*, 539 U.S. at 325 (“[T]oday we endorse Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions.”). See also *Smith v. University of Washington*, 392 F.3d 367, 373 (9th Cir. 2004) (highlighting the “five hallmarks” of a well-crafted diversity initiative: “(1) the absence of quotas; (2) individualized consideration of applicants; (3) serious, good-faith consideration of race-neutral alternatives to the affirmative action program; (4) that no member of any racial group was unduly harmed; and (5) that the program had a sunset provision or some other end point” (citing *Grutter*, 539 U.S. at 335–43)).

36. However, in 2007, the Court heard *Parents Involved in Cmty. Schools v. Seattle School Dist. No. 1*, 551 U.S. 701 (2007), in which parents of public school students sued the district for utilizing a school assignment scheme based on race, alleging the district violated the Equal Protection Clause of the Fourteenth Amendment. The Court made at least two illuminating findings that could be applied to higher education: (1) racial diversity, without other diversity factors, cannot be a compelling interest, and (2) educational institutions that use

silence in 2013 with the case *Fisher v. University of Texas at Austin*.³⁷ In *Fisher*, two white female plaintiffs sued the University of Texas at Austin, alleging the university's "use of race in the admissions process violated the Equal Protection Clause of the Fourteenth Amendment."³⁸ The Court remanded the case to the United States Court of Appeals for the Fifth Circuit, and instructed the lower court to apply the strict scrutiny standard adopted in *Grutter* and *Bakke*.³⁹ Thus, the Court did not answer the question of whether the University of Texas' diversity initiative is unconstitutional.⁴⁰

B. Race, Diversity, and Data Collection Techniques

1. Race, Ethnicity, and Diversity

What is race?⁴¹ As defined by critical race theorists, public health professionals, social scientists, and others, race is a social construct, a

or are considering using a diversity initiative must make a "serious and good faith 'consideration of workable race-neutral alternatives.'" *Parents Involved* is also the source of Justice Roberts' contention that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Id.* at 748. See also LeGrand, *supra* note 13, at 64.

37. 133 S. Ct. 2411 (2013).

38. *Id.* at 2415. More specifically, the plaintiffs argued that the university's admission policy discriminated against them based on their "race in violation of their right to equal protection of the laws under the Fourteenth Amendment of the United States Constitution, U.S. Const. amend. XIV, § 1, and federal civil rights statutes, 42 U.S.C. §§ 1981, 1983, and 2000d *et seq.*" See *Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587, 589 (5th Cir. 2009). The University of Texas at Austin's practice was "ripe for challenge," because the university re-adopted a diversity initiative after employing a race-neutral alternative. LeGrand, *supra* note 13, at 69.

39. *Fisher*, 133 S. Ct. at 2415.

40. Commentators had suggested three possible outcomes from the eight-member Court: "a complete and history-making ban on race-conscious admissions, a tightening of the current limitations on consideration of race or ethnicity, or a decision that more or less leaves things as they are." Richard Perez-Pena, *Colleges Look to Supreme Court for Clues*, N.Y. TIMES, Oct. 11, 2012, at A20. Some scholars likely believed the Court would take a conservative stance and ban consideration of race at public higher education institutions, since Justice Sandra Day O'Connor, who was the deciding vote in many controversial cases on this issue, had retired. See Danielle Ledford, *Is Race Neutrality a Fallacy? A Comparison of the U.S. and French Models of Affirmative Action in Higher Education*, 46 TEX. INT'L L.J. 355, 370 (2011) (reasoning that with Justice O'Connor's retirement, the Court may be less deferential to institutes of higher learning).

41. Definitions of race included in the *Oxford English Dictionary* include: (1) "a group or set, esp. of people, having a common feature or features;" (2) "a person's offspring;" and

“fluctuating, decentered complex of social meanings that are formed and transformed under the constant pressures of political struggle.”⁴² The law represents “one of the most powerful mechanisms by which any society creates, defines, and regulates” race.⁴³ Because no scientific basis exists to group individuals based on their “race,” physical differences—including skin color, the texture of an individual’s hair, and the broadness of his or her nose—are often the determining factors for assigning an individual to a racial group.⁴⁴

In the United States, since the early twentieth century, the “Black or African American” designation has been limited to those individuals who have any known Black African ancestry (a.k.a. “the one-drop rule”).⁴⁵ Today, under the one-drop rule, mixed-race

(3) “the stock, class, family, etc. to which a living thing belongs.” SHORTER OXFORD ENGLISH DICTIONARY 2444 (6th ed. 2007). See also Johnson, Jr., *supra* note 5, at 1585. In *St. Francis College v. Al-Khazraji*, the Court cited to nineteenth-century dictionaries that defined race as a “continued series of descendants from a parent who is called the *stock*” and “descendants of a common ancestor.” 481 U.S. 604, 610–11 (1987) (citations omitted). Not until the twentieth century were “Caucasian, Mongolian, and Negro” designated as the three major races, and was race defined by different physical characteristics. *Id.* at 611 (citation omitted).

