

# COMPLIMENTARY DISCRIMINATION AND COMPLEMENTARY DISCRIMINATION IN FACULTY HIRING

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## ABSTRACT

*This Article focuses on one form of discrimination in faculty hiring. Specifically, this Article concentrates on discrimination against the “overqualified” minority faculty candidate, the candidate who is presumed to have too many opportunities and thus gets excluded from faculty interview lists and consideration. In so doing, this Article poses and answers the question: “Can exclusion from interviewing pools and selection based upon the notion that one is just ‘too good’ to recruit to a particular department constitute an actionable form of discrimination?” Part I of this Article begins by briefly reviewing the changes in faculty diversity and inclusion at colleges and universities. Part II lays out a hypothetical of a superstar, bidding-war minority faculty candidate in English and explicates how the exclusion of this candidate, although accompanied by high praise and not racial animus, may constitute actionable discrimination. In so doing, it examines how federal courts have analyzed the concept of “overqualification” when employers have articulated it as the reason for not hiring a job applicant in discrimination lawsuits. It then explains why the myth of the “overqualified” minority faculty candidate as the “highly sought-after” candidate can render that candidate’s exclusion from interviews, and thus hiring, a unique and specific form of racial discrimination. Part III further explicates how this form of “complimentary discrimination” works to create the*

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*“complementary discrimination” of keeping other “less qualified,” but certainly qualified minorities locked out of the academic market or out of particular schools. Specifically, it explains how faculties’ dreams of one day recruiting the superstar minority candidate—generally the only type of minority candidate whom they truly find acceptable—can function as an excuse for not “settling” for racial minority candidates who are well qualified, but not as highly credentialed as the superstars, which, in turn, continues the cycle of low representation of minorities on college and university faculties. To illustrate this point, this Part details a hypothetical involving a minority female candidate on the entry level market in law. The Conclusion of this Article then expresses and details the need for and importance of increasing diversity on college and university faculties in today’s society and the importance of carefully evaluating one’s own biases when creating and serving on faculty search committees.*

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#### INTRODUCTION

Faculty hiring at colleges and universities<sup>1</sup> can be a messy process. Although there are arguably objective criteria for evaluating applicants

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1. Although the concepts in this Article apply to all departments, including law schools, the primary hypothetical in this Article, *see infra* Part II.A, addresses and focuses on application processes that greatly differ from the process offered to law faculty candidates through the Association of American Law Schools’ (AALS) Faculty Appointments Register (FAR). For example, unlike the hypothetical faculty candidate in Part II.A, the average faculty candidate in law would not have limited his applications and thus his opportunities to just a few schools; generally, entry-level law candidates

during the appointments process,<sup>2</sup> faculties generally make their final decisions on offers among qualified candidates based on subjective criteria, such as speculations about a candidate's future productivity and teaching effectiveness. Is the candidate a good fit for the department? Will he or she be a productive scholar for years to come? How will the institution's students respond to the candidate as a teacher?

When faculties add factors of diversity, especially racial diversity, to the mix of their hiring considerations, the responses to these questions can become even stickier. For candidates who are on the margins, such as racial minorities, questions regarding whether the candidate is a good fit are less likely to work to their advantage.<sup>3</sup> Majority faculty members often find it hard to imagine minority candidates engaged in future discussions of politics and current events during the lunch hour in the faculty lounge.<sup>4</sup> Majority faculty members also experience difficulty in seeing such candidates as younger versions of themselves, ready to carry on the

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use the FAR, which makes their applications accessible to every law school in the United States. Ilyhung Lee, *The Rookie Season*, 39 SANTA CLARA L. REV. 473, 474 n.2 (1999).

2. See Richard Delgado, *Rodrigo's Tenth Chronicle: Merit and Affirmative Action*, 83 GEO. L.J. 1711, 1718–19 (1995) (arguing that merit “is a resource attractor,” “that the pre-existing level of merit may be skewed, and that supposedly neutral mechanisms prevent us from seeing this”); Caroline Sotello Viernes Turner, *Before Starting a Faculty Search, Take a Good Look at the Search Committee*, CHRON. HIGHER EDUC., Sept. 29, 2006, at B32, available at <http://chronicle.com/weekly/v53/i06/06b03201.htm> (critiquing the use of an applicant's graduate school as an objective qualification in light of racial and ethnic disparities in enrollment in elite programs); see also Smith et al., *Interrupting the Usual: Successful Strategies for Hiring Diverse Faculty*, J. HIGHER EDUC., Mar.–Apr. 2004, at 133, 136–37 (asserting that “informal systems of preference still mold much of American life, and take marked importance over merit”); Caroline Sotello Viernes Turner et al., *Exploring Underrepresentation: The Case of Faculty of Color in the Midwest*, J. HIGHER EDUC., Jan.–Feb. 1999, at 27, 31 [hereinafter Sotello Viernes Turner et al., *Midwest*] (expressing doubt about how merit is quantified).

3. For example, as one tenured American Indian male professor declared, “Mainstream students look at minority professors in a different light. . . . Not looking like a mainstream instructor naturally tends to work against you.” Sotello Viernes Turner et al., *Midwest*, *supra* note 2, at 43. Professor Patricia Williams eloquently described one interaction, in which students highlighted their own perception about how she was treated differently as a result of her race and gender. She wrote:

Two students come to visit me in the wake of the evaluations, my scores having been published in the student newspaper. They think the response has to do with race and gender, and with the perceived preposterousness of the authority that I, as the first black woman ever to have taught at this particular institution, symbolically and imagistically bring to bear in and out of the classroom. Breaking out of this, they say, is something we all suffer as pawns in a hierarchy, but it is particularly aggravated in the confusing, oxymoronic hierarchic symbology of me as a black female law professor.

PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 97 (1991).

4. See Sotello Viernes Turner, *supra* note 2, at B32 (noting that faculty members generally “want to work with people who feel familiar to them”); see also Stephanie M. Wildman, *Integration in the 1980s: The Dream of Diversity and the Cycle of Exclusion*, 64 TUL. L. REV. 1625, 1644 (1990) (suggesting that some faculty resist diversity in faculty hiring because they will not be comfortable with a minority).

department's traditions.<sup>5</sup> In some cases, a minority candidate's questions about issues of diversity and inclusion on campus can work to raise flags about him or her as a potential troublemaker, someone who may disrupt the collegiality among the faculty with controversial "side" issues.<sup>6</sup> Similarly, questions about a minority candidate's scholarship or reception by students can become tinged by race, especially if the candidate's scholarship focuses on issues of race and diversity.<sup>7</sup>

Ultimately, when faculties fail to give an offer to a minority candidate at the end of the hiring process, they frequently offer two particular excuses. These two reasons are voiced in terms that are at once distinct and complementary of one another.

1. There were no, or hardly any, applications from qualified minority candidates to consider.<sup>8</sup>

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5. As Caroline Sotello Viernes Turner once explained:

Many committees create a job description that would attract faculty members much like themselves. They advertise the position in publications that people mostly like themselves read. They evaluate résumés of people who often resemble themselves, invite three to five candidates for campus interviews who—again—are similar to themselves, and then make an offer to the person with whom they are most comfortable. Over time that process has inevitably resulted in campuses that are more homogeneous than not.

Sotello Viernes Turner, *supra* note 2, at B32; *see also* Wildman, *supra* note 4, at 1671 ("This subtext is about, 'Will this person fit into our group, fit into our institution, not change it in any way that will make me not fit, not hurt my place in the institution in any way?' It is a conversation that looks to the future because the participant worries, 'If someone comes who is not like me, will I still be valued at this place, at other places, or have other opportunities?'").

6. *See* Sumi Cho, "Unwise," "Untimely," and "Extreme": *Redefining Collegial Culture in the Workplace and Revaluing the Role of Social Change*, 39 U.C. DAVIS L. REV. 805, 809 (2006) (contending that "those who transgress the cultural norm of gendered and racial hierarchy appear to be 'impolite' and 'uncollegial' regardless of history, context, or power relations"); Perry A. Zirkel, *Mayberry v. Dees: Collegiality as a Criterion for Faculty Tenure*, 12 EDUC. L. REP. 1053, 1059 (1983) (arguing that "collegiality" can serve as a subterfuge in academic employment decisions and can negatively affect the operation of "the robust exchange of ideas" in colleges and universities).

7. *See* Derrick A. Bell, *Diversity and Academic Freedom*, 43 J. LEGAL EDUC. 371, 377 (1993) ("Minority law teachers, particularly those of us whose writings are intended to unearth rather than entomb racial connections between past and current events, are disturbing to many whites, who mistake our refusal to conform for a lack of competence."); Sotello Viernes Turner et al., *Midwest*, *supra* note 2, at 30 (asserting that minority faculty may see "their work devalued if it focuses on minority issues"); *see also* DERRICK A. BELL, *CONFRONTING AUTHORITY: REFLECTIONS OF AN ARDENT PROFESSOR* 35 (1994) (noting that as a junior professor, he had to "overcome [Harvard Law students'] apprehension that because [he] was the one black in an otherwise all-white faculty [he] might not be competent").

8. *See* Michael A. Olivas, *The Education of Latino Lawyers: An Essay on Crop Cultivation*, 14 CHICANO-LATINO L. REV. 117, 133 (1994) (contending that one myth about minorities in academia is that there are no qualified minorities and that minorities possess "unexceptional credentials"); Smith et al., *supra* note 2, at 134–35 (also identifying as a common faculty excuse the lack of qualified minority candidates). Certainly, in a number of fields, there is a serious pipeline problem. For example, in 2004, one survey revealed that the number of underrepresented minorities—African Americans, American

2. There was no point in even trying to interview the few, qualified minority candidates on the market because they would never accept an offer from the department. These candidates are in such high demand that there will be many bidding wars between institutions over them.<sup>9</sup>

According to this usual round of excuses, there are two basic types of minority faculty candidates: (1) those who are unqualified for the department, and (2) those who are “overqualified” for the department.<sup>10</sup>

Usually, academic articles address the disadvantages of the minority applicant in the first category—the minority candidate who is deemed unqualified or unworthy for hire, in many cases due to conscious or unconscious<sup>11</sup> biases<sup>12</sup> in the evaluation of applicants. This Article,

Indians, and Latinas/os—who earned astronomy doctorates was only 6, physics doctorates was only 22, and mathematics doctorates was only 29. Ben Gose, *The Professoriate Is Increasingly Diverse, But That Didn't Happen by Accident*, CHRON. HIGHER EDUC., Sept. 28, 2007, <http://chronicle.com/weekly/v54i05.05b00101.htm>; see also Daryl G. Smith & José F. Moreno, *Hiring the Next Generation of Professors?: Will Myths Remain Excuses?*, CHRON. HIGHER EDUC., Sept. 29, 2006, at B22, B24, available at <http://chronicle.com/weekly/v53/i06/06b02201.htm> (noting that underrepresented minority graduate enrollment at the eight doctoral institutions in their study was only 14%, even though undergraduate enrollment was 22%); Sotello Viernes Turner et al., *Midwest*, *supra* note 2, at 45 (noting that the most frequently cited obstacle to successful recruitment of faculty of color in their study “was a lack of qualified candidates in all fields of study”); *id.* at 27–28, 55 (same).

9. Daryl G. Smith, *Faculty Diversity When Jobs Are Scarce: Debunking the Myths*, CHRON. HIGHER EDUC., Sept. 6, 1996, at B3 (arguing that “the notion that institutions must engage in ‘bidding wars’ to attract scholars of color” is a myth that makes it harder for colleges and universities to diversify their faculties); Smith et al., *supra* note 2, at 135 (“Because of pipeline issues and because of the continued limits in the labor market for faculty, many assume that there is a ‘bidding war’ in which faculty of color are sought after over ‘traditional’ White male faculty.”); Sotello Viernes Turner et al., *Midwest*, *supra* note 2, at 27 (asserting that there is the myth that “because of high demand/low supply, minority PhDs are flooded with job offers”). For example, Professor Smith quoted the following passage from a report by a prestigious research university: “Although a concerted effort has been made, small candidate pools and intense competition between top universities has made growth in faculty numbers difficult.” Smith, *supra* note 9, at B3. In one study, Professor Smith and her team of researchers exposed the falsity behind the myth of the minority, bidding-war candidate. See *infra* notes 27–31.

10. My use of the term “overqualified” to describe a faculty candidate is not literal. “Overqualified” in this context really means “exceptionally qualified.” In order to be consistent with the language that is used in discrimination cases, however, I use the term “overqualified” as opposed to the phrase “exceptionally qualified.”

