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*A crucial element of politics . . . is the struggle to define social reality and to interpret people's inchoate aspirations and needs. Particular words and expressions often become focal in such struggles, functioning as keywords, sites at which the meaning of social existence is negotiated and contested. Keywords typically carry unspoken assumptions and connotations that can powerfully influence the discourses they permeate—in part by constituting a body of doxa, or taken-for-granted commonsense belief that escapes critical scrutiny.*

—Fraser and Gordon<sup>1</sup>

## INTRODUCTION

In the United States the concept of the “role model” has emerged with increasing frequency in both the social and legal domains. Indeed, talk about role models has become an important aspect of social, political, and legal discourse. People argue about whether professional women have enough role models,<sup>2</sup> whether

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<sup>1</sup> Nancy Fraser & Linda Gordon, *A Genealogy of Dependency: Tracing a Keyword of the U.S. Welfare State*, 19 SIGNS 309, 310 (1994) (citations omitted).

<sup>2</sup> See generally Berenice Fisher, *Wandering in the Wilderness: The Search for Women Role Models*, 13 SIGNS 211 (1988). It is interesting to note here that the debate about the need for such role models not only occurs among individuals with different outlooks on life and social relations, but also within individuals themselves. For example, Fisher reports that when she heard for the first time, in the 1970s, “the claim that . . . women . . . needed female role models to make [their] way through the world,” she was very angry. *Id.* at 211. Angry, (1) because that claim appeared to deemphasize the idea of the independent woman for which she had struggled, (2) because the emphasis on role models “sets women up for cooptation when the powers-that-be offer us role models instead of justice,” and (3) because of the “subtle and not-so-subtle ways [in which] such advocacy perpetuates the logic of domination, by encouraging us to look up to ‘special women’ rather than to look around us for the women with whom we might act.” *Id.* at 212.

But writing in 1988 Fischer had a less hostile view toward the notion of role models. By then she “understood more fully the possibilities of role models for the lives of contemporary women.” *Id.* at 214; see also Nancy A. Roeske & Karen Lake, *Role Models for Women Medical Students*, 52 J. MED. EDUC. 459, 459 (1977) (“Increasing numbers of women are entering medical school. However, there are still relatively

the underrepresentation of minorities<sup>3</sup> in various occupations and positions of social and political influence (and the educational crisis in the inner cities) can be explained in terms of the lack of role models,<sup>4</sup> whether one can be a role model to those who belong to a different racial group or gender,<sup>5</sup> whether membership in a

few women physicians. Thus, many women medical students have not had an opportunity to know a woman physician prior to entering medical school. This situation has led to questions regarding the need for women physicians to serve as role models for women medical students.”).

<sup>3</sup> The “minority” that is the primary focus of this Article is African Americans, although a great deal of the analysis and observation could be applied to other minority groups as well. I might also mention here that in this Article, I shall use the terms “black” and “African American” interchangeably.

Although some parts of this Article deal with the notion of role model as it applies to women, and although a great deal of analysis could be applied to women, I must point out, lest I be taken to promise more than I can deliver, that the Article’s focus is the rhetoric of role model as it applies to African Americans.

<sup>4</sup> See *Verbatim*, WASH. POST, Jan. 20, 1992, at A23 (“[T]he current statistics for minority higher education are discouraging. . . . [T]he lack of African-American role models has been cited in study after study as one of the prime reasons our youngsters do not pursue college educations and certain career options like science and engineering.” (quoting Rep. Conyers)).

Indeed, some cities and school districts have established, or are in the process of establishing, special schools exclusively for black male students; their idea is to provide black male role models for these students to compensate for a perceived lack of appropriate male role models in their home lives. See Michael J. Weber, Note, *Immersed in an Educational Crisis: Alternative Programs for African-American Males*, 45 STAN. L. REV. 1099, 1099-1101 (1993) (“In response [to the educational crisis among African American males] several public school districts have proposed or implemented African-American all-male schools (or classes) in a controversial attempt to improve the academic performance and self-esteem of African-American boys. . . . Although these programs are not identical, they share certain characteristics . . . [one of which is the] attempt to provide African-American male role models or mentors with whom the students can identify.” (emphasis added) (citations omitted)); see also Note, *Inner-City Single-Sex Schools: Educational Reform or Invidious Discrimination*, 105 HARV. L. REV. 1741, 1744 (1992) (discussing the constitutionality of such programs and explaining that “[m]any educators . . . maintain that single-sex schools [for boys] should employ a high proportion of Black male teachers because Black boys—often abandoned by their fathers—need Black male role models”).

The educational crisis among African Americans, especially African American males, has reached a frightening level. A recent news report stated that the percentage of African American males going to college, as depressingly low as it once was, has in fact decreased in the last few years. See Ernesto Portillo Jr., *High School Achievers: Minority Grads Opted for School Over “Cool”*, SAN DIEGO UNION-TRIB., June 17, 1994, at A1, A27. What is even more depressing are the reasons that young African Americans gave for choosing not to go to college: that it is not “cool” to appear brainy and studious, that they will become outsiders in the community of people that surround and matter to them. See *id.* One African American high school student said that he was called a “white boy” by another African American student because he was seen to be intelligent and studious. As this student put it, “You can’t be cool if you’re smart. That’s the kind of thing I grew up with.” *Id.* at A1.