42. IAN F. HANEY-LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 13 (1996) (quoting John Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129, 2160 (1992)). See also Carrie Lynn H. Okizaki, Comment, “*What Are You?*”: *Hapa-Girl and Multiracial Identity*, 71 U. COLO. L. REV. 463, 465 (2000) (noting “racial classifications have been social constructions used as a means to achieve various social purposes”). See also Johnson, Jr., *supra* note 5, at 1555 (noting that “there is no acceptable scientific definition of race and that no racial differences can be separated or characterized by genetic material”). In addition, “the Human Genome Project has found that the human population has 99.9% of its DNA in common.” *Id.* at 1586 (quoting Margaret A. Winker, *Measuring Race and Ethnicity: Why and How?*, 292 JAMA 1612, 1613 (2004)) (footnotes omitted). See also Sharona Hoffman, *Is There a Place for “Race” as a Legal Concept?*, 36 ARIZ. ST. L.J. 1093, 1093 (2004) (providing additional support for the notion that race is a social construct by noting that “the best research in genetics, medicine, and the social sciences reveals that the concept of ‘race’ is elusive and has no reliable definition”).

43. HANEY-LÓPEZ, *supra* note 42, at 11; Hoffman, *supra* note 42, at 1139 (“Notions of ‘race,’ reinforced by legal mandates, have historically engendered the belief that human beings are divided into well-defined subspecies, some of which are superior to others. This misconception has led to countless human rights violations.”).

44. See Trina Jones, *Shades of Brown: The Law of Skin Color*, 49 DUKE L.J. 1487, 1494 (2000) (“Although standing alone they are meaningless, gross morphological differences (e.g., the broadness of the nose, the fullness of the lips, the curl of the hair) have and continue to be used to delineate racial categories and to assign persons to racial groups.”).

45. DAVIS, *supra* note 4, at 12. Not counting those individuals who, because of physical indicators, identify as “Black or African American” and those who are aware of their African ancestry, Black-white miscegenation, including that which occurred in Africa prior to the

individuals (e.g., singer Mariah Carey), Black Americans born in Africa (e.g., soccer player Freddy Adu), and individuals with a white ancestor (e.g., First Lady Michelle Obama) all have the same racial status.⁴⁶ No other racial group has been defined by the overly generalized one-drop rule.⁴⁷ Indeed, the reasoning behind the creation of such a broad and inclusive rule was to help white slave traders and sharecroppers promote slavery and supply plantations with slaves.⁴⁸ The one-drop rule, which created the link between race and slavery, was of critical importance in American slave society.⁴⁹ The rule made it easy to determine whether an individual was free or bound to slavery, and whether one was privileged or disenfranchised.⁵⁰ The landmark case *Plessy v. Ferguson*⁵¹ and another Louisiana-based case called *Doe v. State*⁵² illustrate how illogical the one-drop rule was, and yet how the rule was nevertheless upheld as valid by the judiciary, including the Supreme Court.⁵³

In 1892, Plessy Ferguson, a man with “seven-eighths Caucasian and one-eighth African blood [and a] mixture of colored blood [that] was not discernible in him,”⁵⁴ sued the state of Louisiana after he was asked to leave the whites-only seating area of a railcar.⁵⁵ Justice

settlement of North America, in the West Indies prior to bringing slaves from that region to North America, in Europe in ancient times and later, and within the United States itself, has produced an even larger group that could qualify as “Black or African American,” if the process by which all of these groups eventually “mixed” was known or acknowledged. *Id.* at 28.

46. See Johnson, Jr., *supra* note 5, at 1560 (describing two ways in which an individual is classified as Black: “(1) an ancestor is known to be black or a person of color (i.e. the ‘one drop of blood’ rule); or (2) if the person, based on appearance or what is popularly called phenotype, is visibly black or a person of color”).

47. DAVIS, *supra* note 4, at 12. The “one-drop rule” is commonly understood to mean that a person with one drop of African blood, or any known African ancestry, is Black. See Kenneth E. Payson, *Check One Box: Reconsidering Directive No. 15 and the Classification of Mixed-Race People*, 84 CAL. L. REV. 1233, 1237 (1996).

48. DAVIS, *supra* note 4, at 41–42. It was popularly believed, particularly in the South, that God created Blacks to be slaves. *Id.*

49. Luther Wright, Jr., *Who’s Black, Who’s White, and Who Cares: Reconceptualizing the United States’s Definition of Race and Racial Classifications*, 48 VAND. L. REV. 513, 524 (1995).

50. *Id.* at 521, 524.

51. 163 U.S. 537 (1896).

52. See *Doe v. State*, 479 So.2d 369 (La. Ct. App. 1985).

53. See *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896); see also *Doe*, 479 So.2d at 372.

54. *Plessy*, 163 U.S. at 538.

55. *Id.*

Brown, after acknowledging that Ferguson looked white, but before ruling in favor of Louisiana, described a few versions of the one-drop rule employed in different states at the time:

It is true that the question of the proportion of colored blood necessary to constitute a colored person, as distinguished from a white person, is one upon which there is a difference of opinion in the different states; some holding that any visible admixture of black blood stamps the person as belonging to the colored race; others, that it depends upon the preponderance of blood; and still others, that the predominance of white blood must only be in the proportion of three-fourths.⁵⁶

In Louisiana, the rule, which the United States Supreme Court upheld, was that a colored person⁵⁷ was anyone with one-thirty-second of African blood.⁵⁸ This rule was challenged nearly a century later, when Susie Phipps, in order to request a passport, obtained a copy of her birth certificate and was shocked to discover that her parents were (and likely she was) “colored.”⁵⁹ Phipps wanted to change her parents’ racial designation, listed on her birth certificate, from colored to white.⁶⁰ She looked white, was “raised white,” and stated that her father had blue eyes.⁶¹ Evidence suggested that Phipps was descended from a freed slave and other mixed-race ancestors.⁶² Though she and likely her parents were unaware of their Black

56. *Id.* at 552 (citations omitted).