11. See Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1498–528 (2005) (discussing the results of multiple psychological studies, which confirm an unconscious bias based on race from subjects); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 329–44 (1987) (borrowing from Freudian psychoanalysis to construct his theory of unconscious racism); Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1198–227 (2009) (exploring unconscious bias among judges in criminal law cases); see also Catherine Smith, *Unconscious Bias and “Outsider Interest Convergence*, 40 CONN. L. REV. 1077, 1084–88 (2008) (exploring “how unconscious biases prevent marginalized groups from building meaningful coalitions with one another”); Audrey J. Lee,

however, concentrates on the concept of the “overqualified minority candidate,” the faculty candidate who is presumed to have too many opportunities and thus gets excluded from faculty interview lists and consideration. Specifically, this Article poses and answers the question: “Can this form of complimentary exclusion—exclusion from interviewing pools based upon the notion that one is just ‘too good’ to recruit to a particular department—be a form of actionable discrimination?” Part I of this Article begins by briefly reviewing the changes in faculty diversity and inclusion at colleges and universities, both generally and within specific fields. Part II lays out a hypothetical of a superstar, bidding-war minority candidate and explicates how the exclusion of this candidate, although accompanied by high praise, may constitute actionable discrimination. In so doing, it examines how federal courts have analyzed overqualification when employers have articulated it as the reason for not hiring a job applicant in discrimination lawsuits. It then explains why the myth of the “overqualified” minority faculty candidate as the “highly sought-after” candidate can render his or her exclusion from interviews, and thus hiring, a unique and specific form of racial discrimination. Part III defines two new terms for these types of discriminatory encounters. “Complimentary discrimination” refers to the exclusion of superstar minority candidates from the interviewing and hiring process based upon the myth that their race, coupled with their credentials and “affirmative action,” will make them too highly sought after, too difficult to pursue, and too expensive to recruit.<sup>13</sup> “Complementary discrimination” refers to the exclusion of qualified minorities who do not fit the superstar profile as a result of departments’ decisions to hold out for the Great black/Latino/Asian Pacific American/American Indian Hope and their resistance to “settling” for “lesser” minorities. Part III further explicates how complimentary discrimination produces complementary discrimination. Specifically, it explains how faculties’ dreams of one day recruiting the Great black/Latino/Asian Pacific American/American Indian Hope—generally the only type of minority candidate whom they truly find acceptable—can function as an excuse for not “settling” for racial minority candidates who are well qualified but not “superstars,” an excuse that only results in a cycle of low representation of minorities on college and

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Note, *Unconscious Bias Theory in Employment Discrimination Litigation*, 40 HARV. C.R.-C.L. L. REV. 481, 482–96 (2005) (discussing the prevalence of unconscious bias).

12. See, e.g., Delgado, *supra* note 2, at 1722–30.

13. See CAROLINE SOTELLO VIERNES TURNER & SAMUEL L. MYERS, JR., FACULTY OF COLOR IN ACADEME: BITTERSWEET SUCCESS 125–26 (2000).

university faculties. To illustrate this point, this Part details a hypothetical involving a minority female candidate on the entry level market in law. This Article concludes by expressing the need for increasing diversity on college and university faculties in today's society and the importance of carefully evaluating one's own biases when creating and serving on faculty search committees.

### I. A LONG WAY TO GO?

Although this Article focuses on an analysis of discrimination in faculty hiring, it is important to note the progress that American institutions of higher education have made in racially and ethnically diversifying their faculties. For example, according to the Department of Education, there was a 58% increase in the number of racial minorities who held full-time faculty positions at colleges and universities in the United States between the years 1995 to 2005.<sup>14</sup> Specifically, the percentages of Latina/o and Asian Pacific American faculty grew by 75%, each to 22,818 and 48,457 faculty members, respectively.<sup>15</sup> The percentages of African American and American Indian faculty grew, too, but at lower rates, with African American faculty up by 33% to 35,458, and American Indian faculty up by 50% to 3,231.<sup>16</sup> Additionally, another study of twenty-eight private institutions revealed that new hires at those schools were slightly more diverse than the overall faculty profile at those schools, with 12.2% of new hires being Asian Pacific American, 6.9% of new hires being Latina/o, 4.8% of new hires being African American, and 0.6% of new hires being American Indian.<sup>17</sup>

Although faculties on university and college campuses are increasingly becoming more diverse, they still have a long way to go.<sup>18</sup> To begin,

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14. Gose, *supra* note 8.

15. *Id.*

16. *Id.*

17. Smith & Moreno, *supra* note 8, at B23.

18. See Smith et al., *supra* note 2, at 133 (asserting that "the reality is that perhaps the least successful of all the many diversity initiatives on campuses are those in the area of faculty diversity"); Caroline S. Turner, *Incorporation and Marginalization in the Academy: From Border Toward Center for Faculty of Color?*, 34 J. BLACK STUD. 112, 112 (2003) ("Research findings demonstrate that faculty members of color are, at most, 14% of the total faculty . . ."); Sotello Viernes Turner et al., *Midwest*, *supra* note 2, at 28 (noting the "continued underrepresentation of faculty of color in the nation's colleges and universities"); see also Lori Pierce, *It's About Moral, Not Market, Values*, CHRON. HIGHER EDUC., Apr. 13, 2007, at C4, available at <http://chronicle.com/articles/Its-About-Moral-Not-Marke/46470/> ("[B]ut 80 percent of full-time teaching faculty members are white. Asian Americans (6 percent), Native Americans (under 1 percent), African Americans (5 percent), and Hispanics (3 percent) remain woefully underrepresented across the board."); Ediberto Roman &

between 1993 and 2003, the percentage of underrepresented minority faculty at “four-year institutions grew only 2% nationally, from approximately 6% to 8%.”<sup>19</sup> In some fields, such as law, the proportion of minorities who are being hired into faculty positions is decreasing over time. For example, in 2005, the Association of American Law Schools (AALS) reported that “minority candidates for faculty positions bore a disproportionate share of the decrease in hiring slots,” noting that “both the absolute number as well as the proportion of minority law professors hired decreased in 1996–97 from 1990–91.”<sup>20</sup>

Additionally, the combined percentage total of racial minorities in non-tenure track positions such as contract professor, lecturer, and instructor is greater than the percentage of racial minorities within the tenure stream at any rank,<sup>21</sup> which means that, especially now, in the midst of the economic downturn, fewer minority professors will be teaching at colleges and universities.<sup>22</sup> In fact, as one goes up the professorial ranks on campuses, the proportion of faculty of color declines at each level.<sup>23</sup> Specifically, the proportion of minority faculty in higher education continues to drop as one examines faculty numbers from the assistant professor to associate professor to full professor rank.<sup>24</sup> As of 2007, statistics from the Department of Education showed that African Americans constituted 6.3%

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Christopher B. Carbot, *Freeriders and Diversity in the Legal Academy: A New Dirty Dozen List?*, 83 IND. L.J. 1235, 1244, 1246 n.79 (2008) (noting that “less than half of American law schools . . . employ even a single Latina[o] professor on their faculties” and arguing that those institutions are “freeriding on the few institutions taking the value of increasing Latina[o] diversity seriously”); Kevin R. Johnson, *On the Appointment of a Latina/o to the Supreme Court*, 5 HARV. LATINO L. REV. 1, 14 (2002) (acknowledging the dimly low number of Latina/o law professors in the United States).

19. JOSÉ F. MORENO ET AL., THE JAMES IRVINE FOUND., THE REVOLVING DOOR FOR UNDERREPRESENTED MINORITY FACULTY IN HIGHER EDUCATION: AN ANALYSIS FROM THE CAMPUS DIVERSITY INITIATIVE 2 (2006). This report noted that, at the California institutions in the study (which were specifically trying to diversify), “URM faculty [as an average across the sample] constituted 12% of the faculty, compared to an average of 7% of the existing faculty in 2000”. *Id.* at 10. Here, the term “underrepresented” refers to Blacks or African Americans, Latinas/os, and American Indians.

20. AALS COMMITTEE ON RECRUITMENT AND RETENTION OF MINORITY LAW TEACHERS, THE RACIAL GAP IN THE PROMOTION TO TENURE OF LAW PROFESSORS: REPORT OF THE COMMITTEE ON THE RECRUITMENT AND RETENTION OF MINORITY LAW TEACHERS COMMITTEE COMMENTARY 3 (2005), available at <http://www.aals.org/documents/racialgap.pdf>.

21. ASSOCIATION OF AMERICAN LAW SCHOOLS STATISTICAL REPORT ON LAW SCHOOL FACULTY AND CANDIDATES FOR LAW FACULTY POSITIONS PRELIMINARY TABLES 13 tbl.2B (2005–2006), available at <http://www.aals.org/documents/statistics/20052006statisticsonlawfaculty.pdf>.

22. Ben Gose, *Diversity Takes a Hit During Tough Times*, CHRON. HIGHER EDUC., Oct. 11, 2009, <http://chronicle.com/article/Diversity-Takes-a-Hit-Durin/48732/> (“In some cases the spending cuts are also leading to reductions in enrollment and positions for non-tenure-track faculty members, which may inadvertently hurt minority students and professors.”).

23. Turner, *supra* note 18, at 113.

24. *Id.*



of assistant professors, 5.5% of associate professors, and 3.4% of professors; Latinos constituted 3.8% of assistant professors, 3.3% of associate professors, and 2.4% of professors; Asian Pacific Americans constituted 10.3% of assistant professors, 7.7% of associate professors, and 7.1% of professors; and American Indians constituted 0.4% of assistant professors, 0.4% of associate professors, and 0.3% of professors.<sup>25</sup>

Additionally, while there is a pipeline problem for faculty positions due to the low percentages of racial minorities with a Ph.D. or with other academic credentials, the lack of diversity among college and university faculties cannot be explained away by pipeline issues alone.<sup>26</sup> For example, in a study of nearly 300 recipients of all races who had been awarded fellowships from three prestigious programs run by the Ford, Spencer, and Mellon Foundations, a team of scholars found that even elite minority candidates experience difficulty finding academic jobs.<sup>27</sup>

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25. U.S. Department of Education, Institute of Education Sciences, National Center for Education Statistics, Digest of Education Statistics, [http://nces.ed.gov/programs/digest/d08/tables/dt08\\_249.asp](http://nces.ed.gov/programs/digest/d08/tables/dt08_249.asp).

26. See Richard H. Chused, *The Hiring and Retention of Minorities and Women on American Law School Faculties*, 137 U. PA. L. REV. 537, 547, 555 (1988) (“[C]ontinual chatter among law school faculties suggests that the pool of qualified minority persons is so small that faculty diversification is impossible. There is reason to doubt the validity of this perception. . . . Enough schools have now attained meaningful racial and gender diversity on their faculties to make the ‘unavailability of qualified applicant’ excuse heard from racially segregated or male faculties totally ring hollow.”); Olivas, *supra* note 8, at 131 (arguing that the number of Latina/o law graduates has, by now, produced enough of a pool to change the very low numbers of Latina/o faculty in the legal academy); see also Smith et al., *supra* note 2, at 135 (pointing out “that even in fields with more scholars of color, such as education and psychology, the faculty is not diverse”). Additionally, as Professor Lori Pierce of DePaul University has argued, current faculty members of all races need “to take responsibility for the abysmal rate of minority faculty representation by taking responsibility for the students who are under [their] care now” and encouraging them to pursue a career in academia. Pierce, *supra* note 18, at C6; see also Olivas, *supra* note 8, at 134–35 (“Faculty in all disciplines should encourage promising minority students by hiring them as research assistants or teaching assistants, mentoring them, inculcating scholarly values, and ensuring a fuller stream of persons who will aspire to eventual careers in teaching.”). Several institutions have invested in programs that are designed to help solve the pipeline problem. For example, Columbia University, which “already has one of the most-diverse faculties in the Ivy League,” has invested \$500,000 in a program that is designed to expose a diverse group of recent college graduates to graduate work in the sciences. Gose, *supra* note 8; see also Smith & Moreno, *supra* note 8, at B24 (“Doctoral education and the development of future faculty members need to be part of the strategy to diversify the faculty . . .”).

27. Smith, *supra* note 9; Smith et al., *supra* note 2, at 136; see also Olivas, *supra* note 8, at 136 (“It is a self-serving mythology that minority candidates are ‘flooded with offers’ when every year, qualified and interested minorities are looking for academic work but do not find it.”). The researchers for the study were Daryl Smith, Professor of Education and Psychology at Claremont Graduate University; Caroline S. Turner, Professor of Educational Leadership and Policy Studies at Arizona State University; Nana Osei-Kofi, Research Assistant at Claremont Graduate University; and Sandra Richards, Research Assistant at Claremont Graduate University. See Smith et al., *supra* note 2, at 133.