<sup>5</sup> Professor Derrick Bell left the Harvard Law School after a long and unsuccessful

particular racial minority group in and of itself makes an individual an appropriate role model for members of that group,<sup>6</sup> and even whether characters in television programs can serve as appropriate (positive) role models for their audience.<sup>7</sup> "Role model" has

campaign to persuade the school to hire an African American woman professor. Even though Harvard had a number of African American male professors, including Professor Bell himself, and several white female professors, Professor Bell felt that neither the male African American professors nor the white female professors could be role models for female African American students. See Fox Butterfield, *Harvard Law School Torn By Race Issue*, N.Y. TIMES, Apr. 26, 1990, at A20. The issue also sparked a lawsuit against Harvard University brought by Harvard Law School students. See *Harvard Law Sch. Coalition for Civil Rights v. President of Harvard College*, 595 N.E.2d 316 (Mass. 1992). The students' complaint alleged that the absence of members of certain groups on the faculty was a result of the school's discriminatory hiring practice, which violated a Massachusetts law that prohibited discriminatory employment practices against certain protected groups. See *id.* at 317-18. The Supreme Judicial Court of Massachusetts dismissed the complaint because the students did not have standing and partly because "the injuries they complain[ed] of—denial of 'perspectives,' 'life experiences,' and 'access to . . . role models'—[were] not within the area of concern of the statute." *Id.* at 319.

The issue of role models in general as well as the specific question whether African American women law professors were needed as role models for African American women law students were explored in a symposium several years ago. See Symposium, *Black Women Law Professors: Building a Community at the Intersection of Race and Gender*, 6 BERKELEY WOMEN'S L.J. 1 (1990-1991) [hereinafter *Black Women Law Professors*]. The symposium was apparently inspired by, and was intended to be a response to, the controversy at Harvard. In the introduction to the symposium, Emma Coleman Jordan writes: "We undertook these reflections in response to two widely-publicized events at Harvard Law School." Emma C. Jordan, *Images of Black Women in the Legal Academy*, 6 BERKELEY WOMEN'S L.J. 1, 4 (1990-1991). As Jordan put it, a response from African American women professors was necessary because, even though the controversy revolved around the need for African American women professors to act as role models for African American female students, the intense media coverage "contained a wide variety of comments and opinions, from black and white students at Harvard, from Harvard faculty and faculty at other schools. . . . [C]omments from black women law professors were a glaring omission from the body of opinion rapidly accumulating in the wake of Professor Bell's leave of absence." *Id.*

<sup>6</sup> The recent controversy at Northwestern University School of Law involving the candidacy of a minority professor raised the issue of whether a black professor who has a white Australian father and a black Cuban mother, but who was born and raised in this country, could be an appropriate role model for black students in the school and therefore should be considered as a minority candidate. The issue was picked up by the national media and was given some play, although not always accurately or fairly. See, e.g., Jan C. Greenburg et al., *Race Issue Sparks Hiring Controversy at NU Law School*, CHI. TRIB., Dec. 13, 1994, § 3, at 3; Melanie Kirkpatrick, *Rule of Law: Not Black Enough for This Law School*, WALL ST. J., Jan. 11, 1995, at A15; *Not Black Enough*, NEW REPUBLIC, Jan. 9, 1995, at 8; Rohan Preston, *Battle to Keep Black Professor Leaves Bruised Egos and Reputations*, N.Y. TIMES, Mar. 8, 1995, at B8; *Racism Takes an Odd Turn at NU*, CHI. TRIB., Dec. 17, 1994, at 24; Bob Sexter, *Black Prof Fails Political Test*, CHI. SUN TIMES, Dec. 11, 1994, at 3, available in LEXIS, News Library, Majpap File.

<sup>7</sup> During the 1992 presidential election, Vice President Dan Quayle accused the

therefore emerged as a key term in the discursive landscape through which individuals debate and contest the nature and meaning of social and political life in this country.

Quite often the discourse (and controversy) concerning role models, popular and scholarly, does not revolve around empirical claims.<sup>8</sup> Rather, the term is invoked as a means of making and contesting normative claims about the desirability of certain activities and as a rhetorical device to defend desired objectives and to attack unacceptable commitments.<sup>9</sup> Its attractiveness as a rhetorical device has resulted, to some degree, from its elasticity and indeterminacy, characteristics that allow people to invoke the term to assert varying normative positions under various circumstances without actually making an extended argument to defend those positions.<sup>10</sup>

fictional character Murphy Brown of being a bad role model for unmarried females by "mocking the importance of fathers by bearing a child alone and calling it just another 'life-style choice.'" Lance Morrow, *But Seriously Folks* . . ., TIME, June 1, 1992, at 29, 30. What was interesting about the Vice President's comment was that he made it in a speech concerning unmarried young black females in the inner cities, even though, as *Time* magazine noted, "few young black females watch *Murphy Brown*." *Id.* ("The show, which in overall audience is the third most popular on network television, ranks 56th in popularity among American blacks."); see also *Quayle Speaks and Culture Has a Cow*, CHI. TRIB., May 24, 1992, at 6 ("William J. Bennett, the Bush administration's first drug policy chief, . . . told recovering addicts that Bart Simpson, the resident brat on 'The Simpsons' TV cartoon series, was a lousy role model.") [hereinafter *Quayle Speaks*].

Even companies have been referred to as role models. See *New '90s Role Models*, MGMT. TODAY, Mar. 1992, at 3 (referring to a particular company as a "role model" for other companies on account of its conservative style of asset management).