57. In the United States, “[t]he terms Negro, mulatto, colored, black, and African American have all come to mean persons with any African black ancestry.” DAVIS, *supra* note 4, at 32.

58. *Doe*, 479 So.2d at 371. By the early twentieth century, southern states, including Louisiana, racially classified individuals by using a formula based on ancestry. See Paul Finkelman, *The Crime of Color*, 67 TUL. L. REV. 2063, 2110 (1993). In Louisiana, La.R.S. 42:267 provided that “a person having one-thirty second or less of Negro blood shall not be deemed, described or designated by any public official in the State of Louisiana as ‘colored,’ a ‘mulatto,’ a ‘black,’ a ‘negro’ . . . a ‘colored person’ or a ‘person of color.’” *Id.* at 2111 (emphasis added). La.R.S. 42:267 was on the books until its repeal in 1983. *Id.*

59. Kent Demaret, *Raised White, a Louisiana Belle Challenges Race Records That Call Her ‘Colored.’*; PEOPLE, 1982, available at <http://www.people.com/people/archive/article/0,,20083727,00.html>. Phipps and other members of her family brought suit to have their birth certificates changed. *Doe*, 479 So.2d at 370.

60. *Doe*, 479 So.2d at 371.

61. Demaret, *supra* note 59.

62. *Id.*

ancestry, Phipps' parents were classified as colored, and the state refused to change the birth certificate.⁶³ Phipps looked, lived, and identified as a white person,⁶⁴ but because she was the child of two colored parents, and because the state followed the one-drop rule, she would likely be categorized as "Black or African American" under modern terminology. Phipps struggled so much with being designated as "colored" that she became physically ill.⁶⁵ She identified as white and was determined to correct her parents' racial designations.⁶⁶

Phipps' reaction illustrates how the racial label of "Black or African American" had both expressed and implied negative connotations. The label negatively impacted her sense of social mobility and how she believed she would be perceived within her community.⁶⁷ Classification as "Black or African American" placed Phipps in an oppressed and subordinated state within society.⁶⁸ Today, we recognize that "Black or African American" individuals are certainly not the only racial group to have been the target of institutionalized oppression;⁶⁹ but Phipps' reaction upon learning her parents' race demonstrates why Black Americans are recognized as having suffered an acute harm.⁷⁰ Racial discrimination was not

63. *Doe*, 479 So.2d at 372. ("Individual racial designations are purely social and cultural perceptions, and the evidence conclusively proves those subjective perceptions were correctly recorded at the time appellants' birth certificates were issued."). See also Demaret, *supra* note 59.

64. Demaret, *supra* note 59.

65. Michael Omi, *Racial Identity and the State: The Dilemmas of Classification*, 15 LAW & INEQ. 7, 8 (1997).

66. Demaret, *supra* note 59.

67. See Johnson, Jr., *supra* note 5, at 1562 (noting that race impacts "the job opportunities presented, who one marries, where one lives, the health care one receives, and even where one is interred following death").

68. See Okizaki, *supra* note 42, at 469 (noting the "social and relational construct of race both defines an individual's relationship with society, and identifies his or her place within the social order").

69. See Ian F. Haney-López, "A Nation of Minorities": Race, Ethnicity, and Reactionary Colorblindness, 59 STAN. L. REV. 985, 987 (2007) (listing examples of discriminatory treatment against non-Blacks: "the doctrine of discovery and the trail of broken treaties; the Chinese exclusion acts, naturalization limited to "white persons," alien land laws, and Japanese internment; and the legal instantiation of Manifest Destiny imposed on the northern half of Mexico, Puerto Rico, and Hawaii").

70. See Angela Onwuachi-Willig, *The Admission of Legacy Blacks*, 60 VAND. L. REV. 1141, 1150 (2007) (calling attention to the reasons why affirmative action was implemented: as

limited to legal settings but pervaded a Black person's ability to marry, vote, obtain an education, find housing and employment, assemble in groups, and even stand outside in the evening.⁷¹

Like the one-drop rule, the "Black or African American" category on law school applications continues a legal tradition of lumping individuals into a category, ignoring discrete differences, and using the group designation to assign social value and status to its members. While race might be a socially constructed and fluid concept,⁷² the racial designation that an individual is afforded had then, and continues to have today, concrete and serious effects on that individual's legal rights and ability to access social and public services. And today, race can impact whether or not an individual is included in a diversity initiative at a higher education legal institution.⁷³

2. Data Collection

Race influences how one navigates and integrates within a society, and the social movement of Blacks has historically been

a means of combating "the effects of slavery and *rampant* discrimination against Blacks for more than 100 years thereafter" (emphasis added).

71. Hoffman, *supra* note 42, at 1101 (noting that Blacks "were prohibited from holding public office, from testifying in court, from assembling in groups of five or more, and from being out after nine at night without a lawful reason").

72. Even the current usage of "Black or African American" as the correct terminology for an individual of African descent has changed over the years. "Black," "Negro," "Afro-American," "Colored," and "African American" are all terms that were at one point or another deemed to be the proper racial classification for individuals with African ancestry. See Hoffman, *supra* note 42, at 1144.