Specifically, the researchers found that even though the minority Ph.D.s in their study were among the most elite of the new scholars on the market, few of them (only 11%) were highly sought after, meaning that they had “received personal solicitations from institutions and multiple job offers.”<sup>28</sup> Even for those candidates, this 11%, being highly sought after only meant “being called by no more than two institutions—often not ones that were the candidates’ top choices.”<sup>29</sup> “Moreover, the majority of the scientists in the study (54%)—all underrepresented scholars of color (African Americans, American Indians, and Latinos/as)—were not pursued for faculty positions by academic institutions.”<sup>30</sup> The team of researchers also reported that 75% of the white male Ph.D.s in their study “had found faculty appointments with which they were quite satisfied” and that “[i]n most cases where such candidates had had difficulty finding a regular faculty job, the fields in which they specialized had virtually no openings.”<sup>31</sup>

In fact, studies of college and university faculties and their hiring practices have exposed two trends that should be of great concern. First, data show that minority faculty members are usually not hired during standard faculty hiring searches. Again, because of the biases that make it difficult for majority faculty members to view minority candidates as juniors who can carry on department traditions or as the most qualified applicants, underrepresented minorities are rarely hired absent a focus on diversity or other types of interventions. In a study of nearly 700 faculty searches at three large elite public research universities, researchers discovered that minority faculty members were most likely to be hired under one of the following three designated conditions as opposed to “regular” searches:

- (1) The job description used to recruit faculty members explicitly engages diversity at the department or subfield level;
- (2) An institutional “special hire” strategy, such as a waiver of a search, target of opportunity hire, or spousal hire is used; and
- (3) The search is conducted by an ethnically/racially diverse search committee.<sup>32</sup>

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28. Smith, *supra* note 9, at B3.

29. *Id.*

30. Smith et al., *supra* note 2, at 136.

31. Smith, *supra* note 9, at B4.

32. Smith et al., *supra* note 2, at 134, 152, 155 (asserting that “successful hires of underrepresented faculty of color at these predominantly White institutions are most likely to occur when a job description contains an educational or scholarly link to the study of race or ethnicity and/or

More specifically, the researchers discovered that: (1) African Americans were almost exclusively hired under the three designated conditions at a rate of 86%; (2) American Indians were hired entirely under the three designated conditions at a rate of 100%; (3) Latinas/os were hired under the three designated conditions plus in fields such as Spanish and Latin American Studies at a rate of 57%; and (4) Asian Pacific Americans were hired under the three designated conditions in addition to searches in Asian languages and international areas at a rate of 25%.<sup>33</sup> Furthermore, for each racial group, more women were hired under the three designated conditions than men.<sup>34</sup> “Indeed, all African-American women, 62% of Latinas, 100% of American Indians, 37% of Asian-American women, and 36% of White women were hired under these conditions in comparison to 77%, 34%, 100%, 8%, 17% respectively for men.”<sup>35</sup> Overall, a “meager 5% of regular hires, that is to say hires for positions without a diversity indicator and without the use of a special hire, resulted in the hiring of an underrepresented faculty member.”<sup>36</sup> As the researchers explained:

[W]ithout these [three designated] conditions, the ethnic composition of the faculty would have been quite different. In the proposed scenario, only .6% of the faculty would be African American, 4.7% would be Latino/a, 0% American Indian, 17% Asian American, and 77% White. However, while interventions or diversity indicators made a significant difference in the ethnic composition of the faculty, especially for underrepresented faculty, Whites maintained an overwhelming majority position throughout.

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when an institutional intervention strategy that bypasses or enhances the traditional search process is used,” such as a spousal hire); *cf.* Deborah Jones Merritt & Barbara F. Reskin, *New Directions for Women in the Legal Academy*, 53 J. LEGAL EDUC. 489, 490–91 (2003) (reporting that their study of tenure-track and non-tenure-track law faculty hires between 1986 and 1991 showed that “[a]ggressive action . . . was needed just to assure that faculties identified and hired women who were equal to the white men they so readily hired”).

33. Smith et al., *supra* note 2, at 141–42. The percentage of Asian Pacific American faculty hired during regular searches is high, but it is important to note that most of that hiring occurred in science and business, mostly quantitative fields, which suggests “that academic pipeline issues are still critical to achieving greater representation of Asian Americans at all levels of higher education and throughout a range of disciplines.” *See id.* at 151, 153–54.

34. *See id.* at 146.

35. *Id.* at 146, 148; *see also* Deborah Jones Merritt, *Are Women Stuck on the Academic Ladder? An Empirical Perspective*, 10 UCLA WOMEN’S L.J. 249, 251 (2000) (noting, based on her empirical research, that women of color were “particularly disadvantaged” on the market in legal academia).

36. Smith et al., *supra* note 2, at 144.

Indeed, 65% of those hired with diversity indicators or special hires were White.<sup>37</sup>

In essence, it is generally only when institutions focus on diversifying their ranks that racial minorities, especially underrepresented racial minorities, are given offers to join faculties. Absent a special focus effort on diversity, either through the search or on the hiring committee, racial and ethnic diversity is usually ignored in the hiring process. Even then, as one important study revealed,<sup>38</sup> colleges and universities perform poorly in actually racially and ethnically diversifying their faculties.<sup>39</sup>

Furthermore, even though there is an increase in the number of minority hires among faculties, research has revealed that this increase is largely just compensating for the minority faculty who leave their institutions each year. For instance, in the field of law, there is not only a wide gap between the tenure rates of minority and majority faculty, but that gap is also continuing to grow over time. As the AALS explained in one of its studies concerning minority faculty recruitment and retention in 2004:

Comparing minority and non-minority tenure-track professors, we see two alarming trends—a wide racial tenure gap in each cohort and longitudinally, an increasing racial gap over time. Among those law professors hired in 1991, 74% of white law professors were

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37. *Id.* at 144–45.

38. This study involved research on the Campus Diversity Initiative at several private colleges and universities in California. The Campus Diversity Initiative was funded by the James Irvine Foundation and was “a \$29 million effort, to help twenty-eight independent colleges and universities in California strategically address issues of diversity on their campuses.” Moreno et al., *supra* note 19, at 1. The purpose of the initiative “was to increase the access and success of historically underrepresented and low-income students and to build institutions’ capacity to develop and evaluate diversity efforts.” Smith & Moreno, *supra* note 8, at B23. The researchers for this study were Daryl Smith, Professor of Education and Psychology at Claremont Graduate University; José Moreno, Professor of Chicano and Latino Studies at California State University at Long Beach; Alma R. Clayton-Pedersen, Vice-President for Education and Institutional Renewal at the Association of American Colleges and Universities; Sharon Parker, Senior Research Associate at Claremont Graduate University; and Daniel Hiroyuki Teraguchi, Dean for Diversity and Academic Achievement at Wesleyan University. *See* Moreno et al., *supra* note 19, at 1.

39. For example, the authors asserted:

[W]hen one considers the sheer number of hires during this five-year period—nearly 1,500 on CDI campuses [the 28 Campus Diversity Initiative institutions in the Irvine Foundation study]—many would be distressed to know that only 157 of these were American Indian/Alaska Native, African American, or Latino/a. Those concerned with diversity would be especially disturbed because the low rate of URM hires occurred during a period when these campuses had the racial/ethnic diversification of students *and* faculty as a focus, and when approximately one-third of the faculty had turned over.

Moreno et al., *supra* note 19, at 13.

awarded tenure by year seven, as compared to 60% of people of color. The racial gap is more striking for the 1996–1997 cohort, where 73% of white law professors but only 47% of minority law professors were awarded tenure by year eight.<sup>40</sup>

Indeed, the most startling statistic from this AALS report was its revelation that, out of the eleven Latinas/os who became law professors in 1996–1997, none of them had received tenure by year seven.<sup>41</sup>

Additionally, in 2006, a team of researchers examined the efforts of the Campus Diversity Initiative in California and detailed their findings concerning the trends in tenured and tenure-track faculty members and new hires between 2000 and 2004 at the twenty-eight private institutions that participated in the program.<sup>42</sup> Specifically, the scholars reported their findings of an average turnover quotient of 58% at the institutions, which meant “that three of every five new underrepresented-minority hires went to replace underrepresented-minority faculty members who had left.”<sup>43</sup> As the researchers on the Irvine Foundation Project demonstrated, the end result was a revolving door of racial minorities in and out of academia.<sup>44</sup> At the same time, the scholars also revealed that the size of faculties in general is growing<sup>45</sup> and that white candidates are receiving the bulk of these offers, which means that the proportion of minority faculty to white faculty is growing very slowly. Indeed, the Department of Education’s record in 2005 revealed just a slight increase in the proportion of minority scholars in the United States over the previous decade—from 12.7% in 1995 to 16.5% in 2005.<sup>46</sup>

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40. AALS COMMITTEE ON RECRUITMENT AND RETENTION OF MINORITY LAW TEACHERS, *supra* note 20, at 3; *see also* RICHARD WHITE, AALS REPORT, THE PROMOTION, RETENTION, AND TENURING OF LAW SCHOOL FACULTY: COMPARING FACULTY HIRED IN 1990 AND 1991 TO FACULTY HIRED IN 1996 AND 1997 12–15 (2004).

41. AALS COMMITTEE ON RECRUITMENT AND RETENTION OF MINORITY LAW TEACHERS, *supra* note 20, at 4.

42. *See supra* note 38 and accompanying text.

43. Smith & Moreno, *supra* note 8, at B23; *see also* Moreno et al., *supra* note 19, at 10 (noting also that “there was only a net change of 2% URM faculty between 2000 and 2004”). The turnover quotient for Asian Pacific American faculty was approximately 50%. *Id.* at 11. As this study reveals, faculty retention “requires as much attention as recruitment.” *Id.* at 12.

44. Smith & Moreno, *supra* note 8.

45. *See* Smith & Moreno, *supra* note 8, at B23 (noting that tenure-track positions grew and that the “actual number of white faculty members grew by about 2 percent”).

46. *See* Gose, *supra* note 8 (explaining that “[t]he increase in the proportion of U.S. minority scholars lagged well behind the increase in raw numbers because the number of white and nonresident-alien scholars also rose during the decade”).

## II. CAN A COMPLIMENT BE DISCRIMINATORY?

As some scholars have noted, the failure to significantly increase the proportion of minority faculty at colleges and universities across the nation is due, in part, to different forms of discrimination. For example, several scholars have critiqued the notion of merit as a means of unearthing the inherent racial biases in the hiring process of new and lateral faculty. Professor Richard Delgado has highlighted how “merit, like most legal terms, gets applied against a background of cultural assumptions, presuppositions, understandings, and implied exceptions, most of which operate against . . . people [of color].”<sup>47</sup> Furthermore, Professor Derrick Bell has discussed how biased applications of merit during the hiring process work only to preserve those in power.<sup>48</sup>

This Part, however, focuses on what I call “complimentary discrimination,” which is discrimination rooted in the compliment of overqualification: “You’re just too good for us to pursue you.” In so doing, this Part considers and provides insight into the viability of a “complimentary discrimination” claim. Part II.A presents a hypothetical of “complimentary discrimination” against an African American candidate on the market for an English professorship. Part II.B describes federal courts’ responses to the employer rationale of overqualification in hiring discrimination cases. It then applies these courts’ analyses to the hypothetical illustrated in Part II.A.

### A. *What Bidding Wars?*

In today’s academic job market, it is difficult for Ph.D.’s and other advanced degree holders to obtain tenure-track appointments. All job applicants, including the most highly qualified candidates, may experience road bumps during their job search or searches.<sup>49</sup> No person is guaranteed

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47. Delgado, *supra* note 2, at 1726; *see id.* at 1721–26 (contending that “[m]erit is what the victors impose”).

48. *See* Bell, *supra* note 7, at 374. In his article *Reflections on Academic Merit Badges and Becoming an Eagle Scout*, Professor Michael Olivas discusses what he describes as biases in the awarding of “merit badges” to faculty. He contends that “the most exclusionary practices occur in the distribution of the highest level of prestige resources, those of the various merit badges earned or handed out in the daily business of academia.” Michael A. Olivas, *Reflections on Academic Merit Badges and Becoming an Eagle Scout*, 43 HOUS. L. REV. 81, 84 (2006).

