

## **“I Think You Didn't Get It Because They Misidentified You as Latina”: A Commentary on Multiracials and Civil Rights: Mixed-Race Stories of Discrimination**

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**“I THINK YOU DIDN’T GET IT BECAUSE  
THEY MISIDENTIFIED YOU AS LATINA”: A  
COMMENTARY ON MULTIRACIALS AND  
CIVIL RIGHTS: MIXED-RACE STORIES OF  
DISCRIMINATION**

Nancy Chi Cantalupo\*

INTRODUCTION

*Liz was interviewing for a tenure-track, entry-level law faculty position at Law School X, “ranked” (in that year) around 100. She had heard a rumor that the law school was determined to hire a person who would add to the diversity of the faculty, which was both White- and male-dominated.*

*Liz’s “job talk,” a presentation on a current article that she was writing, used Liz’s own multiracial identification to illustrate a point relevant to her research, which utilized both critical race theory and feminist legal theory. In the course of explaining her illustration, Liz mentioned that she was often identified by others as Latina, but that her background (and her identification) was Asian Pacific American and White.*

*Several weeks after the interview, the chair of the search committee called to tell Liz that although the faculty “had not voted not to give her an offer,” other candidates would be offered the position before Liz was offered it, and the chair anticipated that another candidate or candidates would accept the position before it could be offered to Liz. When she asked the chair and, later, another faculty member, for feedback on areas in which she could improve, she*

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*was told that, although she had experience teaching Contracts, because she did not write scholarship on Contracts, she lacked credibility as someone who truly wanted to teach or would teach Contracts well.*

*A week or so later, without clarifying whether Liz might still get an offer to join the faculty, the chair called again, explaining that she needed to report demographic information about all of the candidates to the Association of American Law Schools, and asked what she should list as Liz's race. Liz was taken aback and somewhat confused by the question because she thought that various indications on her CV of volunteer work with Asian Pacific American organizations, as well as her job talk illustration, made it unnecessary for the chair to ask this question. Nevertheless, not knowing whether her candidacy was still active, Liz did not refuse to answer the question. Instead, she explained the intricacies of answering such questions when one is multiracial, including that the answer often depends on the options provided: did the form provide racial categories and say "check all that apply"? Did it provide a single "multiracial" category? Or was there simply an "other" and did it provide a write-in space?*

*After Liz explained how she would fill out each kind of form, the chair ended the call, and Liz texted an account of the conversation to friends. She explained later that her purpose in the texts was in part to have a contemporaneous account of the conversation (in which she also described what happened at the interview, as background to the phone call with the chair), which had left her feeling troubled. However, she didn't seriously consider legal action. She learned about nine months later that Law School X had hired two men of color and that one had been asked to teach Contracts, even though he had never taught Contracts and did not write on topics even remotely related to Contracts. A White woman professor at Law School X, whose research areas overlapped significantly with Liz's, remarked to Liz, when discussing Liz's candidacy, that she and other (unspecified) faculty members had struggled with the issue of hiring new colleagues "who looked just like" those already on the faculty.*

*Nearly a year after the interview, which Liz spent at a different, lower-ranked law school in a tenure-track post, Liz had lunch with a friend on Law School X's faculty. A tenured, White, and male*

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*faculty member who had been at Law School X for about 10 years, he told Liz, chuckling, “I think they didn’t offer you the job because they thought you were Latina, but then found out you were not!” As annoying as she found his privileged amusement at a situation that Liz had experienced as biased and discriminatory, she kept to her decision not to consult an employment discrimination attorney friend about potential claims for several reasons. First, although employment discrimination was not her field, she suspected any claim she made would be very hard to win. Second, in light of the difficulties in winning such a case, Liz decided the potential costs to her future career and collegial relationships, especially as she had many years before even going up for tenure, far outweighed the potential benefits. Finally and most importantly, she realized that she felt uncomfortable even making such a legal claim, as Law School X had been committed to diversifying its faculty and had indeed hired two (monoracial-identifying and -identified) faculty of color, making her feel as if any discrimination claim would smack of “reverse discrimination.”*

This hypothetical, “based on true events” as they say in the movies, poses some interesting questions for the topic that Professor Tanya Katerí Hernández tackles in *Multiracials and Civil Rights: Mixed-Race Stories of Discrimination*, her volume on how multiracial-identifying Americans experience race discrimination and how anti-discrimination civil rights laws do and should respond. So, too, does a set of distressing, yet rarely discussed, statistics found in the National Intimate Partner and Sexual Violence Survey (“NISVS”), showing that an average of one-in-two multiracial women experiences intimate partner or sexual violence in her lifetime, a form of discrimination that targets multiracial women at higher rates than any other demographic group in the U.S.<sup>1</sup>

Professor Hernández’s detailed look at court opinions in cases brought by multiracial plaintiffs, as well as her own reflections on life as a multiracial person, points out that existing civil rights law can address the discrimination experienced by multiracial

<sup>1</sup> MICHELE C. BLACK ET AL., NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT 3 (2011), [https://www.cdc.gov/violenceprevention/pdf/nisvs\\_executive\\_summary-a.pdf](https://www.cdc.gov/violenceprevention/pdf/nisvs_executive_summary-a.pdf).

plaintiffs.<sup>2</sup> Her analysis thus disagrees with that of various authors who Professor Hernández identifies with the term “multiracial-identity scholars,” as well as non-legal advocates for special treatment of multiracial Americans, such as the Multiracial Category Movement that lobbied for changes to the U.S. Census.<sup>3</sup> Professor Hernández draws this conclusion in part because of the “capacious” quality of civil rights laws, which she argues are as capable of addressing race discrimination against multiracial people as against “monoracial” people.<sup>4</sup> Although not as important as this capaciousness, another critical reason is related to the multiracial plaintiff’s “phenotype:” that is, the source of the discrimination these plaintiffs face is largely, if not entirely, based on the monoracial category that the (White) employers think they look like.<sup>5</sup> This is particularly true for those multiracial plaintiffs whose own phenotype, or the phenotypes of their friends and family, identify them as part African American. Indeed, Professor Hernández’s analysis demonstrates that even an association with Blackness through some method not related to phenotype (e.g., an Ancestry.com report explaining that a White-looking plaintiff who “had... lived as a White man” all his life had African ancestry<sup>6</sup>) can be sufficient to trigger anti-Black animus.

Professor Hernández’s analysis is thus highly persuasive—for the cases that have reached court and for multiracial plaintiffs marked in some way as African American and therefore subjected to anti-Black bias and discrimination. But Liz’s case differs in two ways from the instances of multiracial discrimination at the core of Professor Hernández’s analysis. First, the Law School X faculty did not think Liz was African American, so anti-Black racism was not at issue in their hiring decisions. Second, Liz’s reasons for not

<sup>2</sup> See TANYA KATERÍ HERNÁNDEZ, *MULTIRACIALS AND CIVIL RIGHTS: MIXED-RACE STORIES OF DISCRIMINATION* 5–6, 9 (2018) (describing the issues and conclusion addressed throughout the book); see generally *id.* at ix–xvii (providing a narrative of her family’s story and her life as a mixed-race person).