73. See Brief for Association of American Law Schools as Amici Curiae Supporting Respondents, *Fisher v. University of Texas*, 133 S. Ct. 2411 (2013) (No. 11-345), 2012 WL 3527822 (arguing that many law schools "take race into account in their admissions decisions," because no race-neutral method exists that allows law schools to achieve racial diversity and fulfill other important goals). See also *Bakke*, 438 U.S. at 401 (Marshall, J., concurring in part and dissenting in part) ("It is because of a legacy of unequal treatment that we now must permit the institutions of this society to give consideration to race in making decisions about who will hold the positions of influence, affluence, and prestige in America."); see also *Time to scrap affirmative action*, *ECONOMIST*, April 27–May 3, 2013, at 11 (noting that many affirmative action policies put in place in the United States and elsewhere were meant "to atone for past injustices and ameliorate their legacy"). The U.S. Commission on Civil Rights, in 1977, defined diversity initiatives as an effort to not only terminate discrimination but also "to correct or compensate for past or present discrimination." Leong, *supra* note 4, at 2161–62.

stunted by racial discrimination and oppression.⁷⁴ With these conditions in mind, the Department of Education (DOE) and other federal institutions began collecting race and ethnicity information from higher education candidates to monitor and evaluate diversity initiatives at colleges across the nation.⁷⁵ The DOE prescribes the minimum data collection standard that educational institutions must use when collecting race and ethnicity information.⁷⁶ Higher education institutions must first ask candidates if they are “Hispanic/Latino” and then request that candidates select from a list containing, at a minimum, the following five racial groups: (1) American Indian or Alaska Native; (2) Asian; (3) Black or African American; (4) Native Hawaiian or Other Pacific Islander; and (5) White.⁷⁷ Higher education institutions are also required to allow candidates to select two or more races, but candidates are not provided boxes for “multiracial” or “two or more races.”⁷⁸ Law schools and other education institutions are permitted to create sub-categories of the five required groupings if they so choose, and many have done so.⁷⁹ The University of Southern California Gould School of Law, for example, first asks applicants, “Are you Hispanic or Latino?” Next, candidates can “check any or all that apply” of “Asian” (including Chinese, Filipino, Japanese, Korean, Pakistani, Thai, Vietnamese, and Other Asian); “Black or African American”;

74. See Leong, *supra* note 4, at 2156.

75. See Hoffman, *supra* note 42, at 1107 (“For record-keeping purposes and in order to promote diversity and equal opportunity, Congress requires a wide variety of entities to provide reports indicating the ‘races’ of those participating in and benefitting from various programs.”); see also Katherine K. Wallmen et al., *Measuring Our Nation's Diversity: Developing a Common Language for Data on Race/Ethnicity*, 90 AM. J. PUB. HEALTH 1704, 1707 (2000) (noting that racial data collection was implemented by various federal institutions in the 1970s because of “the need for comparable data to monitor equal access, in areas such as housing, education . . . and employment opportunities, for population groups that historically had experienced discrimination and differential treatment because of race and ethnicity”). France is a “race-blind country,” and the French Constitution guarantees equality to all citizens without regard to race, national origin, or religion. Ledford, *supra* note 40, at 366. Taking this concept to its extreme, the French census does not report data by race, religion, or ethnicity. Ledford, *supra* note 40, at 367.

76. Final Guidance on Maintaining, Collecting, and Reporting Racial and Ethnic Data to the U.S. Department of Education, 72 Fed. Reg. 59266-02, 59266 (Oct. 19, 2007).

77. *Id.* at 59267.

78. *Id.* at 59271.

79. *Id.*

“Hispanic/Latino” (including Central American, Mexican, Cuban, Puerto Rican, South American, and Other Hispanic/Latino); “Native Hawaiian or Other Pacific Islander”; and “White/Caucasian.”⁸⁰

The Law School Admission Council (LSAC) also collects race and ethnicity information from law school candidates.⁸¹ Law school applicants create accounts through LSAC, where they have a centralized place to work on admissions applications. Each user is asked to provide biographical information, including ethnicity, and this information is transmitted to each law school the applicant applies to.⁸²

In addition to explicitly asking applicants to check-off their race or ethnicity on an application, alternative mechanisms have been implemented to collect either additional information about an applicant’s racial diversity or information on non-racial diversity factors. Some law schools ask applicants to submit a statement on how they will contribute to the diversity of the law school community.⁸³ Other law schools ask applicants to describe how a

80. UNIV. OF S. CAL. GOULD SCH. OF LAW APPLICATION FOR ADMISSION (2011) (on file with author). The 2013 application is available at <http://weblaw.usc.edu/how/jd/jd-application.cfm> (last visited Nov. 2, 2013).

81. All American Bar Association-approved law schools are members of LSAC and utilize the organization to process credentials for an average 60,000 individuals who apply to law schools each year. *About the Law School Admission Council*, LAW SCH. ADMISSION COUNCIL (Oct. 6, 2013), <http://www.lsac.org/aboutlsac/about-lsac.asp>. See also 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, 1142 (2011).

82. Like some law schools, LSAC also treats “Black or African American” individuals as a monolithic group, allowing them to only select that designation. Indeed, even groups such as “Native Hawaiian or Other Pacific Islander” and “Aboriginal or Torres Strait Islander Australian” are allowed to select from one or the other. “Asian” individuals have the greatest number of selections to choose from (eleven choices) followed by “Hispanic/Latino” (five choices). “Puerto Rican” is separated as a distinct ethnicity, and “Caucasian/White” individuals are able to select from four choices (European, Other Caucasian/White, North African, and Middle Eastern). *Demographics Options for LSAC Applications*, LAW SCH. ADMISSION COUNCIL, www.lsac.org (log in to account; then under the drop down menu under “My Account,” click “Profile”; then click “Edit Ethnicity”) (last accessed Nov. 10, 2012).