<sup>8</sup> Even though "there's little evidence in social-science literature that children actually adopt the behavior of athletes they adore," that has not stopped people from talking about the importance of professional athletes who act as good or positive role models. David Gelman et al., *I'm Not a Role Model*, NEWSWEEK, June 28, 1993, at 56, 57. Gary Alan Fine, head of the Sociology Department at the University of Georgia, aptly observed that "[t]here are not going to be many who say, 'Well, Michael Jordan gambles, then I'm gonna gamble.'" *Id.*

<sup>9</sup> Stanley Fish describes rhetoric as "the art of constructing the (verbal) ground upon which you then confidently walk." STANLEY FISH, *THERE'S NO SUCH THING AS FREE SPEECH AND IT'S A GOOD THING, TOO* 170 (1994). For a brief history of the emergence, decline, and current reemergence of rhetoric as a "system of education and communication," see John Bender & David E. Wellbery, *Rhetoricity: On the Modernist Return of Rhetoric*, in *THE ENDS OF RHETORIC: HISTORY, THEORY, PRACTICE* 3, 5 (John Bender & David E. Wellbery eds., 1990).

<sup>10</sup> Martha Nussbaum makes a similar argument in relation to those whom she characterizes as antiessentialist theorists. She argues that antiessentialists assert a link between essentialism, on the one hand, and "an ignorance of history [and a] lack of sensitivity to the voices of women and minorities," on the other, without extended discussion, "as if they were in the know about some new and decisive discovery that

In some contexts, the term means "mentor," and in other circumstances, the expression means "hero."<sup>11</sup> Sometimes the power of the role model is restricted to a specific segment of the model's behavior, and thus is role-specific. For example, a professional can serve as a role model to those who aspire to enter that profession. Thus, a good medical doctor can be a positive role model to medical students, and a famous lawyer can inspire law students,<sup>12</sup> but only in relation to the professional lives of the particular role model followers. Sometimes, however, the term refers to a comprehensively influential individual. In these situations, the role aspirant's "emulation may . . . extend[] to a wider array of behaviors and values of these persons."<sup>13</sup> A parent or a school teacher may serve as a role model in this comprehensive sense.<sup>14</sup> Here the reference point transcends a specific role to include the sum total of roles that constitute the individual. When people talk about parents as role models, they do not mean that children will just imitate their parents in relation to specific and defined activities or professions, but rather that parents' entire set of commitments, actions, and habits will shape the attitudes and aspirations of their children.

The concept of role model has not always been part of the vocabulary of discourse in this country. Indeed, it only emerged as such in the 1950s, mainly in the social sciences and particularly in psychological and sociological studies. It was later adopted in popular usage and has now become part of legal discourse.<sup>15</sup> This

removes the need for argument." Martha C. Nussbaum, *Human Functioning and Social Justice: In Defense of Aristotelian Essentialism*, 20 POL. THEORY 202, 205 (1992).

Similarly, in a recent Supreme Court decision, Justice Scalia invoked the concept of role model to justify an important legal conclusion without explaining why he invoked the term or what meaning it was meant to carry. See *Vernonia Sch. Dist. v. Acton*, 115 S. Ct. 2386, 2395-96 (1995). Scalia devoted merely a sentence to the concept, and yet he apparently relied on it to reach a significant constitutional conclusion. See *infra* notes 51, 154, 191.

<sup>11</sup> See *infra* notes 28-33 and accompanying text (discussing the use of and confusion between the terms).

<sup>12</sup> See, e.g., Derrick Bell, *In Memory of Thurgood Marshall*, 68 N.Y.U. L. REV. 212, 213 (1993) ("Thurgood Marshall, like it or not, was a model to black lawyers and law students across the country.").

<sup>13</sup> ROBERT K. MERTON, *SOCIAL THEORY AND SOCIAL STRUCTURE* 357 (enlarged ed. 1968).

<sup>14</sup> See *Ambach v. Norwick*, 441 U.S. 68, 78-79 (1979) (stating that a "teacher serves as a role model for his students, exerting a subtle but important influence over their perceptions and values").

<sup>15</sup> See, e.g., *Vernonia Sch. Dist. v. Acton*, 115 S. Ct. 2386, 2396 (1995) (discussing the role model effect of student athletes); *Lee v. Weisman*, 505 U.S. 577, 643 (1992)

Article will explore the genealogy<sup>16</sup> of the concept of role model

(Scalia, J., dissenting) (discussing emulation of teachers in the context of school prayer); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 497 (1989) (noting the shortcomings of a role model theory used by lower courts); *Edwards v. Aguillard*, 482 U.S. 578, 583-84 (1987) (discussing emulation of teachers in the context of Establishment Clause jurisprudence); *Ambach*, 441 U.S. at 78-79 (discussing a noncitizen teacher's influence on students as a role model); *Avery v. Homewood City Bd. of Educ.*, 674 F.2d 337, 341 (5th Cir. Unit B 1982) (rejecting arguments that "unwed parenthood is per se proof of immorality and that a parent of an illegitimate child is an unfit role model"), *cert. denied*, 461 U.S. 943 (1983); *Andrews v. Drew Mun. Separate Sch. Dist.*, 507 F.2d 611, 616-17 (5th Cir. 1975) (rejecting a role model theory that justified prohibiting unwed mothers from filling positions as teachers' aides); *Marsh v. Flint Bd. of Educ.*, 708 F. Supp. 821, 825 (E.D. Mich. 1989) (noting the repudiation of the role model theory in school hirings); *Chambers v. Omaha Girls Club*, 629 F. Supp. 925, 933 (D. Neb. 1986) (finding that a "negative role model policy" did not discriminate on the basis of race), *aff'd*, 834 F.2d 697 (8th Cir. 1987); *Pontoon v. Newport News Sch. Bd.*, 632 F. Supp. 1056, 1065 (E.D. Va. 1986) (discussing why the bad moral example set by an unwed pregnant woman is not a legitimate concern in the teaching profession); *Wygant v. Jackson Bd. of Educ.*, 546 F. Supp. 1195, 1201 (E.D. Mich. 1982) (upholding the constitutionality of a collective bargaining agreement with an affirmative action clause that recognized the "vitaly important" role that minority teachers play as role models to minority students), *aff'd*, 746 F.2d 1152, 1156 (6th Cir. 1984), *and rev'd*, 476 U.S. 267, 274-76 (1986); *Jaczak v. Ochburg*, 540 F. Supp. 698, 703 (E.D. Mich. 1982) (holding that an employer's refusal to hire a woman due to the company's supposed need for a male "role model" was discriminatory); *Harvey v. YWCA*, 533 F. Supp. 949, 952 (W.D.N.C. 1982) (discussing whether an unwed pregnant woman could offer herself to teenagers as a role model for an alternative lifestyle); *Oliver v. Kalamazoo Bd. of Educ.*, 498 F. Supp. 732, 754 (W.D. Mich. 1980) (requiring that the Board of Education recall first all laid-off black tenured teachers to ensure that students would be provided with role models).