<sup>3</sup> See *id.* at 4–5, 13–15 (beginning on page 4, then discussed throughout the book); see also *id.* at 97–98 (describing the Multiracial Category Movement (“MCM”).

<sup>4</sup> See *id.* at 11–12, 15, 19, 100. Note that this assessment does not suggest that civil rights laws address all of the race discrimination that exists—merely that multiracial plaintiffs are not uniquely disadvantaged in comparison to monoracial plaintiffs under these laws. See also *id.* at 17–18, 111.

<sup>5</sup> See *id.* at 30–32.

<sup>6</sup> See *id.* at 1.

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pursuing a lawsuit show that her case almost certainly would never make it to court or, therefore, into Professor Hernández’s analysis. What is less clear is whether there are many cases like Liz’s, as well as what implications her and any similar cases might have for civil rights law.

Likewise, as explained *infra*, despite being clear victims of discrimination, the overwhelming number of NISVS survey respondents have not and will not assert any legal claims that will be litigated before a court. In addition, because almost no research has delved further into the statistics regarding multiracial women’s extreme vulnerability to the wide spectrum of gender-based violence measured by the NISVS, we do not know if multiracial women who identify as part African American face more, less, or similar rates of gender-based violence as multiracial women who self-identify as non-Black. Moreover, as Liz’s case shows, self-identification does not necessarily match the assumptions that the people engaging in the discriminatory acts may make about a multiracial person, while the NISVS relies on self-identification of the gender-based violence victim and does not ask any questions of those perpetrating the discrimination, including with regard to the race of their victims.<sup>7</sup> The NISVS does not focus, as the civil rights litigation at the center of Professor Hernández’s analysis does, on the perceptions of the discriminator, regarding race or anything else.

How either the NISVS data or Liz’s experience fits into two alternative theories of discrimination against multiracial people is an additional question. The first of these can be found in the legal multiracial-identity scholar literature that Professor Hernández addresses and critiques,<sup>8</sup> and the other I most often see in cultural commentaries by multiracial people, often reflecting on or inspired by President Barack Obama’s multiracial background.<sup>9</sup> In the

<sup>7</sup> Matthew J. Breiding et al., *Prevalence and Characteristics of Sexual Violence, Stalking, and Intimate Partner Violence Victimization - National Intimate Partner and Sexual Violence Survey*, 63(8) MORBIDITY & MORTALITY WKLY. REP., (Sept. 5, 2014), at 6, 17, <https://www.cdc.gov/mmwr/pdf/ss/ss6308.pdf>.

<sup>8</sup> See *id.* at 8–9, 15.

<sup>9</sup> See generally *e.g.*, WILL HARRIS, *MIXED-RACE SUPERMAN: KEANU, OBAMA, AND MULTIRACIAL EXPERIENCE* (Melville House Printing 2019) (2018) (exploring the legacies of Barack Obama and Keanu Reeves, and how their mixed raced heritages gave them a cultural shapelessness that was a form of resistance); see also Jennifer Latson, *The Biracial*

remainder of this essay, I argue that the examples of both Liz's hypothetical and the NISVS complicate all three theories of multiracial discrimination and suggest that it may in fact be too early to theorize at all, because we simply do not have enough information—as an empirical, descriptive matter—about the experiences of multiracial people, including with regard to experiences with discrimination. Furthermore, without research or other mechanisms to discover and bring to light experiences like Liz's, along with those of the many multiracial survivors of gender-based violence surveyed by the NISVS and those of those survivors' abusers, neither the nature of multiracial discrimination nor the efficacy of using existing civil rights law to combat it is truly knowable.

With these many questions in mind, I first focus on the gaps in our knowledge about discrimination against multiracial Americans exposed by Liz's hypothetical and how these demonstrate our highly partial understanding of such discrimination under all three discrimination theories. I then add the NISVS data to the analysis to see what insights it can add to that partial understanding. Finally, I conclude with some thoughts about next steps for filling these gaps.

### I. LIZ'S HYPOTHETICAL

The biggest difficulties for Liz's case getting to court reside in her mind—the first having to do with her perceiving the discrimination at all and the second relating to her distaste at making a “reverse discrimination”-like legal claim. Regarding the first—yes, the strange conversation with the chair about how to report Liz's race and the suggestion that clearing up some confusion about her race had been important enough to prompt the phone call had left Liz feeling “troubled.” However, much of the call looks like a statistics-based version of a typical interaction for multiracial people, in which strangers ask various questions, subtle and not-at-all-subtle, about their race (from my own experiences: “where are you from?,” which is often followed with “No, I mean

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originally," and, on one memorable occasion, by an employer on my first day of work: "what are you?!"). It was not until her friend's disclosure that the search committee had "misidentified" her race and her friend's view that the misidentification was connected to the lack of an offer that Liz understood the real purpose of the chair's call.

A disconnect between phenotype and actual background/identification could lead to much more problematic situations than Liz's. Multiracial people who identify with and live in families and communities connected to a certain racial, ethnic history and experience would not necessarily understand or be able to identify biased or discriminatory behavior typically directed at a different racial, ethnic group. For example, a Latina who wraps a scarf around her head and neck for warmth but does not know that Muslim women wear scarves for religious reasons, and who is fired because her manager discriminates against Muslims, might not realize that she was fired because her manager assumed she was Muslim.

Moreover, such a hypothetical situation is much simpler than the complexity of what the research shows actually inhibits victims of discrimination from perceiving and identifying that discrimination. In *Perceiving Subtle Sexism: Mapping the Social-Psychological Forces and Legal Narratives that Obscure Gender Bias*, Professor Deborah Brake surveys much social-science literature on barriers to perceiving bias and identifying discrimination, both gender- and race-based.<sup>10</sup> These barriers include:

- (1) an inability to perceive bias when it is directed at oneself even if one recognizes bias as a general problem and especially if the bias is manifested in subtle, not obvious, ways;<sup>11</sup>
- (2) the belief in a "just world" that supposedly judges people based on merit and therefore resists a self-image of victim, which is equated with "*failure or irresponsibility*" even if the

<sup>10</sup> See generally Deborah L. Brake, *Perceiving Subtle Sexism: Mapping the Social-Psychological Forces and Legal Narratives that Obscure Legal Bias*, 16 COLUM. J. GENDER & L. 67 (2007).

<sup>11</sup> See *id.* at 74-75.