49. *See* Philip Zapp, *A Job’s a Job*, CHRON. HIGHER EDUC., Mar. 9, 2007, <http://chronicle.com/article/A-Jobs-a-Job/46442> (“Jobs are so scarce that even the best candidates are not guaranteed a position.”); *see also* Laura S. Malisheski, *Thrills and Chills at the Tenure-Track Park*, CHRON. HIGHER EDUC., July 18, 2008, at B32, *available at* <http://chronicle.com/article/ThrillsChills-at-Tenur/26156/> (“[I]n most fields, the academic market has been tight for years, and you don’t get much

a faculty appointment. Still, myths and legends attach themselves to groups of potential job applicants, such as minority candidates with the purported right pedigree, right awards and prizes, right teaching evaluations, and right publications. One such myth is that these candidates are so heavily sought after that they are fighting off offers, drowning in phone calls, and deciding between the bidding offers from numerous institutions. As data from several studies have revealed, however, this myth is not rooted in reality.<sup>50</sup> To the contrary, highly qualified minority applicants often struggle to find academic jobs. In fact, many of them experience a specific and unique form of exclusion on the market, one based on the compliment of being unattainable because of the combination of their race and exceptional credentials.<sup>51</sup>

Consider, for example, the hypothetical job search of Derrick Kennedy, an African American male from Omaha, Nebraska. Kennedy received his B.A. in English, *summa cum laude*, from Amherst College and graduated from Harvard University with a Ph.D. in English. As a graduate student, Kennedy won the highest school prize in his graduate division for his dissertation. He also had stellar teaching evaluations from his days as a teaching assistant and instructor. After graduate school, he completed a postdoctoral fellowship at Yale University with the number one scholar in his subfield, British Literature, and he has a list of quality publications that is the envy of his peers and that should easily land him a job at a prestigious doctorate-granting institution.

As a graduate of Amherst, however, Kennedy is committed to education at liberal arts colleges and wants to become a professor at a top liberal arts institution. All of Kennedy's peers tell him, "You're a shoo-in for a job at a liberal arts college. An English department at a liberal arts college will jump at the chance to hire you."

However, none of the English departments at the seven liberal arts colleges with openings in British Literature offered Kennedy an interview for a faculty job. They simply could not believe that Kennedy would

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choice about where you might end up."); see, e.g., Richard Riofrio, *Inside Man*, CHRON. HIGHER EDUC., Feb. 8, 2008, at C1, available at <http://chronicle.com/article/Inside-Man/45950/> (noting how many applications are received for one job opening and how difficult it is to obtain even one tenure-track job and asserting that he was on the academic job market in English eight years in a row).

50. See Smith & Moreno, *supra* note 8, at B23 (also discrediting the myth "that in hiring only diversity counts").

51. The impetus behind this Article was a series of discussions that I had with friends at various institutions, particularly liberal arts colleges. My friends had become frustrated by the various excuses that their colleagues gave for not considering minority candidates and by their colleagues' use of double standards to evaluate the qualifications of minority candidates.

actually come to a liberal arts college over a major doctorate-granting institution, despite the fact that Kennedy expressed his commitment to small colleges in his application cover letter and that his advisor discussed Kennedy's preference for a liberal arts college in his recommendation letter. These departments concluded that Kennedy must be using them as a backup.<sup>52</sup>

Overall, these seven English departments, even the ones at highly ranked institutions, were worried about sticking their necks out to go after a candidate like Kennedy. They had been burned before, not by minority candidates, but by majority candidates who had similar credentials and went to other institutions. For example, one department ended up with a failed search after giving an offer to a superstar white male candidate who held on to the offer for weeks until he got an offer from his top choice,<sup>53</sup> an event that ultimately caused the department to also lose its second and third choices to other schools. Another department lost a new faculty position, which it had fought hard for years to obtain, after its own failed search.<sup>54</sup> Additionally, although each of the English departments had had luck with recruiting majority candidates with Kennedy's credentials in the past, they each truly believed that they had no chance of recruiting an applicant like Kennedy because they expected that Kennedy, unlike the "less-sought-after," superstar majority candidates (who, in their view, are hurt by purportedly aggressive affirmative action hiring practices), would have more offers than he could handle.

As these departments saw it, even though English faculty openings—especially in Kennedy's subfield—are a scarcity, they had no shot at recruiting Kennedy, precisely because he is a highly qualified minority. After all, minority candidates with Kennedy's credentials are a rare find and are in high demand.<sup>55</sup> The departments ultimately determined that doctorate-granting institutions would simply engage in a bidding war over Kennedy, one that they would surely lose because of fewer resources and lack of comparable research support. Furthermore, they thought, even if

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52. See Zelda Rifkin, *How We Did It*, CHRON. HIGHER ED., Apr. 4, 2006, at C1, available at <http://chronicle.com/article/How-We-Did-it/46711/> (involving one example of a search committee at a liberal arts college that "weed[ed] out all those candidates [whom they viewed as seeing their] type of institution as a backup, in case they couldn't get a job at a research university").

53. See *id.*

54. See *id.*

55. For instance, in explaining why Wesleyan College, a women's college in Georgia, had only 3 minority faculty members out of 52 faculty members, Susan Welsh, the college's director of communications, declared, "'Our salaries are not competitive,' . . . 'and there is such demand for minority professors and Ph.D. candidates.'" Gose, *supra* note 8.



they could “convince” Kennedy to consider a liberal arts institution, they would not be able to persuade him to come to their particular schools. Each of the targeted liberal arts colleges is located in a small town, and each separately worried that its location would be an obstacle for recruitment because there are so few African Americans who live in each town and the few African American faculty members on each campus are generally unhappy living in the towns.<sup>56</sup>

Unfortunately for Kennedy, he believed his peers and subscribed to the myth of himself as a bidding-war candidate. He applied only to liberal arts colleges, no major research institutions.<sup>57</sup> At the end of his search, Kennedy, despite his stellar credentials, had no job offer or prospects for a job offer.

Each one of the seven institutions to which Kennedy applied hired “less qualified” candidates—at least based on traditional paper credentials. All but one of the final hires were white, with a few who lacked a Ph.D. in hand. Four of the final hires were the second choices of the departments, with those departments initially granting offers to white candidates with credentials very similar to Kennedy’s. The sole minority hire at these schools was Asian Pacific American, but he was already working at the liberal arts institution as a pre-doctoral fellow when its English Department extended him an offer.

After his failed search, Kennedy was disappointed and angry. He did not understand why he received no job offers, much less interviews, at the schools to which he applied. After learning about the credentials of a few final hires, Kennedy called his advisor to see if his advisor could offer insight into why he was not given any interviews. Through a referral from a friend, Kennedy’s advisor called the Chair of the Search Committee at Kennedy’s top choice school. The Chair of the Search Committee told the advisor, “Are you kidding me? We would have loved to have interviewed him—heck hired him—if we knew that he was really interested! But, to be honest, we took one look at his CV and determined that he was out of our league. You know how all those R-I schools clamor for stellar minority candidates. We figured that he would have his pick of the litter. An African American male like that!” The advisor later related what he

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56. See Smith et al., *supra* note 2, at 135 (“In this context, ‘ordinary’ institutions believe they are not comparably rich enough, located well enough, or prestigious enough to attract the few candidates who are in such high demand.”).

57. This hypothetical is loosely based on a real candidate’s narrative. See *supra* note 1 for a brief explanation about why a law faculty candidate would not find himself or herself in this predicament.

learned to Kennedy, who became even more disappointed and began to wonder: “Do I have actionable claims for race discrimination?”

*B. Too Good for Discrimination?*

The answer to Kennedy’s question is not so easy to determine. There are no relevant Title VII race discrimination cases that address his experience with “overqualification” on the job market.<sup>58</sup> Furthermore, although courts have held that the employer rationale of overqualification may be a pretext for discrimination in age discrimination cases brought under the Age Discrimination in Employment Act,<sup>59</sup> it is not so clear that they would extend that holding to race discrimination in hiring cases brought within the academic context. This Part considers the possibilities for extending such a holding to the type of complimentary exclusion experienced by Kennedy. Part II.B.1 generally describes the standards for evaluating the employer rationale of overqualification in hiring discrimination cases brought under Title VII of the Civil Rights Act of 1964.<sup>60</sup> Part II.B.2 reviews and examines the hypothetical of Kennedy by using the analyses in these cases.

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58. In cases concerning allegations of race discrimination in faculty hiring, the employers have asserted that the candidate was not as qualified as the final hire. *See, e.g., Amini v. Oberlin Coll.*, 440 F.3d 350 (6th Cir. 2006) (affirming the district court’s grant of summary judgment for the employer where the employer asserted that the plaintiff was not among the most qualified candidates); *Sarmiento v. Queens Coll. CUNY*, 153 Fed. Appx. 21, 22–23 (2d Cir. 2005) (affirming the district court’s grant of summary judgment on the plaintiff’s race-discrimination claim where the plaintiff’s subfield was not advertised in the opening, and the plaintiff had failed to submit any evidence of his teaching experience or his receipt of grants and had failed to meet the minimum submission requirements by not submitting a sample syllabus).

Although this Article addresses the viability of a discrimination claim brought by an “overqualified” candidate, such a candidate would be unlikely to ever file a claim of discrimination. The costs of litigation to one’s career would be too severe. That said, this Article still holds significant value in its explanation of the legal grounds for such a claim and, more so, in its potential to cause individual faculty members to reflect upon their own behavior during the faculty hiring process and how they may or may not engage in racial discrimination as they evaluate faculty candidates.

59. 29 U.S.C. § 621 (2006) (declaring that the statute was enacted primarily to “promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment”); *see also Taggart v. Time, Inc.*, 924 F.2d 43, 44 (2d Cir. 1991) (declaring that, for individuals forty years and older, the rationale of overqualification “may often be simply a code word for too old”).

60. 42 U.S.C. § 2000e-2(a) (2006).

### *1. On Being Overqualified*

Title VII makes it illegal for an employer “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to . . . privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”<sup>61</sup> Under Title VII, plaintiffs can prove discrimination through either direct evidence or circumstantial evidence. “Direct evidence is that evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer’s actions.”<sup>62</sup> Because employers rarely provide plaintiffs with smoking gun evidence of discriminatory intent,<sup>63</sup> plaintiffs usually work to prove their discrimination claims through circumstantial evidence. For example, in the hypothetical above, although one could argue that the Search Committee Chair’s comments about Kennedy from one department directly implicate race, a fact finder would have to draw several inferences to determine that there was racial discrimination based on these comments.<sup>64</sup> Thus, even for Kennedy, who can point to comments by one decision maker that directly address race, the likely method for proving discrimination is through circumstantial evidence.

In 1973, the Supreme Court established a burden-shifting framework in *McDonnell Douglas Corp. v. Green*<sup>65</sup> to evaluate racial discrimination

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61. *Id.*

62. *Amini*, 440 F.3d at 359 (quoting *Kocak v. Cmty. Health Partners of Ohio, Inc.*, 400 F.3d 466, 470 (6th Cir. 2005)). *But see* Martin J. Katz, *Unifying Disparate Treatment (Really)*, 59 HASTINGS L.J. 643, 651 (2008) (arguing that there is currently “a four-way circuit split” over the definition of “direct evidence”).

63. Martin J. Katz, *Reclaiming McDonnell Douglas*, 83 NOTRE DAME L. REV. 109, 182 (2007) (“Causation may be proven by a defendant’s admissions (e.g., ‘I fired her because she is a woman’). Needless to say, such admissions are rare. Alternatively, causation may be proven by statements by decision makers that do not amount to admissions, but which nonetheless indicate a tendency toward bias (e.g., ‘I do not like women’ or ‘women do not belong at work’). As employers become more litigation-seasoned, it has become increasingly rare for plaintiffs to discover such statements.”); *see also* Juan F. Perea, *Ethnicity and Prejudice: Reevaluating “National Origin” Discrimination Under Title VII*, 35 WM. & MARY L. REV. 805, 860 (1994) (“Most employers know better than to discriminate overtly.”); Angela Onwuachi-Willig & Mario L. Barnes, *By Any Other Name?: On Being “Regarded As” Black, and Why Title VII Should Apply Even if Lakisha and Jamal Are White*, 2005 WIS. L. REV. 1283, 1285 (2005) (asserting that discrimination has generally become more subtle); Lu-in Wang, *Race as Proxy: Situational Racism and Self-Fulfilling Stereotypes*, 53 DEPAUL L. REV. 1013, 1035 (2004) (“To be sure, the discrimination of today is less likely to be as blatant or crude as the racism of the (not so) distant past . . .”).

64. *Amini*, 440 F.3d at 359 (“Evidence of discrimination is not considered direct evidence unless a racial motivation is explicitly expressed.”).