Legal discourse on the concept of role model has not been restricted to the courts but has been taken up by the legal academy as well. See, e.g., Regina Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539, 557 (asserting that "the use of role models has become a pretext for continuing and expanding the economic and ideological war on unwed black mothers"); *Black Women Law Professors*, *supra* note 5 (exploring the issue whether African American women law professors are needed as role models for African American women law students); Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1104-09 (1991) (noting that black elected officials are role models within the black community). See generally Richard Delgado, *Affirmative Action As a Majoritarian Device: Or, Do You Really Want to Be a Role Model?*, 89 MICH. L. REV. 1222 (1991) (objecting to the role model status imposed on successful members of minority groups through affirmative action by dominant America). In legal discourse the concept is often invoked in the context of affirmative action, where it is offered as a justification for particular hiring or school admissions decisions.

<sup>16</sup> By "genealogy" I simply mean the historical development of the concept, the assumptions and meanings that the term has carried over the years, and how those assumptions and understandings might have been historically contingent. Therefore, one purpose of genealogical inquiry, to quote Michel Foucault, is "to dig deeply to show how things have been historically contingent, for such and such reason intelligible but not necessary[, to] . . . make the intelligible appear against a

and the circumstances that gave rise to its emergence.<sup>17</sup> In this regard, it might be useful to ask whether the historical fact of racial divisions in this country has contributed to the popularity of discourse on the concept of role model, at least in the popular media and in ordinary daily conversations. As the historian E.J. Hobsbawm has observed, “[c]oncepts, of course, are not part of free-floating philosophical discourse, but socially, historically and locally rooted, and must be explained in terms of these realities.”<sup>18</sup> The immense popularity of the concept of role model in the United States and the frequency with which it is invoked in daily conversations and in political discourse<sup>19</sup> suggest that its popularity as a rhetorical device derives largely from past and present local conditions.

background of emptiness, and deny its necessity . . . , [and to show] that what exists is far from filling all possible spaces.” MICHEL FOUCAULT, *Friendship As a Way of Life*, in FOUCAULT LIVE 208 (Sylvere Lotringer ed., John Johnston trans., 1989); see also William E. Connolly, *Beyond Good and Evil: The Ethical Sensibility of Michel Foucault*, 21 POL. THEORY 365, 367 (1993).

Another purpose of genealogical inquiry is to uncover the nature of social institutions and social structures that have made the discursive landscape seem necessary and inevitable to see how they can be reconstituted and reconceptualized. Put simply, genealogical inquiry has twin purposes. It enables us to critique ideology that structures people’s views and perceptions without those views and perceptions being points of reflection. See Fraser & Gordon, *supra* note 1, at 310-11. It also gives us the means to develop a fuller context within which discursive shifts and reconceptualizations are possible. See *id.*

<sup>17</sup> My desire to inquire into the genealogy of the term is partly inspired by the work of the late Raymond Williams. As Williams observed, the purpose of looking to the past is not to discover “the ‘proper’ or ‘stricter’ meaning of a word by reference to its origins . . . [and] to produce what can best be called a sacral attitude to words . . . [with] corresponding complaints of vulgar contemporary misunderstanding and misuse.” RAYMOND WILLIAMS, *KEYWORDS: A VOCABULARY OF CULTURE AND SOCIETY* 20 (rev. ed. 1985). Rather, it is to explore how historical changes—changes in social structures and circumstances—alter the relationship between words or phrases and concepts. See *id.* at 21.

Raymond Williams’s work on culture and cultural criticism has inspired many others to inquire into the genealogy of keywords or phrases. As this project neared its completion, I came across an excellent article by Nancy Fraser and Linda Gordon that set out to explore “*dependency* as a keyword of the U.S. welfare state and reconstruct its genealogy.” Fraser & Gordon, *supra* note 1, at 310. They were also inspired by Williams’s work. See *id.* It is a testimony to the power of Williams’s intelligence and the acuteness of his insights about the human condition that his work continues to inspire with equal enthusiasm people of diverse intellectual interests such as philosophers, cultural critics, historians, and legal scholars.

<sup>18</sup> E.J. HOBSBAWM, *NATIONS AND NATIONALISM SINCE 1780*, at 9 (1990).

<sup>19</sup> For example, the media invoked the term 249 times in relation to O.J. Simpson in the few weeks between his arrest on June 17, 1995, and the day I conducted this search on July 7, 1995. Search of LEXIS, News Library, Curnws File (July 7, 1994).