- victim recognizes the existence of discrimination against the victim's social group;<sup>12</sup>
- (3) the tendency of people to compare themselves to those in their own social group, rather than looking to people outside their group, as well as to compare current experiences to past experiences, both of which elide a sense that one is being treated unfairly and inhibit feelings of entitlement that allow people to perceive that they deserve better;<sup>13</sup>
  - (4) the inability, especially when a situation involves multiple criteria and is susceptible to multiple interpretations, to see discrimination unless one is presented with aggregate data about multiple instances of discrimination at once, a quite rare way for victims of discrimination to be presented with such evidence;<sup>14</sup>
  - (5) the desire to avoid being retaliated against for reporting discrimination, leading to dissonance that victims often eliminate by suppressing their perceptions of discrimination or bias;<sup>15</sup> and
  - (6) the tendency of discrimination law to treat a lot of biased and discriminatory behavior as nevertheless "not actionable."<sup>16</sup>

This list of factors that commonly suppress victims' perceptions of bias and discrimination is formidable enough when the victim's self-identification and others' identification of the victim match easily. When self-identification and others' identification do *not* match, such barriers likely become insurmountable. Even if Liz herself had thought she had an actionable claim and sought to

<sup>12</sup> See *id.* at 76-81 (noting that a "just world" is associated with the ideology of individual responsibility which changes the meaning of victim to "*failure or irresponsibility*," and contradicts seeing oneself as a victim).

<sup>13</sup> See *id.* at 81-83. "For example, a woman's prior pay has a strong influence on her expectations about the level of pay she currently deserves. Since women on average receive less pay than men, the comparison to past experience is likely to suppress a woman's sense of entitlement with respect to current pay. In this way, individual discrimination becomes self-reinforcing: people who have experienced discrimination believe that they deserve less and do not perceive persisting disadvantage as discriminatory or illegitimate, while persons with privilege have a strong sense of entitlement to continued favorable treatment." *Id.* at 83.

<sup>14</sup> See *id.* at 86-87.

<sup>15</sup> See *id.* at 91.

<sup>16</sup> See *id.* at 103.

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bring suit, convincing a lawyer to take such a case (at least on a contingency fee basis, which would require the lawyer to feel confident of winning any lawsuit) or successfully arguing discrimination in court seems virtually impossible.

The likelihood that Liz's case would never be litigated agrees in some respects with the points made by the multiracial-identity scholars, as well as with the critique of those points that Professor Hernández offers in her volume. Multiracial-identity scholars suggest in various ways that discrimination against multiracial-identified people is unique and therefore unique anti-discrimination legal theories and strategies are needed to combat it.<sup>17</sup> Professor Hernández rejects that approach because she sees multiple multiracial plaintiffs experiencing discrimination very similarly to how monoracial people of color experience discrimination, and she argues that existing civil rights law is fully capable of handling any incidentally unique aspects of multiracial persons' experiences with discrimination.<sup>18</sup>

In both cases, the analysis is based primarily on *court decisions* involving multiracial plaintiffs. Indeed, the small number of court decisions and the fact that many experiences, potentially including those similar to Liz's, likely will never make it to court makes it quite premature to decide, as the multiracial-identity scholars' theories do, that multiracial experiences of discrimination are significantly different than other experiences of race discrimination, or to decide what any legal interventions should look like. As such, the multiracial-identity scholars' theories would also not be able to factor Liz's experience into their analysis of multiracial discrimination.

Of even greater concern is Professor Hernández's point that declaring multiracial discrimination to be unique presents dangers to civil rights laws and theories of discrimination because of the larger political context surrounding multiracial people.<sup>19</sup> In battles over racial categories in the census, for instance, Professor Hernández has documented very clearly a political push primarily by White people to create a broad "multiracial" category that

<sup>17</sup> See HERNANDEZ, *supra* note 2, at 4–5.

<sup>18</sup> See *id.* at 5–6.

<sup>19</sup> See *id.* at 14–15.

ignores the way in which multiracial people can have very different experiences depending on which races make up their multiracial identity.<sup>20</sup> In the United States, even casual observation would lead one to conclude that multiracial people who are clearly part African American are treated very differently from multiracial people who are clearly part Asian American.<sup>21</sup> This is not to suggest that both groups will not face discrimination, but the *kind* of discrimination each group of multiracial Americans faces is likely quite different and, as Professor Hernández documents, more likely to be similar to monoracial Americans whose phenotype the multiracial group shares than to multiracial Americans whose racial heritage and phenotype are completely different.<sup>22</sup>

An existing civil rights legal theory not only avoids these dangers and deals with the concerns of the multiracial-identity scholarship, but it also presents a more useful analytic frame for Liz's case: colorism.<sup>23</sup> Colorism happens when members of the same racial group experience intra-racial or interracial discrimination because their skin color is lighter or darker.<sup>24</sup> As such, it provides an example of Professor Hernández's point that existing civil rights law already provides doctrines dealing with discrimination that multiracials may experience. While those who have darker skin generally experience more interracial discrimination than those with lighter skin, as Professor Hernández discusses,<sup>25</sup> claims of skin color discrimination also provide a mechanism to deal with intra-racial discrimination that might be directed at multiracial-identifying people. Like the approaches in the multiracial-identity scholarship, colorism is linked to racial mixing, whether recent or

<sup>20</sup> See *id.* at 98–100.

<sup>21</sup> See Elbert Lin, *Yellow is Yellow*, 20 *YALE L & POL'Y REV.* 529, 531, 535 (2002) (discussing how Asian American discrimination is separate and distinct from African American discrimination and the two should not be viewed through the same lens).

<sup>22</sup> See *id.* at 531; see also HERNÁNDEZ, *supra* note 2, at 6, 94 (discussing how multiracial people are discriminated against because they are perceived as monoracial more often than they are discriminated against for being mixed race).

<sup>23</sup> See Trina Jones, *Shades of Brown: The Law of Skin Color*, 49 *DUKE L. J.* 1487, 1540 (2000); see also Tauyna Lovell Banks, *Colorism: A Darker Shade of Pale*, 47 *UCLA L. REV.*, 1705, 1725 (2003) (discussing how colorism is a useful lens to view discrimination claims brought by Latinx people because the ethnic variety of plaintiffs made it difficult to identify plaintiffs by race).

<sup>24</sup> See Banks, *supra* note 23, at 1711–12, 1714–15.

<sup>25</sup> See HERNÁNDEZ, *supra* note 2, at 31.