65. 411 U.S. 792 (1973).

claims through the use of circumstantial evidence.<sup>66</sup> Under this framework, a plaintiff can prove discrimination in hiring through three different steps. In the first step, the plaintiff must establish a prima facie case of discrimination by proving the following four factors: that (1) he or she belongs to a minority group; (2) he or she applied for and was qualified for the position at issue; (3) he or she was rejected for the job despite his or her qualifications; and (4) the position remained open after his or her rejection, and the employer continued to seek or review applications from persons of similar qualifications.<sup>67</sup> Once the plaintiff proves each of these factors, the court then draws an inference of discrimination and moves to the second step, where the employer must merely articulate a legitimate explanation for rejecting the plaintiff's application.<sup>68</sup> If the employer satisfies this burden, the court then moves to the third step, where the plaintiff has to prove that the employer's stated reason was a pretext for discrimination in order to win the case.<sup>69</sup> The plaintiff may prove pretext by demonstrating "that the proffered reason (1) had no basis in fact, (2) did not actually motivate the [employer's] challenged conduct, or (3) was insufficient to warrant the challenged conduct."<sup>70</sup> Even upon proof of pretext, a jury may still ultimately rule in favor of the defendant if it

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66. See *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985) ("The shifting burdens of proof set forth in *McDonnell Douglas* are designed to assure that the 'plaintiff [has] his day in court despite the unavailability of direct evidence.'" (quoting *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1014 (1st Cir. 1979)). A number of scholars have argued that *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003) will result in the treatment of most Title VII intentional discrimination claims as mixed-motive cases and have maintained that the *McDonnell Douglas* framework is no longer viable. See, e.g., William R. Corbett, *An Allegory of the Cave and the Desert Palace*, 41 HOUS. L. REV. 1549, 1566 (2005); Jeffrey A. Van Detta, "Le Roi est Mort; Vive Le Roi!": *An Essay on the Quiet Demise of McDonnell Douglas and the Transformation of Every Title VII Case After Desert Palace, Inc. v. Costa Into a "Mixed Motives" Case*, 52 DRAKE L. REV. 71, 72-73 (2003); Michael J. Zimmer, *The New Discrimination Law: Price Waterhouse Is Dead, Whither McDonnell Douglas?*, 53 EMORY L.J. 1887, 1891 (2004). But see Matthew R. Scott & Russell D. Chapman, *Much Ado About Nothing—Why Desert Palace Neither Murdered McDonnell Douglas Nor Transformed All Employment Discrimination Cases to Mixed-Motive*, 36 ST. MARY'S L.J. 395, 405 (2005) ("[N]othing in *Desert Palace* hints at the death or even wounding of *McDonnell Douglas*"). Additionally, many courts still apply the *McDonnell Douglas* framework in analyzing discrimination cases. See, e.g., *Strate v. Midwest Bankcentre, Inc.*, 398 F.3d 1011, 1017 (8th Cir. 2005); *Cooper v. Southern Co.*, 390 F.3d 695, 725 n.17 (11th Cir. 2004); see also *Raytheon Co. v. Hernandez*, 540 U.S. 44, 53-54 (2003) (applying *McDonnell Douglas* in a single motive case).

67. *McDonnell Douglas*, 411 U.S. at 802; see also *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 582 (6th Cir. 1992).

68. *McDonnell Douglas*, 411 U.S. at 802-03; see also *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254-56 (1981) (noting that the defendant's burden is only one of production, not persuasion).

69. *McDonnell Douglas*, 411 U.S. at 803-04; see also *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143 (2000).

70. *Johnson v. Kroger Co.*, 319 F.3d 858, 866 (6th Cir. 2003) (citation omitted).

believes that a nondiscriminatory factor was at play.<sup>71</sup> The ultimate burden of persuasion rests with the plaintiff at all times.<sup>72</sup> That ultimate burden requires proof that the employer's actions were, at least in part, motivated by impermissible reasons, such as race.<sup>73</sup>

For discrimination cases involving the issue of overqualification, courts' analyses of underlying claims generally focus on the third step in the *McDonnell Douglas* framework: proving pretext. Because proof of a prima facie case of discrimination is not onerous, purportedly overqualified job candidates such as Kennedy can easily satisfy the first step of the burden-shifting framework. Specifically, Kennedy can show that (1) he is a member of a minority group, African Americans; (2) he applied for a faculty position in his field of British literature at seven different liberal arts colleges; (3) he was qualified for all the positions at issue—as displayed by the departments' belief that he, an African American male, was too highly credentialed to be attainable; (4) he was not invited for an interview and thus was rejected for each position; and (5) the departments continued to review the applications of others outside of his group with comparable or lesser qualifications. Similarly, the employers, the English departments at the targeted seven institutions, can easily satisfy their minimal burden of merely articulating a legitimate, nondiscriminatory reason for not hiring Kennedy<sup>74</sup>—their honestly held belief that he would be unattainable.

The stumbling block for plaintiffs and courts in general (and in this particular case), then, occurs during the pretext stage. Overall, while an employer's unwillingness to consider and hire an overqualified applicant

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71. *See* *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993) (holding that a plaintiff who proves pretext in the third stage does not necessarily win because the fact finders may still find that there was no discrimination). As Professor Martin Katz has explained:

If the defendant's proffered reason is wrong, the factfinder can conclude either that the defendant lied or that the defendant made a good faith mistake (a nondiscriminatory reason). Or if the defendant lied, the factfinder can conclude that the lie was either a cover-up or a lie for a benign reason (a second possible nondiscriminatory reason). Or, if the defendant engaged in a cover-up, the factfinder can conclude that what was being covered up was either a discriminatory motivation or a nondiscriminatory one (a third possible nondiscriminatory reason).

Katz, *supra* note 63, at 172. "The[se] presumptions and shifting burdens are merely an aid—not ends in themselves." *Goodman v. Lukens Steel Co.*, 777 F.2d 113, 130 (3d Cir. 1985).

72. *Burdine*, 450 U.S. at 253.

73. *See* *Rachid v. Jack in the Box, Inc.*, 376 F.3d 305, 312 (5th Cir. 2004).

74. *Perryman v. Johnson Prods. Co.*, 698 F.2d 1138, 1142 (11th Cir. 1983) ("It is important to bear in mind, however, that the defendant's burden of rebuttal is exceedingly light; 'the defendant need not persuade the court that it was actually motivated by the proffered reasons . . .'" (quoting *Burdine*, 450 U.S. at 254–55)).

may appear illogical at first glance,<sup>75</sup> it certainly is not irrational and thus cannot in itself serve as determinative proof of pretext. As numerous courts have recognized, there are many reasons why an employer may not want to hire an overqualified applicant for a job.<sup>76</sup> After all, running a business or organization requires more than simply hiring employees who are capable of performing their assigned tasks. Employers also have to consider workplace morale, work satisfaction among employees, and the retention of employees.<sup>77</sup> Specifically, employers may want to avoid hiring an overqualified job applicant for fear that the employee may leave for a more desirable job shortly thereafter or to avoid expending resources to investigate and recruit someone who will not accept.<sup>78</sup>

These same considerations (and others) come into play during faculty searches at colleges and universities. For example, departments may not want to offer a position to an “overqualified” candidate if they fear that he or she will simply hold onto the offer until a better one comes along, leaving them with no available backups and a failed search.<sup>79</sup> Likewise, departments may worry about a candidate who is seeking an offer from them for the sole purpose of negotiating better packages with the candidate’s first choice institution. Additionally, few departments want to invest the time and resources in training and mentoring a young faculty member, only to have him or her leave a year or two later for “greener pastures.”

While conceding that employers have a variety of considerations in running a business or organization, courts have nevertheless

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75. *Taggart v. Time, Inc.*, 924 F.2d 43, 47 (2d Cir. 1991) (“Since overqualified is defined as having more education, training or experience than a job calls for, a ruling that overqualified means unqualified is a *non sequitur*.” (citation omitted)).

76. *See Binder v. Long Island Lighting Co.*, 933 F.2d 187, 194 (2d Cir. 1991) (Altimari, J., concurring) (“[I]n reality an employer may have legitimate reasons for declining to employ overqualified individuals.”); *Woody v. St. Clair County Comm’n*, 885 F.2d 1557, 1561 (11th Cir. 1989) (judicially noting “that people are often turned away from employment because they are ‘overqualified’”); *cf. Taggart*, 924 F.2d 43 (asserting that “[a]n employer might reasonably believe that an overqualified candidate—where that term is applied to a younger person—will continue to seek employment more in keeping with his or her background and training”); *see, e.g., Bay v. Times Mirror Magazines, Inc.*, 936 F.2d 112, 118 (2d Cir. 1991) (finding that the employer could refuse to hire the plaintiff on the ground that he was overqualified where the plaintiff had expressed dissatisfaction with the downgraded position).

77. *See Binder*, 933 F.2d at 194 (Altimari, J., concurring) (“Certainly, an employer might reasonably determine that placing an ‘overqualified’ individual in a particular position would . . . demoralize the individual and engender frustration, low morale and poor job performance.”).

78. *See Gumbs v. Hall*, 51 F. Supp. 2d 275, 282 (W.D.N.Y. 1999), *aff’d*, 205 F.3d 1323 (2d Cir. 2000) (identifying fear that an employee “will not remain with the company for long” as one reason for not hiring an overqualified applicant).

79. *See, e.g., Rifkin*, *supra* note 52, at C4.

acknowledged that, for some employers, the rationale of overqualification may simply be a subterfuge for discriminatory motives.<sup>80</sup> Moreover, during faculty searches, hiring committees might not even bother to discuss what exact fears are communicated by their determination of an applicant as overqualified. A search committee may skip the step where its members discuss what they think might or will happen if they interview, make an offer to, or hire a candidate they deem overqualified. In this way, the label “overqualified” becomes a placeholder—an unelaborated justification for exclusion that requires no further discussion.

Indeed, several courts have recognized how the rationale of overqualification can serve as a pretext for discrimination in age-related cases. For example, the Ninth Circuit Court of Appeals expressed in *EEOC v. Insurance Co. of North America*<sup>81</sup> that the “rejection of overqualified job applicants . . . can function as a proxy for age discrimination.”<sup>82</sup> The court explained that, without any objective content in the criteria, “‘this criterion [of overqualification] . . . allow[s] the employer to shift the standard at its pleasure, raising the standard for some applicants and lowering it for others.’”<sup>83</sup> Similarly, the Second Circuit Court of Appeals outright rejected the overqualification defense in an age-discrimination case by discounting the employer’s rationale that the overqualified applicant would not be challenged by his work and thus would seek other employment.<sup>84</sup> The court reasoned that the rationale did “not comfortably fit those in the age group the statute protects [because] for them loss of employment late in life ordinarily is devastating economically as well as emotionally. Instead, an older applicant [who] is hired is quite unlikely to continue to seek other mostly non-existent employment opportunities.”<sup>85</sup>

## 2. On Rejecting Compliments

For his race discrimination claim, however, the hypothetical candidate, Kennedy, cannot rely on the reasoning used in age discrimination cases to

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80. See *infra* note 82.

81. 49 F.3d 1418 (9th Cir. 1995)

82. *EEOC*, 49 F.3d at 1420–21 (9th Cir. 1995); see also *id.* at 1421 (explaining how the court in *Taggart* described the term “overqualified” as a euphemism for “too old”).

83. *EEOC*, 49 F.3d at 1421 (quoting *Stein v. National City Bank*, 942 F.2d 1062, 1066 (6th Cir. 1991)).

84. *Taggart v. Time, Inc.*, 924 F.2d 43, 47 (2d Cir. 1991).

85. *Id.* at 47–48 (“Denying employment to an older job applicant because he or she had too much experience, training or education is simply to employ a euphemism to mask the real reason for refusal, namely, in the eyes of the employer the applicant is too old.”).

debunk the overqualification rationale during the proof-of-pretext stage of his case. Unlike with age, there is no clear reason to believe that reference to a candidate as “overqualified” is a code word for the purposeful exclusion of racial minorities. As the Fifth Circuit reasoned in one race discrimination lawsuit that involved the defense of overqualification, there is “no reason to believe that a person’s race would make him any more or less likely to seek other opportunities more equivalent to his prior positions.”<sup>86</sup> The fact is that overqualified white candidates can and do suffer from the same type of exclusion on the job market. Furthermore, the type of exclusion that candidates such as Kennedy experience on the academic job market is not the type of exclusion that Congress envisioned when it enacted Title VII. At that time, legislators envisioned exclusion based on the dislike of racial minorities or negative stereotypes and myths about racial minorities.<sup>87</sup> Kennedy’s exclusion, on the other hand, is based, in part, on high praise of his credentials. Or it may be that courts simply find it hard to imagine a minority candidate as too qualified.