My aim is also clarificatory, however, because the concept of role model is more often invoked than examined. When individuals invoke the concept of role model, they refer to a diverse set of political virtues (positive role models) and vices (negative role models). An inquiry into the various meanings that the concept of role model has carried might well lead us to be skeptical about some of the ways in which the term is currently used in both the legal and social domains. Indeed, this Article claims, among other things, that people often use the term as a convenient substitute for dealing with real problems. They use the term to shift attention away from institutional and material issues to questions of mere cultural signification. In doing so, they emphasize individuals and individual acts to the exclusion of institutions and collective acts and constraints. To use C. Wright Mills's words in another context, commentators use the concept of role model in its "hypnotic though frivolous shape, [to] divert attention from problems of power and authority and social reality in general."<sup>20</sup>

This Article does not, however, aim to reject totally the concept of role model. Indeed, it is the desire to salvage a defensible and

<sup>20</sup> C. WRIGHT MILLS, *On Knowledge and Power*, in *POWER, POLITICS, AND PEOPLE: THE COLLECTED ESSAYS OF C. WRIGHT MILLS* 599, 612 (Irving L. Horowitz ed., 1963). Writing about intellectual work, Mills observes:

Intellectual work is related to power in numerous ways, among them these: with ideas one can uphold or justify power, attempting to transform it into legitimate authority; with ideas one can also debunk authority, attempting to reduce it to mere power, to discredit it as arbitrary or as unjust. With ideas one can conceal or expose the holders of power. *And with ideas of more hypnotic though frivolous shape, one can divert attention from problems of power and authority and social reality in general.*

*Id.* (emphasis added).

Cornel West refers to the concept of role model as a "glib formulation[]." CORNEL WEST, *RACE MATTERS* 31 (1993). Discussing what he saw as the racial reasoning of the black leadership that prevailed during the Clarence Thomas/Anita Hill Senate hearing, he comments:

Unfortunately, most black leaders remained caught in a framework of racial reasoning—even when they opposed Thomas and/or supported Hill. Rarely did we have a black leader highlight the moral content of a mature black identity, accent the crucial role of coalition strategy in the struggle for justice, or promote the ideal of black cultural democracy. *Instead, the debate evolved around glib formulations of a black 'role model' based on mere pigmentation, an atavistic defense of blackness that mirrors the increasing xenophobia in American life, and circled around a silence about the ugly authoritarian practices in black America that range from sexual harassment to indescribable violence against women.*

*Id.* (emphasis added).



coherent meaning for the term, in the face of the rhetorical threat that attempts to endow it with everything and thus to rob it of any meaning at all by trivializing it, that has led me to reflect on the concept. In this regard, my concern about the manipulation of the concept of role model parallels the concern David Couzens Hoy expresses in relation to the term "ideology": "it is used in so many different senses that it has become meaningless."<sup>21</sup>

I sympathize with the concern of some minority legal scholars who argue that the use of the concept of role model has negative consequences,<sup>22</sup> such as turning the issue of material inequalities

<sup>21</sup> David C. Hoy, *Deconstructing "Ideology"*, 18 PHIL. & LITERATURE 1, 4 (1994). There are more parallels between Hoy's inquiry and mine. Just like the concept of "real interests," to which the notion of ideology supposedly stands in opposition, people sometimes use the concept of role model so abstractly that its explanatory value with respect to specific cases and circumstances is very low. See, e.g., *infra* notes 51, 154 & 191 (discussing Justice Scalia's use of the concept of role model in *Vernonia*). And at other times, again like "real interests," of which ideology is supposed to be a false imitation, some people invoke the concept of role model in "common sense" ways, such that it has not been subjected to critical scrutiny to assess whether those "common sense" views might be historically and culturally contingent, rather than self-evident truths. See *infra* part III.A.3.c. Hoy's statement about what he believes to be the poststructuralists' view of "real interest" can easily apply to the notion of role model:

If I read poststructuralists like Foucault, Derrida, and Laclau and Mouffe correctly, they are skeptical about the possibility of identifying these real interests in a substantive way. That is, either the real interests will be so universal and abstract as to be unexplanatory of concrete historical cases, or they will be merely attributes of common sense, ones about which we should be historically suspicious since the common sense of one age may not be the same as that of another. The poststructuralists therefore have little use for the concept of ideology, at least in the specific sense of distorted group consciousness.

Hoy, *supra*, at 7.

<sup>22</sup> Many scholars of color are at best ambivalent about using the concept as a justification for affirmative action hiring programs. Anita Allen expressed it this way:

Role models can be extremely important, especially in the lives of young adults. But . . . the role model argument is deeply problematic. It mischaracterizes black women's actual and potential contributions. The 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.

Anita L. Allen, *On Being a Role Model*, 6 BERKELEY WOMEN'S L.J. 22, 25 (1990-1991). At another point Allen observes: "One problem with the role model argument is that while it trumpets our necessity, it whispers our inferiority." *Id.* at 37.

Others, such as Richard Delgado, have specifically rejected the concept. After giving a number of reasons why minority scholars ought to decline to be inscribed as role models, Delgado concludes:

You can do other more honorable, authentic things. You can be a mentor. You can be an "organic intellectual," offering analysis and action programs

into a mere problem of psychology and perception, recharacterizing institutional and structural constraints as individual failings on the part of the supposed role model and lack of ambition on the part of the supposed role model follower, and creating the possibility that the concept will be invoked to affirm and sustain racial tokenism.<sup>23</sup> Despite these negative realities and possibilities, however, we should not reject the concept of role model in its entirety. Rather, we must investigate the "taken-for-granted" meanings of the term, reveal how the ideology of disempowerment characterizes those meanings, and rearticulate the concept as one of resistance, empowerment, and transformation.