83. Question 33 on William & Mary Law School’s First Year Application for Admission starting in August 2011 required a personal statement that identified “factors such as activities or accomplishments, personal or cultural background, career goals, or special talents that you believe would contribute to the Law School community and would support your application to William & Mary Law School.” WILLIAM & MARY LAW SCH. APPLICATION FOR ADMISSION (2011) (on file with author). Optional essay number one on Northwestern University School of

particular personal characteristic has impacted their life and ambitions.⁸⁴ In both examples, students can choose to write about their race or ethnicity. Candidate interviews with law school alumni or admissions representatives offer yet another opportunity for law schools to collect diversity information.

III. ANALYSIS

A. *Immigration and Black Diversity*

The current admissions application structure utilized by some law schools, which gives Black applicants only one option to choose from (“Black or African American”), treats applicants with origins or ancestral history in Charleston, South Carolina; Kingston, Jamaica; London, United Kingdom; and Accra, Ghana, similarly, despite vast differences in proximity to the type of historic discrimination that diversity initiatives were created to remedy.⁸⁵ While it should be acknowledged that the United States has also contributed to the oppression of Black and African racial groups residing outside of its borders, educational diversity initiatives were developed, in part, to remedy racial discrimination that took place within the United States.⁸⁶

Scholars have argued that the “Black or African American” category on admissions applications should be reformed to properly distinguish foreign-born Blacks and recent Black immigrants from Blacks with lengthier ties to the United States.⁸⁷ Black applicants

Law’s Fall 2011 JD application asks students to “describe an aspect of your background that you feel would allow you to contribute uniquely to the school and/or your classmates.” NORTHWESTERN UNIV. SCH. OF LAW APPLICATION FOR ADMISSION (2011) (on file with author).

84. Question seventeen on Tulane Law School’s application asks applicants to provide a statement regarding whether “there are economic, cultural, or social factors that have presented obstacles” the candidate has had to overcome. TULANE UNIV. SCH. OF LAW APPLICATION FOR ADMISSION (2011) (on file with author).

85. Johnson, Jr., *supra* note 5, at 1587.

86. Brown, *supra* note 1, at 295–96.

87. Scholars have noted that a growing portion of “Black or African American” students enrolled in higher education institutions are individuals who are multiracial or from immigrant families. *Id.* at 261. “[A]t a gathering of the Harvard Black Alumni in 2003, two Harvard professors noted that Black Multiracials and Black Immigrants, together, comprised two-thirds

born into families that have resided in the United States for decades deserve *sui generis* treatment because of their ties to institutional discrimination.⁸⁸ Foreign-born Blacks and first-generation immigrants were not subjected to the same institutional racism—including slavery and Jim Crow laws—as Blacks who have resided in America for decades. All men may be created equal, but not all minorities are similarly situated—not even those within the “Black or African American” racial category.⁸⁹ It should be noted, however, that a sour economic climate has resulted in a thirty-year low in law school applications,⁹⁰ and it is likely minority enrollment will decline or stall.⁹¹ Under such conditions, it is not feasible for law schools to solely target non-immigrant Blacks, the “intended beneficiaries” of diversity initiatives.

It is not difficult to imagine how a Black law school applicant who grew up in a Nigerian immigrant family might have a different set of traditions, expectations, and experiences than a Black applicant who grew up in a family with lengthy ties to Jackson, Mississippi.⁹² Cultural distinctions between immigrant and non-immigrant Blacks are easy to draw, and indeed, society views these groups as separate and distinct.⁹³ Black immigrants themselves are likely to create

of Harvard’s black undergraduate population.” *Id.* Further, both multiracial Blacks and immigrant Blacks have “at least one parent who is not a descendant from the group of Blacks whose ancestral line experienced discrimination in the United States.” *Id.* at 262.

88. See Paul Brest & Miranda Oshige, *Affirmative Action for Whom?*, 47 STAN. L. REV. 855, 900 (1995) (arguing that “no other group compares to African Americans in the confluence of the characteristics that argue for inclusion in affirmative action programs.”) See also James Boyd White, *What’s Wrong with our Talk about Race? On History, Particularity, and Affirmative Action*, 100 MICH. L. REV. 1927, 1932 (2002) (commenting that Blacks have suffered a unique kind of discrimination that is “distinct in its duration, its intensity, its legalization, and its ideology”).

89. Edward C. Thomas, *Racial Classification and the Flawed Pursuit of Diversity: How Phantom Minorities Threaten “Critical Mass” Justification in Higher Education*, 2007 BYU L. REV. 813, 816 (2007).

90. Ethan Bronner, *Law Schools’ Applications Fall as Costs Rise and Jobs Are Cut*, N.Y. TIMES, Jan. 30, 2013, available at www.nytimes.com/2013/01/31/education/law-schools-applications-fall-as-costs-rise-and-jobs-are-cut.html.

91. See ABA LEADERSHIP, *supra* note 7.

92. Margaret A. Winker, *Measuring Race and Ethnicity: Why and How?*, 292 JAMA 1612, 1613 (2004) (“The life experience and cultural milieu of US immigrants may be completely different from those who grew up in the United States, despite being assigned to similar racial or ethnic categories.”).