However, the fact that Kennedy’s exclusion from interviewing pools was not based on an intent to exclude racial minorities should not preclude an understanding of his experiences as a unique form of discrimination. Although rooted in a positive evaluation of Kennedy as a faculty candidate, the various departments’ decisions to exclude him from the pool of interviewees were due to his racial background. Specifically, the decisions were grounded in a racial myth—the myth of the highly qualified minority candidate who is engaged in bidding wars between institutions.<sup>88</sup> But for his race, Kennedy may have been offered an interview and job in some of these departments, much like a few of his white superstar counterparts were. Indeed, even under a Title VII mixed-motive analysis, the liberal arts colleges here could be held liable for race discrimination. The Supreme Court first recognized mixed-motive claims under Title VII in *Price Waterhouse v. Hopkins*.<sup>89</sup> There, the Supreme Court held that where an employer has both a legitimate and an

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86. *Barnes v. Ergon Refining, Inc.*, No. 93-7375, 1994 WL 574190, at \*4 n.11 (5th Cir. Oct. 4, 1994); *see also* *Timmerman v. IAS Claim Servs., Inc.*, No. 3-96-CV-0016-R, 1997 WL 279783, at \*3 (N.D. Tex. May 19, 1997), *aff’d*, No. 97-10655, 1998 WL 110078 (5th Cir. Feb. 20, 1998) (noting that the plaintiff cited “no cases in opposition to summary judgment that indicate ‘overqualification’ is a pretext to race discrimination”).

87. *See* Devon Carbado, Catherine Fisk & Mitu Gulati, *After Inclusion*, 4 ANN. REV. L. & SOC. SCI. 83, 88 (2008) (“Employment discrimination today is not what it was when Congress passed the Civil Rights Act of 1964.”).

88. *See* Smith, *supra* note 9, at B3 (detailing the results of her study that showed that elite minority Ph.D.’s “still must struggle to find positions”).

89. 490 U.S. 228 (1989).



illegitimate reason for the challenged employment action, the employer can utilize the “same decision” defense to avoid liability by proving by a preponderance of the evidence that it would have taken the same action anyway.<sup>90</sup> Here, however, the liberal arts colleges would experience difficulty proving the “same decision” defense. Absent a showing that the colleges had also refused to interview white superstar candidates, they would not be able to show that they would have reached the same decision on Kennedy despite their racial considerations.

Furthermore, in determining whether Kennedy’s claim is actionable, it should not matter that the myth carried with it a positive racial stereotype. The consequence for Kennedy, regardless of whether the stereotype was positive or negative, was the same: no interviews and thus no job offers or prospects. All that should matter is that the decision makers deliberately excluded him based on a racial stereotype.<sup>91</sup>

In this sense, Kennedy’s case is distinguishable from cases where courts have found the articulated reason of overqualification to be a

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90. See *id.* at 258. Though *Price Waterhouse* initially established the framework for a mixed-motive claim, the Civil Rights Act of 1991 altered the mixed-motive framework. First, the Act allowed the plaintiff to demonstrate an unfair employment practice by showing that “race . . . was a motivating factor for any employment practice, even though other factors also motivated the practice.” 42 U.S.C. § 2000e-2(m) (2006). Second, while proving race as a motivating factor establishes an unfair employment practice, if the employer can establish a “same decision” defense, a court may not award damages to the plaintiff or require “admission, reinstatement, hiring, promotion, or payment . . .” 42 U.S.C. § 2000e-5(g)(2)(B)(ii) (2006). Additionally, the Supreme Court’s dicta in the recent ADEA case, *Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343 (2009), generally called into question the continuing validity of *Price Waterhouse*’s burden-shifting framework, whereby the “burden of persuasion shifted in alleged mixed-motives Title VII claims.” *Id.* at 2351. The Court noted that, “[w]hatever the deficiencies of *Price Waterhouse* in retrospect, it has become evident in the years since that case was decided that its burden-shifting framework is difficult to apply,” leaving open the question of whether that framework is still “doctrinally sound.” *Id.* at 2352.

91. *Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 61 (1st Cir. 1999) (“The concept of ‘stereotyping’ includes not only simple beliefs such as ‘women are not aggressive’ but also a host of more subtle cognitive phenomena which can skew perceptions and judgments. *Price Waterhouse* highlighted one such phenomenon: the tendency of ‘unique’ employees (that is, single employees belonging to a protected class, such as a single female or a single minority in the pool of employees) to be evaluated more harshly in a subjective evaluation process.”). In a portion of the decision that was upheld by the Supreme Court in *Price Waterhouse*, the D.C. Circuit reasoned:

In keeping with [Title VII’s remedial] purpose, the Supreme Court has never applied the concept of intent so as to excuse an artificial, gender-based employment barrier simply because the employer involved did not harbor the requisite degree of ill-will towards the person in question. As the evidentiary framework established in *McDonnell Douglas* makes clear, the requirement[] of discriminatory motive in disparate treatment cases does not function as a “state of mind” element, but as a method of ensuring that only those arbitrary or artificial employment barriers that are related to an employee or applicant’s race, sex, religion, or national origin are eliminated.

*Hopkins v. Price Waterhouse*, 825 F.2d 458, 468–69 (D.C. Cir. 1987), *rev’d on other grounds* 490 U.S. 228 (1989).

neutral, not a pretextual, reason for discrimination. For example, in the age-discrimination case of *EEOC v. Insurance Co. of North America*,<sup>92</sup> the employer refused to hire the plaintiff Richard Pugh in the position of loss control representative, even though he had thirty years experience in loss control and engineering.<sup>93</sup> Instead, the employer “hired a twenty-eight-year-old woman, with no loss control experience, from outside the pool of applicants who responded to its job advertisement.”<sup>94</sup> The employer explained that it rejected Pugh’s application because he was overqualified, “had too much training and experience,” and, as a result, would “delve[] too deeply into accounts,” which “could consume too much of the insureds’ time.”<sup>95</sup> Noting that the employer’s reason for rejecting Pugh was “objective and non-age-related,” the Ninth Circuit affirmed the district court’s decision to grant summary judgment for the employer.<sup>96</sup> In Kennedy’s case, however, the departments’ reason for rejecting him for an interview was not neutral or unrelated to race. In fact, the decision not to interview him was based on a belief of his unattainability as a faculty member precisely because of his minority status, coupled with his exceptional credentials. Indeed, as the hypothetical in Part II.A reveals, a number of the schools considered and interviewed white candidates with credentials comparable to Kennedy’s and even extended offers to those candidates—likely because of the belief that they, though highly sought after as well, would not be as highly sought after as Kennedy because they are white and do not benefit from affirmative action. In this sense, Kennedy’s discrimination claim is born, ironically, from efforts to remedy past discrimination or, more pointedly, from the proven misperception that minority faculty candidates are receiving numerous quality offers, or even offers at all, because of these efforts.

Although it is true that summary judgment has been granted where the employer has undergone past experiences with overqualified workers who have left for better jobs or because of lower pay and less responsibility,<sup>97</sup> such holdings alone cannot preclude viable causes of action from minority candidates such as Kennedy. The relevant question in cases such as

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92. 49 F.3d 1418 (9th Cir. 1995).

93. *Id.* at 1419.

94. *Id.*

95. *Id.*

96. *Id.* at 1421.

97. *See, e.g., Barnes v. Ergon Refining, Inc.*, No. 93-7375, 1994 WL 574190, at \*4-5 (5th Cir. Oct. 4, 1994) (acknowledging that summary judgment has been granted where the employer “introduced evidence of its unsatisfactory experience with other overqualified applicants” and asserting that such experience provided an objective basis for the challenged conduct).

Kennedy's is not whether the employer's speculations and, thus, decisions are rooted in any real experience, but rather whether those decisions are motivated by racial stereotype. Are the faculties' decisions grounded in the stereotype of the minority bidding-war candidate? Are the faculties treating superstar minority candidates differently by not interviewing them but interviewing majority candidates with similar credentials? Faculties do have a right to make predictions on attainability based on their past experiences, but such predictions cannot be influenced by racial considerations.

Moreover, acknowledgement of the viability of "overqualified" race discrimination claims does not mean that such plaintiffs will automatically win their lawsuits. Circumstantial discrimination cases are difficult to prove in general,<sup>98</sup> and faculty-hiring-discrimination cases are even harder to prove given the many factors, especially subjective factors, that go into interviewing and hiring determinations. As many courts have noted, an employer has wide discretion in deciding whom it will hire so long as its hiring decisions are not based on impermissible considerations.<sup>99</sup> Although courts' suspicions may tend to go up when defendants offer "excessively

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98. *McDonnell Douglas* itself is premised on the notion that it is difficult for plaintiffs to prove circumstantial cases. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801–02 (1973); *see also* Ann C. McGinley, *Reinventing Reality: The Impermissible Intrusion of After-Acquired Evidence in Title VII Litigation*, 26 CONN. L. REV. 145, 151 n.34 (1993) ("The Court has recognized that it is very difficult for a plaintiff to prove discriminatory intent by circumstantial evidence."); Gabrielle R. Lamarche, Note, *State of Employment Discrimination After Hicks*, 32 SUFFOLK L. REV. 107, 111–12 (1998) ("Most employees find it difficult to prove employment discrimination because many variables may affect employment decisions. To complicate matters further, direct evidence of discriminatory intent by an employer rarely exists. As a result, plaintiffs must often rely upon circumstantial evidence to prove employment discrimination. To facilitate the use of circumstantial evidence, the Supreme Court created the *McDonnell Douglas* proof scheme which allows employees to prove employment discrimination using circumstantial evidence."); Kristen T. Saam, Note, *Rewarding Employers' Lies: Making Intentional Discrimination Under Title VII Harder to Prove*, 44 DEPAUL L. REV. 673, 707 (1995) ("In considering what would be enough evidence for the finding of discrimination, it is important to note that the Supreme Court is well aware that there is rarely eyewitness evidence of discrimination. Undoubtedly that is the precise reason why the Supreme Court created the triumvirate evidentiary stages in its opinions in *McDonnell Douglas* and *Burdine*. The necessity of relying on circumstantial or indirect evidence is due to the employee's inability to get inside the decision-maker's mind to determine what his intent is in making employment decisions.")

99. *See Kahn v. United States Secretary of Labor*, 64 F.3d 271, 391 (7th Cir. 1995) ("In other words, an employer may refuse to hire an employee for good reasons, bad reasons, reasons based on erroneous facts, or for no reason at all, as long as its actions are not based on discriminatory purposes."); *Lewis-Webb v. Qualico Steel Co.*, 929 F. Supp. 385, 391 (M.D. Ala. 1996), *aff'd*, 113 F.3d 1251 (11th Cir. 1997); *see also Ruby v. Springfield R-12 Pub. Sch. Dist.*, 76 F.3d 909, 912 n.7 (8th Cir. 1996) (asserting that courts do not "'sit as a super-personnel department that reexamines an entity's business decisions'" (quoting *Krenik v. County of LeSueur*, 47 F.3d 953, 960 (8th Cir. 1995))); *Timmerman v. IAS Claim Servs., Inc.*, No. 3-96-CV-0016-R, 1997 WL 279783, at \*3 (N.D. Tex. May 19, 1997) (providing that courts "cannot hold an employer liable for violating Title VII by exercising illogical business judgment if there is no discriminatory animus involved").

subjective reasons for challenged actions,”<sup>100</sup> the reality is that faculty search committees reject numerous qualified and overqualified applicants for a broad range of reasons, including highly subjective and speculative ones.<sup>101</sup> Thus, in most cases, the court’s or jury’s ultimate determination on discrimination will depend upon a long list of questions, and not just questions about whether the candidate was perceived as unattainable. Courts and juries will also have to examine whether the perception of the candidate’s unattainability was rooted in the myth of the minority bidding-war candidate, whether the employer interviewed superstar majority candidates but failed to interview superstar minority candidates, whether the employer tried to mask discriminatory intent by interviewing only minority candidates whom it knew (through specific references) would not join its faculty, and so on. Even then, a number of these questions will be further complicated by courts’ rigid definitions of “similarly situated” individuals or comparators.<sup>102</sup>

Finally, recognizing Kennedy’s claim as actionable will not open up the floodgates of litigation by faculty applicants, including white applicants. As noted above, institutions may legitimately exclude candidates based upon their perceived overqualification. There are many good reasons for doing so.<sup>103</sup> Thus, white applicants who are not included in finalist pools because they are perceived as being impossible to recruit (without regard to their race) would not have viable race-discrimination claims under Title VII. Title VII precludes only actions rooted in or occurring because of race. Where white candidates are excluded because of perceived overqualification, that perception tends to be based upon their credentials alone or on other non-race-related factors, such as the institution’s location. On the other hand, because the view of Kennedy as a candidate who will have too many offers is rooted in a specific racial myth—one of the highly qualified, bidding-war minority candidate—the decision to not pursue him is premised upon race and thus actionable under Title VII.

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100. Katz, *supra* note 63, at 172; *see also* Woody v. St. Clair County Comm’n, 885 F.2d 1557, 1565 (11th Cir. 1989) (Hatchett, J., dissenting) (“We have recognized that such subjective procedures can lead to racial discrimination, both because important information may be available only to whites and because such procedures place no check on individual biases.” (quoting Carmichael v. Birmingham Saw Works, 738 F.2d 1126, 1133 (11th Cir. 1984))).

101. *See* Zapp, *supra* note 49 (“Already I have served on search committees that have turned away overqualified candidates, many of whom were conducting impressive postdoctoral work.”).