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centuries-old, but unlike those approaches, it focuses on the perception of the accused discriminator, not on the identification of the multiracial person.<sup>26</sup>

In Liz’s case, this focus could simplify the legal analysis, because Liz was perceived as Latina based on others’ interpretation of her phenotype, not her self-identification. Approached using a colorism lens, Liz’s experience could potentially be more readily understood as discriminatory in two different ways. First, applying a colorism lens to Liz’s case would at least take Liz’s self-identification out of the picture as a justification for her not receiving an offer. Second, colorism among Latinx people has been noted and studied by multiple legal scholars, including Professor Hernández in *Multiracials and Civil Rights*, and these analyses indicate that, had the faculty considering Liz’s candidacy believed she was Latina through the end of the hiring process, she might have been a “beneficiary” of colorism (acknowledging that any person subject to a racism-based sorting system can only be described as a “beneficiary” vis-à-vis other people of color who are treated worse by that system).<sup>27</sup>

Discussions of colorism among Latinx Americans include both positive and negative accounts of racial mixing and its effects on the Latinx phenotype(s). Key to understanding these discussions is the very different legal and social approach to racial mixing of Spanish colonialists, as compared to English colonialists.<sup>28</sup> In the southern English territories, and later in many U.S. states, racial mixing was strictly prohibited by anti-miscegenation laws, and laws and social conventions such as the “one-drop rule” considered mixed-race persons, particularly if they were part Black and part White, to be only of the non-White race.<sup>29</sup> In contrast, in the Spanish and Portuguese colonies and later countries across Latin America, a variety of racially mixed categories were acknowledged as a part of the colonial “caste” system, with those who had the lightest skin and the most European phenotype sorted into the

<sup>26</sup> See Banks, *supra* note 23, at 1739, 1742.

<sup>27</sup> See Hernández, *supra* note 2, at 16.

<sup>28</sup> See George Mariscal, *The Role of Spain in Contemporary Race Theory*, 2 ARIZ. J. HISP. CULTURAL STUD. 7, 9, 17 (1998).

<sup>29</sup> See Christine B. Hickman, *The Devil and the “One Drop” Rule*, in MIXED RACE AMERICA AND THE LAW 104 (Kevin Johnson ed., 2003).

highest classes.<sup>30</sup> While this system is rightly seen as just as racist as the U.S. system,<sup>31</sup> racial mixing has also been embraced by many Latin American countries, artists, and intellectuals under the umbrella of “mestizaje,” which links both individual and national identity to interracial and intercultural mixing in affirmative, celebratory, even glorifying ways.<sup>32</sup>

Mestizaje is a concept first articulated by Mexican philosopher José Vasconcelos in his essay, *La Raza Cosmica (The Cosmic Race)*, which declared that mestizos were a “Cosmic Race . . . formed by the ‘synthesis’ of the existing races,”<sup>33</sup> to become the “leader in a new world order.”<sup>34</sup> Explicating the important cultural and national influence of mestizaje in full detail is beyond the scope of this essay, but its influence on U.S. Latinx people is clear. For instance, the American Chicano/a movement that began in the 1960s was inspired in part by the mestizaje concept.<sup>35</sup> Intellectuals such as Chicana feminist philosopher, Dr. Gloria Anzaldúa, advanced similar ideas of a “new mestizo,” who could move between cultures and was “uniquely positioned to help generate new types of cultural knowledge.”<sup>36</sup> Latina sociologist, Dr. Clara E. Rodriguez, notes that Latinx people in the U.S. tend to view race as a continuum as opposed to a binary construct, based less on genealogical-biological criteria than on mestizaje-reminiscent factors such as “national origin, nationality, ethnicity, culture, or a combination of these and skin color.”<sup>37</sup>

<sup>30</sup> See Ana Gonzalez-Barrera, ‘Mestizo’ and ‘mulatto’: Mixed-race identities among U.S. Hispanics, PEW RES. CENT. (July 10, 2015), <http://www.pewresearch.org/fact-tank/2015/07/10/mestizo-and-mulatto-mixed-race-identities-unique-to-hispanics/>.

<sup>31</sup> See Leonard M. Baynes, *If It’s Not Just Black and White Anymore, Why Does Darkness Cast a Longer Discriminatory Shadow than Lightness? An Investigation and Analysis of the Color Hierarchy*, 75 DENV. U. L. REV. 131, 150-51 (1997); see also Laura M. Padilla, *Social and Legal Repercussions of Latinos’ Colonized Mentality*, 53 U. MIAMI L. REV. 769, 773-74, 779 (1999).

<sup>32</sup> See Lourdes Martinez-Echazabal, *Mestizaje and the Discourse of National/Cultural Identity in Latin America, 1845-1959*, 25 LATIN AM. PERSP. 21, 38 (1998).

<sup>33</sup> George A. Martínez, *Latinos, Assimilation and the Law: A Philosophical Perspective*, 20 CHICANO-LATINO L. REV. 1, 17-18 (1999).

<sup>34</sup> Linnete Manrique, *Dreaming of a Cosmic Race: José Vasconcelos and the Politics of Race in Mexico, 1920s-1930s*, 3 COGENT ARTS & HUMAN. 1, 2 (2016).

<sup>35</sup> See *id.* at 2, 9-10.

<sup>36</sup> Martínez, *supra* note 33, at 18.

<sup>37</sup> See Clara E. Rodriguez, *The Question of Race*, in THE LATINO/A CONDITION 45 (Richard Delgado & Jean Stefancic eds., 2d ed. 2010).

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A colorism analysis would predict that either the positive or negative versions of the Latin American history and approach to racial mixing would push in favor of hiring Liz, had she remained Latina in the eyes of those considering her candidacy and assuming the faculty's interest in hiring a Latina was genuine and reasonably strong. Liz's skin color is on the lighter side of the spectrum, and she looks more like those with mixed White and indigenous ancestry than those with mixed White and African ancestry.<sup>38</sup> Therefore, regardless of whether the faculty making the decision was influenced by skin color according to race-based class ideas or mestizaje philosophies, colorism likely would have improved Liz's chances of being hired, at least compared to other Latinx candidates, either actual or theoretical. However, once her self-identification as non-Latina entered the picture, it appears that Liz was no longer considered a person of color. Therefore, Liz would no longer be subject to ranking systems based on skin color and would lose any colorism-related "advantages" attached to her phenotype. Indeed, because the hiring faculty was rightfully determined to reach their goal of diversifying the law faculty, their perception that Liz was White appears to have ended her candidacy.

Several factors in Liz's story indicate that once her non-Latina identification was known, she was in fact categorized as White. Evidence of this includes the chair's confusion about how to list Liz's demographic information in her report on the school's faculty hiring, as well as the White female faculty member's remark to Liz implying that she was basically the same as those already on the school's White-dominated faculty. This perception, that the hiring faculty had categorized her as White, not only likely played a role in ending her candidacy, but, according to Liz, *definitely* ended any chance that she would consider legal action, in light of her distaste in bringing a claim that suggested an accusation of "reverse discrimination." Liz's decision to not consult a lawyer about filing a discrimination lawsuit led to the problem with which my analysis starts: the unlikelihood of Liz's case, or others like it (if they exist), reaching a court.