93. Brown, *supra* note 1, at 298.

barriers with non-immigrant Blacks, in an effort to create distance with a group that is often associated with poverty, criminality, and broken families.⁹⁴ For example, Haitian flags placed on cars and in store windows symbolize cultural pride, but are also a message to the white community that the individuals displaying the flag “expect to be treated differently because they are not African Americans.”⁹⁵ Some members of society may even favor immigrant Blacks over non-immigrant Blacks.⁹⁶ Immigrants also have different conceptions of race, and indeed, the American definition of race, defined by the one-drop rule, is often perplexing to new “Black” arrivals.⁹⁷ Ethiopians, for example, describe themselves as “qeyy,” meaning reddish-brown in Amharic, while the term for black, “tequr,” was used to describe slaves.⁹⁸ For Ethiopians and other “Black” immigrants, not until they reside in the United States are they forced to think of themselves and identify as “Black or African American.”⁹⁹

In addition to express cultural differences between immigrant and non-immigrant Blacks, there are more discreet differences, as well.¹⁰⁰ Immigrant Blacks are thought to have stronger allegiances to and

94. MARY C. WATERS, *BLACK IDENTITIES: WEST INDIAN IMMIGRANT DREAMS AND AMERICAN REALITIES* 48 (1999). In a series of interviews with West Indian immigrants residing in New York City, the author found “most immigrants distanced themselves from black Americans and wanted other people to know that they were not the same.” *Id.* at 65. Further, interviewees expressed distaste for the term “African American” because they did not come from Africa and the term did not “leave room for ethnic distinctiveness.” *Id.*

95. IRA BERLIN, *THE MAKING OF AFRICAN AMERICA: THE FOUR GREAT MIGRATIONS* 219 (2010).

96. Brown, *supra* note 1, at 298 (noting “some Americans may see foreign-born blacks as more polite, less hostile, more solicitous, and easier to get along with than native-born blacks”). Positive stereotypes towards mixed-race and immigrant Blacks may contribute to “psychological benefits that enable a certain kind of psychic freedom from the racial stigma and disadvantage that legacy Blacks may have a harder time obtaining because of pervasive, negative stereotypes about African-Americans.” Onwuachi-Willig, *supra* note 70, at 1177.

97. BERLIN, *supra* note 95, at 218.

98. Steven Kaplan, *Can the Ethiopian Change His Skin? The Beta Israel (Ethiopian Jews) and Racial Discourse*, 98 *AFR. AFF.* 535, 537 (1999).

99. Upon entering the United States, many immigrants discover for the first time that they are Black. See BERLIN, *supra* note 95, at 218; see also WATERS, *supra* note 94, at 50 (“[W]hile 68.3% of Guyanese in New York State say they are black, only 30.5% of those in Guyana say they are. And while 88.2% of Trinidadian New Yorkers say they are black, only 41.1% of people in Trinidad say they are.”). For a discussion of the similar cultural effect of African transitions in Israel, see Uri Ben-Eliezer, *Becoming a Black Jew: Cultural Racism and Anti-Racism in Contemporary Israel*, 10 *SOC. IDENTITIES* 249, 259 (2004).

100. Brown, *supra* note 1, at 298.

familiarity with their country of origin, and thus are less likely to feel compelled to fight against racism and oppression than non-immigrant Blacks.¹⁰¹ A Guyanese immigrant has surmised that immigrants come to the United States to uplift themselves and to then return home, and that they do not feel a need to resolve or address racial issues.¹⁰²

Aside from cultural differences, research indicates that immigrant Blacks have higher incomes and more parental education than non-immigrant Blacks.¹⁰³ The median income for non-immigrant Blacks is approximately ten thousand dollars less than that of African and West Indian immigrants.¹⁰⁴ The number of Blacks immigrating to the United States has dramatically increased since diversity initiatives were implemented in the 1960s.¹⁰⁵ Between 1960 and 2007, the number of Black immigrants in America increased from 125,000 to almost three million.¹⁰⁶

Scholars are also calling for reforms to better label, in a sense, individuals who identify as “Black or African American,” in an effort to remedy the issue of applicants who take advantage of the oversimplified category in order to gain diversity initiative benefits.¹⁰⁷ For example, a United States-born applicant whose parents emigrated from Egypt could reasonably check “Black” on Washington University Law School’s application and “White” on Michigan Law’s application.¹⁰⁸ Washington University Law offers no definition

101. *Id.* See also Brown & Bell, *supra* note 3, at 1273 (noting the major concern of immigrant Blacks is the family, friends, and other relatives and acquaintances left behind when they emigrated to the United States).

102. BERLIN, *supra* note 95, at 221.

103. Brown, *supra* note 1, at 261–62.

104. Non-immigrant Blacks have a median income of \$33,790, while the median income for African immigrants is \$42,900, and people from the Caribbean have a median income of \$43,650. Brown & Bell, *supra* note 3, at 1251.

105. Brown, *supra* note 1, at 293.

106. *Id.* It was estimated that the immigrant Black community would account for approximately 12 percent (or 4.3 million people) of the Black population by 2010. Brown & Bell, *supra* note 3, at 1250.

107. A growing number of graduate and undergraduate applicants seek to improve their chances of admission, financial aid, and other diversity benefits by either concealing or misrepresenting their racial identity, based on how they perceive that identity to be useful or harmful. See Onwuachi-Willig, *supra* note 70, at 1216.