Part I explores the genealogy of the term "role model." It examines the various ways and circumstances in which individuals have understood and invoked the term over the last four decades. As Part I illustrates, two distinct meanings emerged early on: the "role imitation" view and the "comprehensive" view. Both of these approaches enjoy logical and descriptive support. Part I also identifies a recent shift in the use of the concept of role model away

for our people. You can be a matriarch, a patriarch, a legend, or a provocateur. You can be a socially committed professional who marches to your own drummer. You can even be yourself. But to the ad, ROLE MODEL WANTED, the correct answer, in my view, is: NOT ME!

Delgado, *supra* note 15, at 1230-31 (citations omitted).

Interestingly, some minority scholars seem to be simultaneously attracted to and suspicious of the concept of role model. For example, compare Derrick Bell's observation that Justice Marshall "was disdainful of the value of 'role models' like himself," Bell, *supra* note 12, at 213, with the following: "It is very sad but no less clear that black women must assume much of the future leadership burden in the racial struggle. It is thus imperative that we provide models and mentors." ELEANOR KERLOW, POISONED IVY: HOW EGOS, IDEOLOGY, AND POWER POLITICS ALMOST RUINED HARVARD LAW SCHOOL 94 (1994) (quoting Bell during his unsuccessful attempt to persuade Harvard Law School to hire a minority woman professor).

<sup>23</sup> Derrick Bell, in a memorial to Justice Marshall, writes, "[Marshall] was disdainful of the value of 'role models' like himself in a society that deems racial tokenism both progress and proof that personal failings, and not racism, explain the meager achievements of so many blacks." Bell, *supra* note 12, at 213; see also Linda S. Greene, *Tokens, Role Models, and Pedagogical Politics: Lamentations of an African American Female Law Professor*, 6 BERKELEY WOMEN'S L.J. 81, 87-89 (1990-1991) (noting that "the symbolic aspects of our presence often dominate our experiences" and describing role modeling as "a seductive and debilitating business"); Lani Guinier, *Of Gentlemen and Role Models*, 6 BERKELEY WOMEN'S L.J. 93, 99 (1990-1991) (preferring the term "mentor" to "role model" due to concerns about the way the role model argument diminishes the contributions of role models); Angela Harris, *Women of Color in Legal Education: Representing La Mestiza*, 6 BERKELEY WOMEN'S L.J. 107, 108-09 (1990-1991) (discussing the pressure on minority scholars "to prove [our] specialness once and for all" and observing that "[t]he price of specialness is the gilded cage of the token").

from the role imitation and comprehensive views. More and more, the concept refers to race and gender specific activities or interests. I suggest reasons why that shift has occurred, why it might be peculiarly American, and what purposes it might serve.

Part II engages in a critical evaluation of the two primary historical conceptions of role model and argues that the recent departure from them toward a usage of the concept of role model that focuses on race and gender is sometimes logically unsound, descriptively incoherent, and normatively suspect. I also argue, however, that this new approach may sometimes be useful and make sense in terms of what the noted political theorist, Charles Taylor, has referred to as "the politics of recognition."<sup>24</sup> Part II.C develops the notion of the politics of recognition, drawing from the works of George Herbert Mead, Jürgen Habermas, Charles Taylor, and Axel Honneth and then explores the relationship between the politics of recognition and the concept of role model.

Part III examines how each conception of role model—the role imitation view, the comprehensive view, and the politics of recognition view—has fared in the jurisprudence of the courts. I conclude that courts express inconsistent views regarding the usefulness of the concept of role model in the context of adjudication. Likewise, the courts that have accepted the term into their jurisprudence do not agree on what meaning to attach to it. I also draw two general conclusions from the jurisprudential "career" of the concept of role model. First, courts invoke the rhetoric of role model to defend normative positions without making extended arguments to justify those positions. Second, the courts embrace the term as jurisprudentially meaningful and precise when the issue involves the exclusion of marginal groups from political and social life. When minority claimants invoke this rhetoric to support normative positions that do not correspond with the horizons of significance of members of the court,<sup>25</sup> however, courts debunk the rhetoric as amorphous and jurisprudentially suspect (in the same way that general societal discrimination is said to be amorphous).<sup>26</sup>

Part IV deals with likely objections to including the concept of role model within the politics of recognition. These objections are

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<sup>24</sup> Charles Taylor, *The Politics of Recognition*, in *MULTICULTURALISM AND "THE POLITICS OF RECOGNITION"* (Amy Gutmann ed. 1992).

<sup>25</sup> For a description of the notion of "horizons of significance," see *infra* note 121 and accompanying text.

<sup>26</sup> See *infra* note 166.

premised on the fear that including the concept of role model as a version of the politics of recognition devalues, or has the potential of devaluing, two important precepts: individual agency and cultural integrity. These objections, however, rest on erroneous historical and empirical assumptions and are either unwarranted or insincere.

## I. ROLE MODELS: THE HISTORY OF A CONCEPT

The concept of role model is a rhetorical device. Like other rhetorical devices, it emerged within a specific context and has a certain history. A full understanding of the concept requires a genealogical inquiry. This Part provides a brief account of the various ways in which individuals have invoked the term over the years.<sup>27</sup> But before I begin this genealogical inquiry, let me distinguish the term role model from two terms with which it has often been confused: mentor<sup>28</sup> and hero.<sup>29</sup>

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<sup>27</sup> For a comprehensive history of role theory, see BRUCE J. BIDDLE, *ROLE THEORY: EXPECTATIONS, IDENTITIES, AND BEHAVIORS* (1979) [hereinafter *ROLE THEORY EXPECTATIONS*] and *ROLE THEORY: CONCEPTS AND RESEARCH* (Bruce J. Biddle & Edwin J. Thomas eds., 1979) [hereinafter *ROLE THEORY CONCEPTS*]. For an attempt to reformulate role theory with a Nietzschean insight, see Charles D. Kaplan & Karl Weiglus, *Beneath Role Theory: Reformulating a Theory with Nietzsche's Philosophy*, 6 *PHIL. & SOC. CRITICISM* 289 (1979).