I see in this distaste a recognition that Liz's multiracial heritage—and the racially ambiguous phenotype resulting from racial

<sup>38</sup> See Gonzalez-Barrera, *supra* note 30.

mixing—has allowed her to experience many of the benefits of Whiteness. This perception is influenced by my own similar experiences. Throughout my life, people I have met have guessed that my heritage included one or more of the following races/ethnicities: African/African American, Central Asian, Happa (a term my friends from Hawaii used to designate mixed Asian or Hawaiian-White people), Latina, Native American/American Indian, Pakistani, White American, and virtually every ethnicity from locations bordering the Mediterranean Sea. When people of color engaged in such guessing games, they usually started guessing based on a (usually inaccurate) suspicion that I shared a race or ethnicity with them. I enjoyed this tendency because many of my interactions with strangers in the large, cosmopolitan cities in which I have lived for most of my life started out pleasantly, with a widely diverse range of my fellow Americans thinking of me, at least briefly, as “one of them.”

However, with White Americans (especially those of primarily western and northern European ancestry), I usually experience the racial/ethnic guessing game, whether explicit or not, as significantly more fraught. I am aware that many White Americans suspect that I may be a person of color, but without information one way or another, they usually end up assuming I am White. As Professor Hernández discusses in Chapter Three, this assumption has more to do with constructions of Whiteness and White privilege than with anything about me.<sup>39</sup> For most people of my acquaintance who appear not to have ever thought critically about race or racial identity (a category dominated by Whites in my experience), White people are “race-less.”<sup>40</sup> They are just “people,” not “White people.” Therefore, when my phenotype ambiguity makes it impossible to assign me a race, many will think of me as race-less, which then translates into White, because, in the U.S. at least, only White people are race-less.<sup>41</sup> An important note regarding these experiences, which also relate to the civil rights litigation Professor Hernández studies in her volume: although I am occasionally mistaken for African American, most of the time I am not

<sup>39</sup> See HERNÁNDEZ, *supra* note 2, at 47-48, 51.

<sup>40</sup> See *id.* at 47.

<sup>41</sup> See *id.* at 47-48.

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assumed to be part Black. If I were, I suspect that the anti-Black animus that motivates so many of the cases in Professor Hernández's study would preclude any assumptions of racelessness or Whiteness.

As long as I am not perceived to be part Black, this process makes me White by default, with the result that I enjoy a fair amount—maybe the full amount—of White privilege.<sup>42</sup> In other words, my racially ambiguous phenotype—as long as it doesn't suggest that I am part Black and therefore trigger the anti-Blackness that Professor Hernández documents so effectively—has led to more race-based privilege than discrimination. As such, I can relate to Liz's characterization and rejection of any legal claim she might have made as implying "reverse discrimination" because she objected to her racial identity being misidentified and then negated through a process by which "I'm not sure of her race" became "she has no race," which then merged seamlessly into "she's White." I agree with Liz's view that objecting to such a process when it resulted in *not* getting a job just seems wrong when that same process of conferring Whiteness and its privileges has likely overwhelmingly resulted in *getting* jobs.

This aspect of Liz's and my experiences illustrates the last theory of discrimination against multiracials to which I referred at the outset of this commentary: a cultural narrative that I associate with reflections on President Obama's multiracial ancestry and the benefits being multiracial created in terms of, in particular, getting elected President.<sup>43</sup> According to this narrative, the benefits of being multiracial in the U.S. far outweigh any discrimination multiracial people might experience.<sup>44</sup> Multiracial people, who are often assumed to be part White, are assumed to benefit from proximity to White people, to gain some of the privileges of Whiteness through being raised by and/or among White people, even if their phenotype is obviously not White or not fully White.<sup>45</sup> This theory largely comports with Liz's and my experiences of "default Whiteness" as related above.

<sup>42</sup> See *id.*

<sup>43</sup> See generally HARRIS, *supra* note 9.

<sup>44</sup> See Latson, *supra* note 9.

<sup>45</sup> See HERNÁNDEZ, *supra* note 2, at xv, 21, 30-31.



## II. THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY

Despite the consistency of these experiences, the under, or even unremarked statistics of the NISVS calls them into question. These statistics show that in their lifetimes 53.8% of multiracial women in the U.S. experience rape, physical violence and/or stalking by an intimate partner, 33.5% have been raped, and 64.1% have been subjected to conduct fitting the civil rights definition of sexual harassment.<sup>46</sup> By contrast, the next most victimized group of women or men (transgendered persons were not measured by the NISVS) are American Indian or Alaskan Native women, who experience these forms of gender-based violence at rates of 46%, 27.5%, and 55%, respectively.<sup>47</sup> In terms of other monoracial groups, case counts of Asian or Pacific Islander women who were raped were too small to provide statistically reliable percentages, but 31.9% of Asian or Pacific Islander women experienced sexual violence other than rape in their lifetime.<sup>48</sup> For Hispanic women, the lifetime prevalence of rape was 13.6% and the lifetime prevalence of sexual violence other than rape was 35.6%.<sup>49</sup> Finally, 21.2% of non-Hispanic Black women and 20.5% of non-Hispanic White women experienced rape in their lifetimes, and each group experienced a lifetime prevalence of sexual violence other than rape at 38.2% and 46.9%, respectively.<sup>50</sup> Multiracial men also experience high rates of violence compared to men in other racial groups, suggesting that multiracial identification is in fact a relevant, if not the dispositive, characteristic leading to this greater vulnerability<sup>51</sup>

Both social science and legal research has addressed gender-based violence directed at Native American women. It is therefore noteworthy that, despite multiracial women experiencing even higher rates of violence and harassment, the NISVS itself

<sup>46</sup> See BLACK ET AL., *supra* note 1, at 3; see also Breiding, *supra* note 7, at 5.

<sup>47</sup> See *id.*

<sup>48</sup> See Breiding et al., *supra* note 7, at 5.

<sup>49</sup> See *id.*

<sup>50</sup> See *id.*

<sup>51</sup> See *id.* at 11.

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indicates that minimal research—if any at all—has been conducted to delve into these statistics, stating that “little is known about why multiracial women are at greater risk for these forms of violence,” and “[r]esearch is needed to identify risk and protective factors for violence victimization among multiracial persons.”<sup>52</sup>

The size and scope of the NISVS, along with data from the Pew Research Center’s 2015 survey of U.S. multiracials, show that the rates of sexual harassment directed at multiracial Americans point to a serious, potentially widespread and growing, problem.<sup>53</sup> First, the NISVS arguably provides the nation’s most comprehensive and accurate sexual harassment data, including against multiracial people.<sup>54</sup> It does not depend on the filing of official complaints or other formal reporting to gather information about sexual harassment and other forms of gender-based violence.<sup>55</sup> Instead, it asks whether the survey respondent has experienced certain kinds of conduct over the course of the respondent’s lifetime, then sorts the respondent’s answers into categories such as rape, sexual coercion, being made to penetrate a perpetrator, unwanted sexual contact, and non-contact unwanted sexual experiences.<sup>56</sup> These experiences may never have been formally reported to any officials, and by asking questions about *conduct*, the survey does not rely on respondents to identify any conduct as a legal violation.<sup>57</sup> In this sense, those who were surveyed by the NISVS are closer to the hypothetical Liz than any of the plaintiffs who appear in the cases considered by both Professor Hernández and multiracial identity scholars.