108. WASH. UNIV. SCH. OF LAW APPLICATION FOR ADMISSION TO THE JURIS DOCTOR PROGRAM (2011) (on file with author); UNIV. OF MICH. LAW SCH. APPLICATION (2011) (on file with author).

or clarification of what “Black” means, while the Michigan Law application states that “White” applicants are those people “having origins in any of the original peoples of Europe, the Middle East, or North Africa.”¹⁰⁹ Egypt *is* on the African continent, so perhaps the mock applicant would not be wrong to check “Black” on Washington University’s application. Yet, the social definition of Black held by most Americans does not include Egyptians.¹¹⁰

When non-Blacks—as designated by American social conceptions—claim to be a member of the “Black or African American” race and then gain admission to law school, they might have taken the place of an individual who was meant to benefit from diversity initiatives and who could have genuinely contributed to a critical mass of Black law students at a particular law school.¹¹¹ Acts of misrepresentation hinder decreased reliance on diversity initiatives, because the representation of Black students is diluted within an incoming class.¹¹² The Supreme Court has hinted that diversity initiatives must have a logical endpoint or “reasonable durational limits.”¹¹³ In fact, Justice O’Connor infamously stated in *Grutter* that the Court believed the permissible use of race as a factor

109. WASH. UNIV. SCH. OF LAW APPLICATION, *supra* note 108; UNIV. OF MICH. LAW SCH. APPLICATION, *supra* note 108 (describing “Black or African American” as “a person having origins in any of the black racial groups of Africa”).

110. Americans of North African and Middle Eastern descent have been characterized as white since 1915. See Suzanne Manneh, *Census to Count Arabs as White, Despite Write-In Campaign*, NEW AM. MEDIA (Mar. 25, 2010), <http://newamericamedia.org/2010/03/census-to-count-arabs-as-white-despite-write-in-campaign.php>. See also Shaila Dewan, *Has ‘Caucasian’ Lost Its Meaning?*, N.Y. TIMES, July 6, 2013, available at <http://nyti.ms/1c9Fypf> (commenting that since the late eighteenth century, Caucasian has meant white and encompassed “Europeans and the inhabitants of a region reaching from the Obi River in Russia to the Ganges to the Caspian Sea, plus northern Africans”). Author Soheir A. Morsy describes Egyptians’ “opportunistic detachment from African identity” in the United States by noting that most Egyptians would choose to align themselves with the “‘chosen people’ of European origins” and not with “socially debased categories.” Soheir A. Morsy, *Beyond Honorary “White” Egyptians*, in RACE 175–99 (Steven Gregory & Roger Sanjek eds., 1994). Morsy further argues that, due to an underdevelopment of international consciousness in Egypt, “most Egyptians in the United States today are not likely to identify with the struggles of other racially or ethnically differentiated groups.” *Id.* Recently, some Arab American groups have been advocating for a separate “Middle Eastern” category to collect racial data that is currently unavailable but necessary for efforts to remedy discrimination. Omi, *supra* note 65, at 12–13.

111. See Thomas, *supra* note 89, at 854.

112. *Id.* (“Without phantom minorities to dilute critical mass, space will open up, making room for bona fide minorities, and affirmative action will be propelled closer to its sunset.”).

113. *Grutter*, 539 U.S. at 342.

in diversity initiatives would expire within twenty-five years.¹¹⁴ Misrepresentation negatively impacts law school racial diversity in what could be the golden years of such policies.

Concealing or misrepresenting one's race on a law school application is not unique to the "Black or African American" category.¹¹⁵ The problem of over- and under-inclusive labeling of prospective Black or African American law students, however, is uniquely challenging because of the lack of more specific sub-classifications on law school applications. When an applicant has to identify a country or region of origin, or when explanatory text accompanies a category, Black applicants will finally have the opportunity to more fully describe their race and ethnicity. In addition, it can be argued that applicants will be less likely to misrepresent their racial identity when asked to provide a more specific classification than they currently do under a system that merely requires subscription to the single monolithic category of "Black or African American."

B. Critique and Opportunity for Reform

The simplest way to resolve concerns about misrepresentation and the lack of choices within the "Black or African American" racial category is to change the reporting requirements for Black applicants on law school admissions applications. But how? One scholar proposes listing four sub-categories for Black applicants based on region of origin.¹¹⁶ Applicants would choose one or more of "Ascendant Black," "African," "Caribbean," and "Other Blacks."¹¹⁷ The term "Ascendant Black" is quite novel and, without explanatory text, many applicants might not know that the term means a non-Latino applicant with two United States-born Black parents.¹¹⁸ An additional problem with the proposed scheme is that it does not take into account students with one ascendant Black parent and one

114. *Id.* at 343.

115. See Onwuachi-Willig, *supra* note 70, at 1218–19 (recounting two stories of white and Asian applicants who were not forthcoming in regard to their race).

116. Brown & Romero, *supra* note 81, at 1185.

117. *Id.*

118. *Id.* at 1140.

foreign-born parent.¹¹⁹ “Other Black” seems to reference Blacks who themselves or whose parents were born in Europe, Canada, or another non-African, West Indian, or American country/region.¹²⁰ In addition, without the ability to identify from which country within the grouping the applicant’s family hails, the four broad groupings still lend themselves to manipulation by applicants.¹²¹

Another application variation proposes that Black applicants choose from five sub-categories, including “Native-born Blacks,” “Other non-U.S. Ancestry,” and “Black Biracial/Multiracial.”¹²² Each of the sub-categories requests the applicant to specify the ancestry or country of birth of the applicant’s mother and/or father.¹²³ The use of the term “Native-born Black” is clearer than “Ascendant Black,” and requesting applicants to specify the birth country of their parent would help remedy issues of manipulation. However, the DOE has indicated that biracial/multiracial categories are not permissible.¹²⁴ Further, the term “multiracial” lends itself to misinterpretation. It is estimated that up to 70 percent of the “Black or African American” population is multiracial.¹²⁵ Without an explanation or requirement that applicants specify their multiracial identity, a “biracial/multiracial” category would negatively impact diversity collection and work towards the creation of a new monolithic category that lacks specificity. Further, some immigrant Blacks might identify as multiracial in order to create a distinction between themselves and non-immigrant Blacks.¹²⁶

119. As the child of an ascendant Black mother and an African father, I am not sure which box would be appropriate for me to check. I cannot check “Ascendant Black,” because both of my parents were not born in the United States. Yet, it doesn’t look like I should choose “Other Black,” because my parents do not originate from a region other than the United States, Africa, or the Caribbean. Lastly, I would not be inclined to only check “African,” because I was not born in Africa and that is only part of my race.