102. Katz, *supra* note 63, at 183 (contending that “comparators’ situations are rarely identical to the plaintiff’s situation, giving rise to debates about the value of the comparators and often precluding the use of such evidence”).

103. *See supra* notes 77–82 and accompanying text.

### III. COMPLEMENTING DISCRIMINATION

Complimentary discrimination against overqualified candidates (such as Kennedy) causes more than just injury to those candidates alone. While many faculties may view the superstar minority candidate as difficult to recruit and thus not worth the time and effort of including him or her in their hiring processes, they also tend to view such minority candidates as the only minority candidates worthy of hire. As a result, it can be difficult for minorities who do not have traditional credentials, or even those with just less than stellar, but still strong, traditional credentials, to place very well on the job market or even enter academia. In sum, not only can the superstar minority candidate be excluded from faculty hiring pools because he or she is perceived as being unattainable, but faculties' dreams of one day recruiting such a candidate can often function as an excuse for not "settling" for minority candidates who are less qualified (at least on paper), but clearly well-qualified for employment. Moreover, resistance to these lesser but well-qualified minority candidates occurs even when majority members of the faculty have equal or lesser qualifications to those candidates or when the faculty has decided to give an offer to a majority candidate with similar qualifications.<sup>104</sup>

#### A. *Risky Business?*

Faculties' reasons for not hiring those minority candidates who are not superstars but are nonetheless objectively qualified vary. For some faculties, while they generally do not want any of their junior faculty to fail in achieving tenure, they especially do not want to "risk" having a

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104. See Merritt, *supra* note 35, at 252 (reporting her finding that "men were significantly more likely than women to be hired at higher ranks and to teach different subjects—even when men and women had identical credentials"). As Professor Michael Olivas has surmised, "for most schools, white candidates with good (but not sterling) credentials are routinely considered." Olivas, *supra* note 8, at 133; see also Delgado, *supra* note 2, at 1725–26 (contending that, generally speaking, a minority and white candidate with the exact same qualifications are "equal only if you arbitrarily decide that overcoming disadvantage is not a component of merit"). Professors Deborah Merritt and Barbara Reskin once made the following observation based upon their empirical research:

First, we need to preserve and even strengthen affirmative action. Our research suggests that affirmative action was necessary simply to enable equally qualified women, especially women of color, to get jobs on law faculties. We need to help our colleagues understand the unconscious biases that still taint everyone's decision making and show them how affirmative action can combat those tendencies. We may have to be more imaginative in the ways we construct affirmative action, but we need to maintain that principle and be as aggressive as we can.

Merritt & Reskin, *supra* note 32, at 492.

minority faculty member fail in that respect. As a consequence, they err on the side of caution by reserving their pursuit and hiring of minority candidates to the purported bidding-war candidates. They fear that a minority faculty member's tenure failure could result in their earning a reputation as an unfriendly or hostile department for racial minorities. As a result, they actually end up requiring that racial minorities satisfy a higher qualification threshold relative to white candidates.<sup>105</sup> Other faculties worry about potential lawsuits brought by minority candidates if they fail to achieve tenure or promotion, even though majority members are equally as capable of filing such suits, particularly in this age of rising reverse-discrimination suits.<sup>106</sup> Or faculties, because of their own unconscious biases, simply may not conceive of a minority candidate as the strongest candidate for a job.<sup>107</sup>

While paths to academia are also very difficult for majority members, as Professor Richard Delgado has explained, the opportunities for white candidates to obtain jobs with less traditional credentials or even through less traditional methods, such as through referrals, are greater than those

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105. See Wildman, *supra* note 4, at 1664 (arguing that “another yardstick seems to be used when women or people of color are measured”); see, e.g., Olivas, *supra* note 8, at 132 (finding, in his research, that “the credentials of Latina/o law professors exceeded those of all other faculty hired during [that] same period”); see also Paul v. F.W. Woolworth Co., 809 F. Supp. 1155, 1162 (D. Del. 1992) (asserting that discriminatory intent may be found where the employer promotes or hires “only overqualified minorities, while failing to hire or promote qualified minorities who would have been treated differently but for their minority status”); Terry Smith, *Everyday Indignities: Race, Retaliation, and the Promise of Title VII*, 34 COLUM. HUM. RTS. L. REV. 529, 532, 534 (2003) (describing the “subtleties that often characterize workplace racism” and describing subtle discrimination as “often nuanced, sophisticated, and covert means of differentiating based on race”).

106. See John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 989 tbl.2 (1991) (finding that, between 1970 and 1989, reverse discrimination claims were part of a cohort that accounted for nearly 10% of the total increase in discrimination lawsuits); see also Richard Michael Fischl, *Rethinking the Tripartite Division of American Work Law*, 28 BERKELEY J. EMP. & LAB. L. 163, 200 (2007) (noting the increased share of reverse-discrimination lawsuits).

107. For example, in her article “How We Did It,” Professor Zelda Rifkin (a pseudonym) wrote the following about her department's search for a new faculty member: “Some students (outside of our department) demanded that we hire a person of color, a suggestion the committee ignored as illegal and unethical. We felt our students—of whatever ethnicity—best would be served by our hiring the strongest candidate.” Rifkin, *supra* note 52, at C1. As written, Professor Rifkin seems to leave no room for the possibility that a minority candidate may be the strongest candidate. She never indicates that a person of color could actually be the strongest candidate, asserting simply that her school's “students—of whatever ethnicity—would be best served by [their] hiring the strongest candidate.” *Id.* Additionally, although Professor Rifkin cited the institution's majority female student body and faculty as a reason for “vetoing candidates who addressed their cover letters ‘Dear Sir,’” she never once acknowledged the value that a faculty member of color could add to the department, whether serving as a role model for students of color or as a signal to those students “outside of [her] department” that the department also welcomes them. *Id.*; see also Wildman, *supra* note 4, at 1659 (describing the “cycle of exclusion” as being “unwittingly continued”).

for minority candidates. According to Professor Delgado, minority candidates rarely join faculties in the informal way that a number of white candidates do.<sup>108</sup> As he said, “[t]he net result [of biases against racial minorities] is that white people have two chances of getting hired . . . by being superstars and satisfying the ostensible, on-the-books hiring criteria institutions start out with . . . or by means of the informal route the school resorts to . . . when the season is almost over, and the harvest is not yet in.”<sup>109</sup> Furthermore, when minority candidates are selected for faculty positions, such hires are often attributed to diversity goals rather than merit, even when the minority candidate looks exactly like competing white candidates on paper and performs just as well or better during the interview.

*B. Holding Out for the Dream*<sup>110</sup>

Consider, for example, the hypothetical case of Peggie Lee, an Asian Pacific American female from Detroit, Michigan. Lee graduated from the University of Michigan, *magna cum laude*, with a B.A. in Philosophy. Thereafter, she attended Columbia Law School, where she served as an Essays Editor on the Columbia Law Review and was President of the Asian Pacific American Law Students Association. After law school, she clerked on the Second Circuit Court of Appeals and then practiced law at the Department of Justice, Civil Rights Division.

The Fall before Lee planned to become a law professor, she applied for teaching positions through the Faculty Appointments Register at the AALS website. Although Lee was engaged in an extremely busy practice at the Department of Justice, she was able to write a couple of articles during her spare time. Thus, by the time that she went on the market, Lee had one published student note, one published law review article, and one forthcoming journal article. Her published law review article had placed in a top-fifty general interest law review, and her forthcoming piece was set for publication in a top-ten specialty law journal.

Lee had a number of interviews at the AALS job market conference and received a fair number of callbacks from those interviews. One of her callbacks was at a law school ranked in the top fifty in the U.S. News and

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108. Delgado, *supra* note 2, at 1727–28.

109. *Id.* at 1728.

110. See Wildman, *supra* note 4, at 1665 (“The point is that any hire outside the white, male norm is still controversial, subjected to greater scrutiny, and plain doesn’t happen without a lot of pushing within the institutionalized framework . . .”).

World Report law rankings. When Lee went for her callback at that law school, she enjoyed herself, and the faculty liked her. Her job talk was good, though not groundbreaking, but Lee showed tremendous skill in answering questions after her talk.

In addition to Lee, the law school was considering several other candidates. Three of those candidates were white men of varying credentials, and another candidate was a Latino with similar credentials, Robert Sanchez. One of the white male candidates, John Shine, was a superstar candidate. He had held a prestigious circuit court clerkship with a Supreme Court feeder judge and then a clerkship on the Supreme Court, had been Editor-in-Chief of his law school's general interest journal, and had two publications, both very well placed, with another article forthcoming. The second white male candidate, Bob Smith, and Robert Sanchez, the Latino candidate, each had a circuit court clerkship, editorial positions on the general interest law journal of their law schools, and at least one publication. The remaining white male candidate, Tom Jones, had a circuit court clerkship and had been the Managing Editor of a secondary journal at his school; he had one publication, which was a student note, as well as a work in progress. Finally, the law school had previously scheduled a callback with a superstar African American male candidate, Jim Vernon, but Vernon withdrew before he had a chance to come to campus.

When John Shine came to the law school for his interview, he blew the faculty away with his job talk. Ultimately, though, Shine withdrew himself from consideration when he received an offer from a higher-ranked law school. Tom Jones, however, did not excel as much as Shine did during his visit. Jones was very nervous during his visit and gave a poor job talk, and several faculty members left with the impression, though perhaps unfair, that Jones would not be able to become a good teacher. Robert Sanchez gave a good job talk, but not a great one, and failed to really "excite" the faculty about his research. Finally, Bob Smith came in and gave a less than mediocre job talk, but responded relatively well to questions. Several faculty members noted that, although they were disappointed by Smith's performance, he came highly recommended by one of the leading scholars in his field.

When the faculty met to decide which candidate to extend an offer to, they quickly came to a decision to exclude Tom Jones from consideration. After some discussion, the faculty also decided to exclude Robert Sanchez. The hiring decision thus came down to Lee and the second white male candidate, Bob Smith. In discussing the two candidates, majority faculty members repeatedly commented how Lee just did not come across



as a good fit for the law school. Others commented that Lee was “not quite” Wanda Jones, a former faculty member of color who had become a superstar and later moved to a top-ten law school (but who, ironically enough, had barely squeaked by during the law school’s hiring process). “Peggie just does not have the same promise as Wanda,” they said. These same faculty members supported giving an offer to Smith, even though he underperformed during his job talk because they thought that he had “so much potential.” When certain faculty members pointed out that Lee had very similar credentials to Smith and had actually outperformed Smith during her job talk and question period, the supporters of Smith downplayed the difference in their performances and highlighted Smith’s references, which were stronger than Lee’s (without any recognition of how advantage, privilege, access, and race can influence such references). In fact, after a supporter of Lee tried to make his case for her, one faculty member even commented, “It’s too bad Vernon didn’t come in for an interview. He would have been a good hire for us.” In the end, Smith ended up with the job offer from the law school and accepted the offer to join the faculty. Lee ended up at a third-tier law school.

Did the faculty make the wrong decision? The answer is not necessarily yes. Smith may actually have been the better hire of the two. After all, faculty hiring decisions are very difficult, and Smith is highly qualified and has tremendous promise as a scholar and teacher. But the real question is: did the faculty discriminate against Lee (or, for that matter, Robert Sanchez) in its evaluation of the candidates? Arguably, the faculty did. As a number of the faculty members’ comments suggest, many of them never saw Lee as anything more than a diversity hire, comparing her with a past faculty member of color who had left and with a superstar minority candidate who did not even arrive for an interview. As a consequence, these faculty members ended up holding Lee to a higher standard than Smith, discounting her good performances and not cutting her slack for any perceived weaknesses while bending over backwards to explain Smith’s performance. Indeed, they seemed to be holding out for the dream minority candidate and judging Lee more harshly because she did not satisfy that dream, while never even bothering to hold Smith up to that standard. More importantly, they allowed their dream of recovering “a new Wanda Jones” as a faculty member and getting a future Vernon on their faculty to serve as an excuse for not giving a job offer to Lee. As Professor Derrick Bell explained nearly fifteen years ago in his book *Confronting Authority: Reflections of an Ardent Professor*, the faculty engaged in the frustrating process of deferring the current minority candidate “for the more promising [though not yet identified] one in the

pipeline.”<sup>111</sup> In sum, discrimination by the faculty rested not necessarily in its final decision about whom to extend the offer to, but rather in the different treatment and evaluation process for minority candidates that complemented, so to speak, that final decision and thus completed the circle of exclusion.

Overall, the problem of complementary discrimination is not that the minority candidates are not selected for available faculty positions, but rather that they often undergo more heightened scrutiny or doubt than that applied to the majority candidates. The questions, then, are: Why is it important for faculties to understand the nature of complimentary and complementary discrimination in the appointments process, and how can faculties avoid such discrimination in the future?