The NISVS is a very large scale, national-sample study.<sup>58</sup> “[A] national random-digit-dial telephone survey of the

<sup>52</sup> *Id.* at 16.

<sup>53</sup> See Breiding et al., *supra* note 7, at 5; KIM PARKER ET AL., MULTIRACIAL IN AMERICA: PROUD, DIVERSE AND GROWING IN NUMBERS 11 (2015), <https://www.pewsocial-trends.org/2015/06/11/multiracial-in-america/>.

<sup>54</sup> See generally Breiding et al., *supra* note 7.

<sup>55</sup> See *id.* at 1, 3.

<sup>56</sup> See *id.* at 1, 3, 4.

<sup>57</sup> See *id.* at 3. See generally CTR. FOR DISEASE CONTROL & PREVENTION, NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY (NISVS) 2011 VICTIMIZATION QUESTIONS (2014), <https://stacks.cdc.gov/view/cdc/24726>.

<sup>58</sup> See Breiding et al., *supra* note 7, at 1, 3.

noninstitutionalized English- and Spanish-speaking U.S. population aged  $\geq 18$  years,” it was conducted via landline (40%) and cellular (60%) telephones.<sup>59</sup> In 2011, it collected data from 12,727 completed interviews, 6879 with women and 5848 with men.<sup>60</sup> While its title suggests that the conduct it measures is narrower than the full range of conduct included in the definition of sexual harassment under civil rights statutes such as Title VII of the Civil Rights Act of 1964 and Title IX of the Educational Amendments of 1972, in fact the NISVS measures a comparably broad range of sexually harassing behaviors.<sup>61</sup> For instance, the survey asks respondents questions regarding whether they have experienced visual sexual harassment such as indecent exposure, showing of pornography, and taking photos of or filming the victim when the victim did not want to be photographed/filmed.<sup>62</sup> It also asks about verbal harassment in public places that made the victim “feel unsafe.”<sup>63</sup> With regard to sexually-harassing conduct that involves physical contact but without sexual penetration, the NISVS measures sexual kissing, fondling, groping, grabbing or other touching that made the victim feel unsafe.<sup>64</sup>

While the NISVS measures the large extent of the sexual harassment problem for multiracial women (compared to every group studied) and men (compared to other men), the Pew Research Center’s survey of multiracial Americans (“Pew’s study”) shows not only that this population may be larger than what most people would guess, but also that it is growing very rapidly.<sup>65</sup> Between the 2000 and 2010 censuses, for instance, the biracial White and Black population more than doubled, and the biracial White and Asian population increased by 87%.<sup>66</sup> These increases are part of an overall exponential jump in the number of U.S. multiracial people, where the percentage of multiracial babies born increased

<sup>59</sup> *Id.*

<sup>60</sup> *See id.* at 3.

<sup>61</sup> *See id.* at 3-4.

<sup>62</sup> *See* CTR. FOR DISEASE CONTROL & PREVENTION, *supra* note 57.

<sup>63</sup> *See id.*

<sup>64</sup> *See id.*

<sup>65</sup> *See* Breiding et al., *supra* note 7, at 5-6; PARKER ET AL., *supra* note 53, at 32, 36-37 (finding that the mixed-race adult population may be three times greater than the government estimates, and is growing rapidly).

<sup>66</sup> *See* PARKER ET AL., *supra* note 53, at 6.

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nine-fold between 1970 and 2013,<sup>67</sup> and the Census Bureau expects the multiracial population to triple by 2060, provided current trends continue.<sup>68</sup>

Viewing the NISVS together with Pew's study makes clear that a substantial population of Americans may be experiencing a significant amount of discrimination because they are multiracial.<sup>69</sup> Sexual harassment, which includes sexual and intimate partner violence as severe forms of sexual harassment, has long been recognized as a form of discrimination.<sup>70</sup> Therefore, the NISVS data points to an instance where multiracial Americans appear to face greater amounts of discrimination than other (monoracial) people of color. As such, this data point does not fit well with any of the theories of multiracial discrimination discussed thus far. Obviously, a theory that focuses on the ways that multiracial people benefit from being multiracial would not account for a form of discrimination that disproportionately affects multiracial people. However, neither Professor Hernández's thesis nor the multiracial-identity scholars' theories provide a reasonably complete way to understand this statistic either. Each only gets us part of the way there, then gets stuck.

Professor Hernández's analysis accounts for the factors that lead to higher rates of sexual harassment for all women of color, monoracial or multiracial.<sup>71</sup> Multiracial women likely are affected by many of the same causes that researchers and scholars have advanced for the higher rates of sexual harassment and violence experienced by single-race-identified women of color.<sup>72</sup> There is no reason to believe that the stereotypes and other risk factors that single-race-identified women of color face wouldn't also apply to multiracial women, particularly those multiracial women who are

<sup>67</sup> See *id.* at 11.

<sup>68</sup> See *id.*

<sup>69</sup> See Breiding et al., *supra* note 7, at 5-6; PARKER ET AL., *supra* note 53, at 32.

<sup>70</sup> Catharine A. MacKinnon's 1979 book became recognized as the definitive articulation of why sexual harassment constitutes a form of sex or gender discrimination. See CATHERINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 1,4 (1979).

<sup>71</sup> See HERNÁNDEZ, *supra* note 2, at 12.

<sup>72</sup> I have written about these factors extensively in Nancy Chi Cantalupo, *And Even More of Us Are Brave: Intersectionality & Sexual Harassment of Women Students of Color*, 42 HARV. J.L. & GENDER 1, 24-41 (2019).

identified by others as being at least partly “of color.” Pew’s study confirms Professor Hernández’s analysis—as well as my own experiences—in several ways: (1) multiracial Americans do experience race discrimination and (2) the discrimination they face generally tracks how much they are considered by others to be individuals of color.<sup>73</sup> Only 26% of the multiracial people who said that “most people who pass them on the street” would describe them as White said that they had experienced race discrimination; by contrast, those who said others would identify them as Black were nearly two times more likely to experience such discrimination.<sup>74</sup>

The discrimination that respondents in the Pew survey reported as race discrimination could very well have included sexual harassment or sexual violence, especially if those instances were intersectionally discriminatory, as decades of studies in the workplace, educational institutions, and the criminal legal system have shown most if not all of the sexual harassment directed at women of color to be.<sup>75</sup> Racialized sex stereotypes (or sexualized racial stereotypes) are a particularly pernicious cause of this vulnerability, stereotyping women of color as prostitutes or promiscuous.<sup>76</sup> African American women are stereotyped as “Jezebels,”<sup>77</sup> Latinas as “hot-blooded,”<sup>78</sup> Asian Pacific Islander and Asian Pacific American women as “submissive and naturally erotic,”<sup>79</sup> and American Indian/Native American women as

<sup>73</sup> See PARKER ET AL., *supra* note 53, at 51.