<sup>28</sup> Paul Carrington, for example, has used the terms "role model" and "mentor" interchangeably:

The idea that race or gender is important in *mentoring* relationships has the unwelcome characteristic of being segregationist in effect. It suggests to students and faculty that a Mexican-American student, for example, ought to have a Mexican-American *role model*, not a black or a white *role model*. It suggests that persons desiring career counseling should expect to receive it from one of their own.

Paul D. Carrington, *Diversity!*, 1992 UTAH L. REV. 1105, 1149 (emphasis added). For an extended discussion of Carrington's substantive views on the question of race-specific mentoring, see *infra* note 90.

<sup>29</sup> For example, when Winnie Mandela visited New York in 1990, the *Washington Post* used the term "role model" in an heroic sense to describe her. "Leading crowds in her 'Amandla!' (Power!) chant and hailed from midtown television studios to Brooklyn street corners as an inspiration and a *role model* for African American women, the anti-apartheid leader delivered potent messages with unflappable dignity." Paula Span, *The Rallying Cry of Winnie Mandela: In New York, the South African Forges a Bond with Black Women*, WASH. POST, June 23, 1990, at G1 (emphasis added).

*Boston Globe* columnist Ellen Goodman used similar language when she referred to General Norman Schwarzkopf, the military leader of Operation Desert Storm, as "the real thing" for those "search[ing] for a new model of male leadership." Ellen Goodman, *A Shining (Four) Star*, BOSTON GLOBE, Mar. 14, 1991, at 21.

A. "Role Models," "Mentors," and "Heroes"

A mentor is an individual who takes an interest in a specific person and supports that person in his or her professional life. The mentor is usually older and certainly more professionally established than his or her protégé.<sup>30</sup> The relationship between a mentor and a protégé is a reciprocal relationship. Both mentor and protégé show active and personal interest in one another. One cannot be a mentor to the world, nor can one be a protégé of an individual who shows no personal interest in oneself or in one's work. In contrast, a role model relationship does not necessarily involve a two-way relationship. While a supposed role model follower will have an interest in the activities of his or her role model, the role model does not need to have a specific interest in the role model follower and often does not even know him or her personally. Lawyers and law students can imitate a famous lawyer in spite of the fact that the role model and the role model emulators have not met. Unlike a mentor/protégé relationship, a role model/role model emulator relationship is not necessarily personal or reciprocal.<sup>31</sup>

The terms hero and role model have also been used interchangeably,<sup>32</sup> and I think the two are distinguishable as well. A hero is not necessarily a role model. One of the distinguishing features of a role model is that he or she inspires the possibility of emulation. On the other hand, a hero instills admiration and respect for the qualities he or she displays and the achievements he or she has attained. Most people who consider someone a hero

<sup>30</sup> See Jeanne J. Speizer, *Role Models, Mentors, and Sponsors: The Elusive Concepts*, 6 SIGNS 692, 708 (1981) ("The term[] 'mentor' . . . [is] often used . . . to indicate older people in an organization or profession who take younger colleagues under their wings and encourage and support their career progress until they reach midlife."); see also Taunya L. Banks, *Two Life Stories: Reflections of One Black Woman Law Professor*, 6 BERKELEY WOMEN'S L.J. 46, 46 (1990-1991) (noting that the term "mentor" has an intellectual connotation that the term "role model" generally lacks).

<sup>31</sup> For a further discussion of mentors and mentoring relationships, see *infra* notes 89-90 and accompanying text.

<sup>32</sup> In a letter to the widow of Justice Thurgood Marshall, Judge Harry T. Edwards of the United States Court of Appeals for the D.C. Circuit explicitly linked the term hero to the concept of role model. "From afar, I watched and listened and learned, and *Thurgood Marshall became a true hero in my life. It would be presumptuous to say that I aimed to emulate him, for what he did was beyond reach; but he was a role model for me.*" Letter from Harry T. Edwards to Mrs. Marshall (Jan. 29, 1993), in *In Memory of Thurgood Marshall*, 68 N.Y.U. L. REV. 205, 207 (1993) (emphasis added). Note how Judge Edwards used the terms "role model" and "hero" interchangeably by explicitly suggesting that emulation does not constitute a defining characteristic of the concept of role model.

might not have the capacity or the inclination to emulate the actions and activities that made that person a hero. Judge Learned Hand clearly understood this fine point. "One may admire and approve the course of a hero without feeling any duty [one might say even inclination] to follow him. . . . [T]here is surely an appreciable distance between esteem and emulation."<sup>33</sup> Of course, a hero can act as a role model for certain individuals, but a hero is not necessarily a role model for all individuals who consider him or her a hero.

### B. *The Development of the Traditional Role Concept of Role Model*

Given the distinctions among the concept of role model and the terms mentor and hero, what does role model mean and how did it achieve the prominence it currently enjoys?