120. Brown & Romero, *supra* note 81, at 1185.

121. See *supra* note 115 and accompanying text.

122. Brown & Bell, *supra* note 3, at 1279.

123. *Id.*

124. See Final Guidance on Maintaining, Collecting, and Reporting Racial and Ethnic Data to the U.S. Department of Education, 72 Fed. Reg. 59266-02, 59268 (Oct. 19, 2007).

125. Okizaki, *supra* note 42, at 488 (“Thirty to seventy percent of the African American population and an unknown number of individuals who are White-identified are actually multiracial.”). See DAVIS, *supra* note 4, at 28.

126. See Onwuachi-Willig, *supra* note 70, at 1177.

To remedy these issues, law schools should include on their applications explanatory information that defines each racial category. Law schools should not assume that all law school applicants know what “Hispanic,” “White,” or “Black” means, and they should not give applicants the opportunity to be purposefully deceitful. The explanatory text provided on Michigan Law School’s application is a good example.¹²⁷ The application provides that Black applicants are those “having any origins in any of the black racial groups of Africa.”¹²⁸ Second, law schools should include sub-categories in the “Black or African American” category based on which countries and/or regions are statistically most represented by Black applicants. This appears to be the choice of the University of Southern California, which specifies certain countries and regions under its Hispanic and Asian categories.¹²⁹ This specificity might encapsulate the most commonly represented groups currently attending the school or sister law schools. In addition, to give clarity to “Other” categories and general regions (e.g., “West Indian/Caribbean”), law school applications should provide a space for Black applicants to designate their ancestry or country/ies of origin, if known. This could take the form of a drop-down box on electronic applications or a space to write-in a response on paper applications. Finally, requesting that applicants submit an essay describing how their race or ethnicity has impacted their lives, or how it will impact their own learning experiences and those of their classmates at law school, would help to remedy potential manipulation problems and allow immigrants and non-immigrants alike to designate their race in a way similar to other racial groups.

IV. CONCLUSION

The “Black or African American” category must be expanded to reflect the discernable diversity of individuals self-identifying as “Black” within this grouping. Blacks have as many linguistic,

127. UNIV. OF MICH. LAW SCH. APPLICATION, *supra* note 108.

128. *Id.*

129. UNIV. OF S. CAL. APPLICATION, *supra* note 80.

cultural, and religious distinctions as other racial groups.¹³⁰ Scholars argue that reforms should be enacted to ensure diversity initiatives reach their intended targets and that the “growing change in the racial and ethnic make-up” of Blacks is documented.¹³¹ The primary argument to be made in support of reform is that Black law school applicants should be treated similarly to other races who are offered multiple options when asked to identify their race and ethnicity.

It is time for law schools, the gatekeepers of those entering the legal industry,¹³² to discontinue using the one-drop rule on their admissions applications, and to recognize that many applicants do not identify simply as “Black or African American.” It is true that immigrant Blacks, who do not have ties to the historic discrimination that led to the development of diversity initiatives and who may not want to identify as “Black or African American,” are still given the label of “Black” in the United States. As a result, many immigrants are subject to racial profiling and other forms of discrimination on account of their race, despite the fact that they are immigrants.¹³³ What is more, because the number of Black law school matriculates has declined sharply in the past two decades, it will be difficult to achieve a critical mass of Black law school students if efforts are focused on enrolling only a segment of a minority group.¹³⁴ However, affirmative action policies were created to remedy past discrimination of non-immigrant Blacks living in the United States, and it is neither practical nor culturally beneficial to attempt to create a “benefit hierarchy” within the “Black or African American” category.

One might argue that if it has become difficult to categorize individuals based on race, then the classification should be done away with entirely.¹³⁵ However, it is unrealistic to expect that the United States, a country built on racial classifications that the legal system has enforced, can suddenly turn colorblind. Black culture and American society have been shaped by a history of racial

130. BERLIN, *supra* note 95, at 210.

131. Brown, *supra* note 1, at 261. See Onwuachi-Willig, *supra* note 70, at 1150.

132. Lustbader, *supra* note 6, at 72.

133. Hoffman, *supra* note 42, at 1149–50.

134. *Id.* at 71.

135. Wright, Jr., *supra* note 49, at 547.

oppression,¹³⁶ and that oppression must be acknowledged, and can be acknowledged, through diversity initiatives. To better address the concerns over effectively implementing and utilizing diversity initiatives, law schools should exercise logical conformity in their admissions applications and discontinue treating “Black or African Americans” as a monolithic unit. This Note proposes that these goals can be accomplished by more clearly defining each racial category; developing a sub-category of choices for “Black or African American” candidates; allowing law school applicants to select multiple choices from a sub-list of races and ethnicities or allowing students to hand write (or type) their ancestry and country/ies of origin; and by providing applicants an opportunity to expound on how and why they believe their race and ethnic origin will contribute to the law school community.

136. Brown & Bell, *supra* note 3, at 1238–39.