<sup>74</sup> See *id.* at 57 (An average of 52.6% of black-identified (by others) said they experienced the five forms of race discrimination discussed by Pew, also 50.4% of multiracially-identified (by others), and 43.6% of Hispanic-identified (by others)).

<sup>75</sup> See Cantalupo, *supra* note 72, at 25.

<sup>76</sup> See *id.* at 17.

<sup>77</sup> Joan C. Williams, *Double Jeopardy? An Empirical Study with Implications for the Debates Over Implicit Bias and Intersectionality*, 37 HARV. J. L. & GENDER 185, 214 (2014); see also Jessica C. Harris, *Centering Women of Color in the Discourse on Sexual Violence on College Campuses*, in INTERSECTIONS OF IDENTITY AND SEXUAL VIOLENCE ON CAMPUS: CENTERING MINORITIZED STUDENTS’ EXPERIENCES 71-73 (Jessica C. Harris & Chris Linder eds., 2017).

<sup>78</sup> Maria L. Ontiveros, *Three Perspectives on Workplace Harassment of Women of Color*, 23 GOLDEN GATE U. L. REV. 817, 820 (1993); see also Darlene C. DeFour, *The Interface of Racism and Sexism on College Campuses*, in IVORY POWER: SEXUAL HARASSMENT ON CAMPUS 49, 52 (Michele A. Paludi ed., 1990).

<sup>79</sup> Ontiveros, *supra* note 78, at 819; see also Harris, *supra* note 77, at 71-73; Ciera V. Scott et al., *The Intersections of Lived Oppression and Resilience: Sexual Violence Prevention for Women of Color on College Campuses*, in INTERSECTIONS OF IDENTITY AND SEXUAL

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“sexual punching bag(s)”<sup>80</sup> who are “sexually violable”<sup>81</sup> as a “tool of war” and colonization.<sup>82</sup> As is clear from each of these examples, race and gender are so intertwined in these stereotypes that they cannot be separated into discrete categories of discrimination based on race versus gender. These stereotypes then combine with stereotypes deriving from centuries of discrimination against sexual violence victims in criminal proceedings, in which a series of special requirements for the common law crime of rape included the rule that a woman had to be chaste (meaning as close to a virgin as possible) in order to credibly allege rape.<sup>83</sup>

Still, while multiracial women’s identification by others as “of color” may subject multiracial women to similar stereotypes and other factors that increase their vulnerability, if this were the full story, the rates at which multiracial women experience harassment/violence would likely be at least the same, if not somewhat lower, than the highest rates of violence experienced by each of the single-race groups tracked by the NISVS.<sup>84</sup> Because the statistics for multiracial women are considerably higher than the highest of the single-race-identified groups, however, other factors must also be at work. Therefore, a theory that discrimination against multiracial people operates substantially similarly to that against monoracial people who share the multiracial person’s phenotype appears to break down with regard to sexual harassment.

Nevertheless, the multiracial-identity scholars’ theories also do not assist in understanding this statistic, nor is there any indication that the new legal interventions these scholars suggest will help multiracial sexual harassment victims. Indeed, the

VIOLENCE ON CAMPUS: CENTERING MINORITIZED STUDENTS’ EXPERIENCES 119, 150–51 (Jessica C. Harris & Chris Linder eds., 2017).

<sup>80</sup> See Debra Merskin, *The S-Word: Discourse, Stereotypes, and the American Indian Woman*, 21 HOW. J. COMM. 345, 353 (2010); see generally Sarah Deer, *Toward an Indigenous Jurisprudence of Rape*, 14 KAN. J.L. & PUB. POL’Y 121 (2004-2005).

<sup>81</sup> Harris, *supra* note 77, at 71-73

<sup>82</sup> Scott et al., *supra* note 79, at 150-51.

<sup>83</sup> See Michelle J. Anderson, *Diminishing the Legal Impact of Negative Social Attitudes toward Acquaintance Rape Victims*, 13 NEW CRIM. L. REV. 644, 644-45 (2010) (“The marital rape exemption and the historical requirements in rape law of resistance, corroboration, and chastity continue to infect both statutory law and the way that actors with[in] the criminal justice system—police, prosecutors, judges, and juries—see the crime of rape.”).

<sup>84</sup> See Breiding et al., *supra* note 7, at 6.

disproportionate targeting of multiracials for sexual harassment<sup>85</sup> and the (non-)reaction to that data point by researchers<sup>86</sup> exposes the problems with the multiracial-identity scholars' theories in ways that confirm the validity of Professor Hernández's critique. First, as already noted, NISVS researchers admit that little to no research has been done to probe further into the statistic.<sup>87</sup> This seeming incuriosity extends to a failure to delve into data already collected by the NISVS.<sup>88</sup> Although the main report on the NISVS data discusses the prevalence of sexual harassment among multiracial women and men generally, the multiracial category the NISVS report uses is actually created by aggregating the answers of all the survey respondents who listed more than one race in their responses.<sup>89</sup> Because the NISVS collected demographic information about race and ethnicity from respondents using a "check all that apply" approach, the raw data includes information regarding the number of respondents who identify as Black and White or as Asian and Latinx or as one of 55 other combinations.<sup>90</sup> Yet no effort appears to have been made to analyze the data in a manner that would determine what percentage of, for instance, Black Asian multiracials and White American Indian multiracials experience sexual harassment.

This failure proves Professor Hernández's point regarding the dangers of "multiracial" categories, which are advanced by some multiracial-identity scholars as needed to address what they regard as a unique multiracial experience. Such categories treat all multiracial people the same, regardless of what might be a considerable diversity of experience, including with discrimination.<sup>91</sup> Considering that the NISVS has already collected this raw data, the failure to analyze it creates an impression of continuity and commonality between specific multiracial populations where there may not be one in reality. We cannot know, for instance, whether

<sup>85</sup> *See id.*

<sup>86</sup> *See id.* at 16.

<sup>87</sup> *See id.*

<sup>88</sup> *See infra*, paragraph containing n. 91.

<sup>89</sup> *See* PARKER ET AL., *supra* note 53, at 20, 32.

<sup>90</sup> *See* INTER-UNIV. CONSORTIUM FOR POL. & SOC. RSCH., NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY (NISVS): GENERAL POPULATION SURVEY RAW DATA, 2011 2, 4 (2011), <https://www.icpsr.umich.edu/web/NACJD/studies/37520/datadocumentation#>.

<sup>91</sup> *See* HERNÁNDEZ, *supra* note 2, at 5-7.