#### CONCLUSION: AVOIDING BAD COMPLIMENTS

To answer the questions above, faculties first must begin to understand the complicated and subtle forms of differential treatment that occur through complimentary and complementary discrimination because such behaviors work only to reinforce dangerous (though, at times, positive) racial stereotypes and negatively affect the job prospects of good minority faculty candidates. Second, colleges and universities need to understand these forms of discrimination so that they may increase the diversity on their faculties if they truly wish to prepare their graduates for a diverse society.<sup>112</sup> Schools will not be able to accomplish this goal of faculty diversity unless their faculty members engage in serious self-reflection and analysis about their hiring behavior. As Part I of this Article detailed, minority representation among tenured and tenure-track faculty at colleges

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111. Bell, *supra* note 7, at 83.

112. See Sotello Viernes Turner, *supra* note 2; see also Grutter v. Bollinger, 539 U.S. 306, 330–32 (2003) (declaring that diversity provides benefits of cross-racial understanding and exchange within the classroom, which better prepares students to work as professionals and function in an “increasingly diverse workforce and society”) (citation omitted); Pamela J. Bernard, *When Seeking A Diverse Faculty, Watch Out for Legal Minefields*, CHRON. HIGHER EDUC., Sept. 29, 2006, at B28, available at <http://chronicle.com/weekly/v53/i06/06b02801.htm> (“It is crucial for colleges in their hiring practices . . . to create an environment where professors and students can test convention by sharing different experiences and opinions.”); Lee C. Bollinger, *Why Diversity Matters*, CHRON. HIGHER EDUC., June 1, 2007, at B20, available at <http://chronicle.com/weekly/v53/i39/39b02001.htm> (“[P]olicies that encourage a comprehensive diversity . . . are indispensable in training future leaders how to lead all of society, and by attracting a diverse cadre of students and faculty, they increase our universities’ chances of filling in gaps in our knowledge with research and teaching on a wider—and often uncovered—array of subjects.”); Jon Mills, *Diversity in Law Schools: Where Are We Headed in the Twenty-First Century?*, 33 U. TOL. L. REV. 119, 120 (2001) (“A diverse student body and faculty is a representation of the diverse professional world our students will join.”).

and universities remains quite low at many different campuses within different regions, even regions with significant minority public and student populations. If institutions want their students to think critically and broadly, they must expose them to people with different backgrounds than their own and to a wide range of viewpoints, which may vary based upon racial experience.<sup>113</sup> As Professor Caroline Turner once explained, “What is taught, how it is taught, and who teaches always affects classroom dynamics. . . .”<sup>114</sup>

Additionally, colleges and universities need to acknowledge that having a diverse faculty helps to provide a full range of mentors and role models for all students.<sup>115</sup> Finally, colleges and universities must recognize how having diverse faculties can help to influence the scholarly landscape and research agenda of an institution and of academia in general.<sup>116</sup> For

113. *Grutter v. Bollinger*, 539 U.S. at 329–36; Rachel F. Moran, *Of Doubt and Diversity: The Future of Affirmative Action in Higher Education*, 67 OHIO ST. L.J. 201, 217–20 (2006); Angela Onwuachi-Willig, *Using the Master’s “Tool” to Dismantle His House: Why Justice Clarence Thomas Makes the Case for Affirmative Action*, 47 ARIZ. L. REV. 113, 127–29 (2005); cf. Kevin R. Johnson, *The Last Twenty-Five Years of Affirmative Action?*, 21 CONST. COMMENT. 171, 179–90 (2004) (questioning the suggestion that there is a twenty-five-year limit on the benefits of diversity).

114. Turner, *supra* note 18, at 116. Professors Daryl Smith and José Moreno also asserted:

But the desire to reflect student diversity cannot be the only rationale for diversifying the faculty. Diversity is a matter of equity in hiring and retention, as well as a central component of higher education’s ability to develop more relevant and varied forms of knowledge. It is vital to building relationships with different communities outside the campus and essential for creating a work environment that is attractive to people from different backgrounds.

Smith & Moreno, *supra* note 8, at B22.

115. See Smith & Moreno, *supra* note 8, at B22 (noting how professors of color “can clearly play important roles for students—especially those in science, mathematics, and other technical fields where the lack of diversity among students from the United States is becoming a national crisis”); see also Paul Brest & Miranda Oshige, *Race and Remedy in a Multicultural Society: Affirmative Action for Whom?*, 47 STAN. L. REV. 855, 864–65 (1995); Enrique R. Carrasco, *Collective Recognition as a Communitarian Device: Or, of Course We Want to Be Role Models!*, 9 LA RAZA L.J. 81 (1996) (arguing that law professors of color committed to diversity should assume a role-modeling function for students of color); Placido G. Gomez, *White People Think Differently*, 16 T. MARSHALL L. REV. 543, 545 (1991) (noting that faculty of color are “more than mere role models . . . [that] [t]hey may contribute to minority students’ sense of belonging; a sense that the system may tolerate or even appreciate, a different world view, an alternative reality”). But see Anita L. Allen, *On Being a Role Model*, 6 BERKELEY WOMEN’S L.J. 22, 24, 25 (1990–91) (“The [role model] argument encourages the inference that black women are inferior intellectuals and that white teachers have no role to play in addressing the special needs of black students. The quest for ‘positive’ minority role models demanded by the role model argument risks stereotyping minorities on the basis of race and gender, imposing upon black women teachers the felt obligation to be perfectly ‘black’ and perfectly ‘female.’”); Jon C. Dubin, *Faculty Diversity as a Clinical Legal Education Imperative*, 51 HASTINGS L.J. 445, 466–68 (2000) (acknowledging some limitations in imposing role model responsibilities on minority faculty); Lani Guinier, *Of Gentlemen and Role Models*, 6 BERKELEY WOMEN’S L.J. 93, 99 (1990–1991). (explicating how the role model argument can trivialize the contributions that minority women make to faculties).

116. Turner, *supra* note 18, at 117 (referring to *Shattering the Silence*, a book that highlighted

example, in law, scholars such as Professors Derrick Bell, Kimberlé Crenshaw, Richard Delgado, Regina Austin, Neil Gotanda, Cheryl Harris, Charles Lawrence, Mari Matsuda, and Patricia Williams, wrote foundational pieces in Critical Race Theory<sup>117</sup> that challenged both the substance and style of conventional legal scholarship. Their work, in turn, forever changed all areas of scholarship, both legal and nonlegal,<sup>118</sup> and gave birth to other progressive, antisubordination movements such as Latina/o Critical Theory and Critical White Studies.<sup>119</sup>

That said, the task of countering complimentary and complementary discrimination in faculty hiring is not an easy one. To accomplish the goal of increased racial diversity among faculties, search committee members must consist of people from diverse backgrounds with different perspectives on how to judge applicants.<sup>120</sup> After all, diverse committees are more likely to create diverse finalist pools, which in turn can increase the likelihood of hiring a person of color.<sup>121</sup> Creating a diverse hiring

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how scholars of color developed two new areas of scholarship, Asian American Literature and the history of African American women); *see also* Merritt & Reskin, *supra* note 32, at 490 (reporting that three of the most-cited scholars in their study of tenure-track and non-tenure-track faculty hires between 1986 and 1991 were African American women, which “is a striking testament . . . to their success in changing the direction of scholarship within the academy to focus on issues they were writing about”).

117. Critical Race Theory is the area of critical legal scholarship that “focuses on the relationship between law and racial subordination in American society.” Kimberlé Crenshaw, *A Black Feminist Critique of Antidiscrimination Law and Politics*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 195, 213 n.7 (David Kairys ed., rev. ed. 1990).

118. For instance, their work has had a huge impact upon legal fields such as constitutional law, criminal procedure, employment discrimination, education law, and international human rights, and nonlegal fields, such as women’s studies, cultural studies, sociology, and history. *See* Emily M.S. Houh, *Still, At the Margins*, 40 *LAW & SOC’Y REV.* 481, 488 (2006) (arguing that “many of the pieces collected [in the three major Critical Race Theory Readers] have been important not only to the development of American jurisprudence more broadly but also to the development of interdisciplinary approaches to the law”).

119. *See, e.g.*, *CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR* (Richard Delgado & Jean Stefancic eds., 1997); Stephanie L. Phillips, *The Convergence of the Critical Race Theory Workshop with LatCrit Theory: A History*, 53 *U. MIAMI L. REV.* 1247 (1999); *see also* Berta Hernandez Truyol, Angela Harris, & Francisco Valdés, *Beyond the First Decade: A Forward-Looking History of LatCrit Theory, Community and Praxis*, 17 *BERKELEY LA RAZA L.J.* 169 (2006) (detailing the creation and development of LatCrit theory); Barbara Flagg, “*Was Blind But Now I See*”: *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 *MICH. L. REV.* 953, 957 (1993) (highlighting a central feature of white identity, which is transparency or the privilege not to think about race, and setting part of the foundation for Critical White Studies).

120. *See* Bernard, *supra* note 112, at B31 (declaring that “including persons of color on the committee can help” with diversity efforts); Sotello Viernes Turner, *supra* note 2, at B34 (asserting that “[s]earch-committee processes remain crucial factors in fostering institutional commitment to racial and ethnic diversity in the professoriate”).

121. Smith et al., *supra* note 2, at 146 (reporting their finding that “diversity in the finalist pool served to increase somewhat the likelihood of hiring a person of color though a majority are still white”).

committee, however, can be difficult if faculty members have simply hired reflections of themselves for years and years and if there are only a few minority faculty members to take on this time-consuming task.

Additionally, undoing discrimination by compliment will require faculty members to engage in the hard task of critical self-reflection as a means of examining to what extent they assist in perpetuating myths that eventually result in racial biases in the faculty hiring process.<sup>122</sup> As the researchers of the Campus Diversity Initiative declared in their reported results, such self-reflection will not only result in the debunking of racial myths, but it will also “foster a more honest exploration of factors that keep departments from hiring a more diverse faculty.”<sup>123</sup> For example, faculties could reflect on whether they have hired racial and ethnic minorities outside of the three designated conditions described earlier.<sup>124</sup> If not, faculties could explore how such practices, which have resulted in a two-track system where minorities are hired only when diversity is a focus, reinforce the complimentary-complementary dichotomy. In so doing, they can force themselves to analyze and answer why superstar minority candidates are ignored during the “regular” process and why other qualified minorities are simply not viewed as good enough unless the process is “irregular,” meaning focused on diversity.

Moreover, the benefits of engaging in this self-evaluation can be tremendous. For example, a friend who teaches at a small liberal arts college told the following story about a search involving a superstar racial minority candidate whom she initially opposed for hire in her department:

During a search a couple years ago, I became fixated on the belief that a certain candidate (call him candidate X) was not interested in working for our institution. My impressions of him during a preliminary interview had convinced me that he was just “playing the game” and had not convinced me of any serious interest in our institution. As a result, I felt strongly that inviting him to campus would be a waste of one of our “slots” for on campus interviews. I repeated this impression several times during our deliberations. My senior colleague corrected me by saying that my “sense” of what this candidate really wanted was not the point and was not one of our criteria for selection. He was entirely correct, and I relented,

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122. *Id.* at 136 (“Many agree that it is at the departmental level that most policy decisions about hiring are made. . . . Department heads and senior faculty develop recruitment plans and decide what constitutes ‘quality.’”).

123. Moreno et al., *supra* note 19, at 13.

124. *See supra* notes 32–39.

despite my strongly felt “gut” sense. As it turns out, I had reversed two candidates in my own memory, so that my impression, in addition to not being the point of our selection process, had also been misplaced and misdirected. If my colleagues had listened to me, I would have prevented the candidate we ended up hiring in the search from coming to campus based on a hunch that was misdirected.<sup>125</sup>

As my friend’s story reveals, critical reflection of one’s internalization of racial myths and stereotypes, including positive ones about a candidate’s range of choices, can result in numerous positive endings. In my friend’s case, self-evaluation not only opened her up (and ultimately her department) to considering a candidate whom she had previously viewed as racially unattainable because of the candidate’s record and her institution’s location in a nondiverse community (though she had actually misidentified the candidate), but it also provided the candidate with an opportunity to physically interview in the department and at least express his serious interest in the institution. Most of all, it prevented the department from giving the candidate the “compliment” of excluding him from consideration for the the open position. Instead, it enabled the department to give him the best compliment possible, a job offer, which, when accepted, ended up nicely complementing the institution as a whole by providing it with a new, young faculty star and a person of color in its community.

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125. E-mail from Anonymous Liberal Arts College Professor, to Professor Angela Onwuachi-Willig (Aug. 7, 2008, 5:12 P.M. CST) (on file with author).