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the NISVS data indicates that any particular combination of races/ethnicities leads to heightened vulnerability for sexual harassment and, if so, which combinations those are. For instance, is there a clear pattern of anti-Black discrimination in sexual harassment cases, as Professor Hernández sees in the court cases she reviews in *Multiracials and Civil Rights*?<sup>92</sup>

It is entirely possible—likely, even—that the lumping together of all multiracial respondents into one category without differentiation is mainly a reflection of researchers’ unwillingness and/or lack of time/resources to engage in such microanalysis, especially because of the wide range of possible combinations. Because the NISVS follows the U.S. 2010 Census, which allowed people to select multiple races, there are 57 possible racial combinations<sup>93</sup> in the raw data collected from NISVS respondents. For obvious reasons, it is much easier to aggregate these groups into the “multiracial” category that appears in the reports on the NISVS data than to look at 57 categories individually and to compare even some of them to each other to get a more granular sense of the problem.<sup>94</sup> In addition, if many or all of the 57 individual categories contain too few respondents, they may preclude drawing statistically reliable conclusions from the data. Nevertheless, as a consequence of this aggregation of 57 possible combinations, the existing reports provide no way to determine *which* multiracial populations experience greater rates of sexual harassment or if the rates are relatively consistent across all multiracial categories.

Moreover, even if such granular analysis was provided in existing NISVS reports, the NISVS collects data only from harassment victims (in that it does not ask questions about perpetration of harassment and therefore anyone surveyed who was a perpetrator and not a victim would not be included or represented in the study) and relies on victims’ demographic self-identification.<sup>95</sup> Thus, it plays into the other problem that Professor Hernández identifies with the multiracial-identity scholar approach: conflating or flat-out replacing any measurement of discrimination, which is about

<sup>92</sup> See *id.* at 5-6.

<sup>93</sup> PARKER ET AL., *supra* note 53, at 20.

<sup>94</sup> See Breiding et al., *supra* note 7, at 6; PARKER ET AL., *supra* note 53, at 20.

<sup>95</sup> See Breiding et al., *supra* note 7, at 6, 17.



bias and animus by others (e.g., employers, school officials, landlords) against the victim, with the victim's own identity categories.<sup>96</sup> Because of its source (harassment victims), even the NISVS raw data is limited in the insights it can provide as to why multiracials (or *some* multiracial groups) are more vulnerable to the discrimination constituted by sexual harassment. Indeed, the survey engages in the same politically dangerous suggestion that something about the victim is more important than the illegal conduct of the perpetrator. It also ultimately fails to address—may even further complicate—discrimination such as that experienced by Liz, where others' assumptions as to her racial identity, absent her friend's disclosure, would have been virtually impossible for her to perceive since they in no respect matched her self-identification.

### III. RESEARCHING THE MULTIRACIAL AMERICAN EXPERIENCE WITH DISCRIMINATION

Ultimately, both the possibly idiosyncratic case of discrimination that Liz experienced and the broad-based problem of discrimination in the form of disproportionately high rates of sexual harassment exposed by the NISVS show that we simply do not yet have enough information about multiracial Americans' experiences with discrimination to craft legal interventions likely to be effective. Without significantly more empirical measuring of multiracial people's experiences with discrimination, we simply cannot know if using existing civil rights law is adequate or if innovations are required.

Such measurement will not be easy, however. Liz's experience points to the potential problem of looking at legal actions—i.e. court cases—alone to measure the extent and kind of multiracial discrimination that is occurring. The NISVS as well as Pew's study provide both hope and additional caution about an alternative way of measuring discrimination. On the one (hopeful) hand, both show the usefulness of the "check all that apply" approach to identifying who is multiracial, as opposed to the generic

<sup>96</sup> See Tanya K. Hernández, *Multiracial Discourse: Racial Classifications in an Era of Colorblind Jurisprudence*, 57 MD. L. REV. 97, 105 (1998).

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“multiracial” category.<sup>97</sup> Pew’s study was able to identify various data points, including some initial, if somewhat shallow, information about experiences with discrimination by specific multiracial populations, enough to show that experiencing discrimination does vary depending on whether a multiracial person’s phenotype makes them look more White versus more African American.<sup>98</sup> Professor Hernández discusses smaller studies that collected similar data.<sup>99</sup> The NISVS’s raw data provides another opportunity, on a large, national scale, to investigate a specific form of discrimination that the aggregated multiracial category indicates is a particular problem for this population.<sup>100</sup>

On the other (not hopeful) hand, the NISVS points to another measurement problem—one that affects Pew’s study and plagues much research that aims to assess harmful conduct. As already noted, trying to understand discrimination by asking questions of the victims of that discrimination is inherently limited.<sup>101</sup> The multiracial experience, made concrete by Liz’s “based on true events” hypothetical, highlights these limits. Absent her friend’s offhand remark about Liz not being made an offer because she was misidentified as Latina, Liz would not have known what was really affecting her candidacy in that search. Even when discrimination is measured without reliance on formal complaints, the victim’s knowledge of its existence is likely to be limited by all of the factors already discussed, a list that is potentially longer for multiracial victims who face misidentification problems like Liz did. For the full story on whether discrimination occurred and why, one must ask the discriminator. Such research is definitely more difficult, but not impossible, as it has been done in the context of sexual assault, and not only with those convicted of criminal sex offenses, but also those whose sexual harassment has gone undetected.<sup>102</sup>

<sup>97</sup> See PARKER ET AL., *supra* note 53, at 19.

<sup>98</sup> See *id.* at 8-9.

<sup>99</sup> See HERNÁNDEZ, *supra* note 2, at 108.

<sup>100</sup> See Breiding et al., *supra* note 7, at 3.

<sup>101</sup> See Brake, *supra* note 10, at 97-98.

<sup>102</sup> See, e.g., David Lisak & Paul M. Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17(1) VIOLENCE & VICTIMS 73 (2002).

A challenge for all scholars interested in this subject is to initiate and conduct such empirical research so we can craft and/or use existing legal interventions more effectively, in response to fuller and better information. I have plans to work with a criminologist colleague to delve into the raw data from the NISVS to discover as much as possible from data that has already been collected.<sup>103</sup> I also hope that Professor Hernández will be inspired to engage in such research, as she has done very insightful empirical research in the past.<sup>104</sup>

In sum, Professor Hernández is right that, absent more information about how discrimination against multiracial people operates, there is not only no reason to change established civil rights law to address multiracial discrimination but doing so is dangerous to using those established laws to address discrimination against other (mainly monoracial) people of color. Nevertheless, we should not shy away from what will certainly be a difficult research challenge: gathering enough information about the nature and dynamics of discrimination against multiracial people so that we can identify whether there is discrimination uniquely targeting multiracial people, as well as whether that discrimination calls for changes in civil rights law and doctrine.

<sup>103</sup> See Breiding et al., *supra* note 7, at 4.

<sup>104</sup> See Tanya Katerí Hernández, *A Critical Race Feminism Empirical Research Project: Sexual Harassment & the Internal Complaints Black Box*, 39 U.C. DAVIS L. REV. 1235, 1238-39 (2005).