Even though "[t]he term 'role models' first appeared as a category in most fields in 1973," it emerged at least as early as 1957.<sup>34</sup> In a book on the sociology of medical education, Wagner Thielens, Jr. studied entrants to medical and law schools and compared how the students of the two professions "begin to learn and to practice the professional role."<sup>35</sup> He found that students "often choose a figure in the profession, a practitioner known personally or one known only by repute, as a model to imitate and an ideal with which to compare their own performance. In short, they adopt a *role model*."<sup>36</sup>

As a rhetorical device, this concept of role model connotes positive or desirable examples or commitments. It illuminates the processes by which an aspiring role occupant learns the virtues and commitments associated with that role from a role occupant. The concept of role model in this sense has a restricted meaning; a role

<sup>33</sup> *Masses Publishing Co. v. Patten*, 244 F. 535, 542 (S.D.N.Y. 1917), *rev'd*, 246 F. 24 (2d Cir. 1917). As Judge Hand explained, the fact that *The Masses*, a leftist monthly magazine, praised conscientious objectors of WWI such as Emma Goldman and Alexander Berkman should not, as most judges then thought, be taken as encouragement to the magazine's readers to emulate those praised, and, thus, its activities did not violate the Espionage Act of 1917. *See id.* at 541-42.

<sup>34</sup> Speizer, *supra* note 30, at 693. In a recent article about the way journalists used the concept of role model in the O.J. Simpson case, Brent Staples claimed that "[t]he term entered the language 30 years ago." Brent Staples, *Role Models, Bogus and Real*, N.Y. TIMES, June 24, 1994, at A26.

<sup>35</sup> Wagner Thielens, Jr., *Some Comparisons of Entrants to Medical and Law School, in THE STUDENT-PHYSICIAN: INTRODUCTORY STUDIES IN THE SOCIOLOGY OF MEDICAL EDUCATION* 131, 137 (Robert K. Merton et al. eds., 1957).

<sup>36</sup> *Id.* (emphasis added).

model can provide an example in a specific and narrow field.<sup>37</sup> For example, a professional acts as a role model to those entering that profession, but only in relation to their professional lives. Thus, a medical doctor serves as a role model for medical students, and a lawyer serves as a role model for law students. There is neither the demand nor the expectation that the professional will serve as a role model in a comprehensive sense. This is how Robert Merton understood the concept in 1956. Distinguishing between a role model and what he termed a "reference individual," Merton wrote:

Emulation [of individuals] . . . may be restricted to limited segments of their behavior and values and this can be usefully described as adoption of a role model. Or, emulation may be extended to a wider array of behaviors and values of these persons who can then be described as reference individuals.<sup>38</sup>

For the moment, our concern is not whether Merton's distinction between role models and reference individuals is persuasive.<sup>39</sup> Our

<sup>37</sup> This meaning corresponds with the dictionary definition of the term. *Webster's* defines a role model as "a person whose behavior *in a particular role* is imitated by others." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1021 (9th ed. 1988) (emphasis added); see also RICHARD WEINER, WEBSTER'S NEW WORLD DICTIONARY OF MEDIA AND COMMUNICATIONS 410 (1990) ("A role model is an individual who serves as a prototype or model to be emulated."); Theodore D. Kemper, *Reference Groups, Socialization and Achievement*, 33 AM. SOC. REV. 31, 33 (1968) ("[A role model] possesses skills and displays techniques which the actor lacks (or thinks he lacks), and from whom, by observation and comparison with his own performance, the actor can learn.").

<sup>38</sup> MERTON, *supra* note 13, at 357. Actually, the notion of a "reference individual" or the related concept of "reference group" has prior origins. Herbert Hyman supposedly coined the term "reference group." See *id.* at 329 (reporting that, although others identified elements of the notion underlying the expression "reference group," Hyman invented the actual term); see also Robert K. Merton & Alice S. Kitt, *Contributions to the Theory of Reference Group Behavior*, in CONTINUITIES IN SOCIAL RESEARCH: STUDIES IN THE SCOPE AND METHOD OF "THE AMERICAN SOLDIER" 40, 69-70 n.25 (Robert K. Merton & Paul F. Lazarsfeld eds., 1950) (naming Hyman as the pioneer of reference group research); Tamotsu Shibutani, *Reference Groups As Perspectives*, 60 AM. J. SOC. 562, 562-63 (1955) (attributing the term "reference group" to Hyman and redefining it based on stricter criteria). Theodore Kemper later refined the definition of a "reference group" as "a group, collectivity, or person which the actor takes into account in some manner in the course of selecting a behavior from among a set of alternatives, or in making a judgment about a problematic issue." Kemper, *supra* note 37, at 32. See generally Herbert H. Hyman, *The Psychology of Status*, 38 ARCHIVES PSYCHOL. 5 (No. 269) (R. S. Woodworth ed., 1942).

<sup>39</sup> In fact, Merton himself understood that the distinction might not always hold. "To be sure, a role model may become a reference individual as his multiple roles are adopted for emulation rather than emulation remaining confined to the one role on

concern involves Merton's conception of role models as role-specific, rather than as role models in the comprehensive sense.<sup>40</sup> Merton argues that an individual provides an example only in relation to a "limited segment of [his] behavior"—generally professional in nature.<sup>41</sup>

### 1. The Role Imitation View

Merton's hypothesis presumes that role model followers can pick and choose the characteristics they emulate, imitating the role model *only* in relation to a particular role and not worrying about other aspects of the role model's life. Indeed, this conception explains why the concept of role model was originally understood in positive terms only.<sup>42</sup> By definition, a role model chosen explicitly for his or her professional status cannot provide a negative example. After all, a professional role model impliedly possesses a certain positive professional status. So long as the role aspirant disregards other negative aspects of the role model's life, imitation will be limited to his or her positive traits.

In its earliest days, therefore, the concept of role model conveyed a positive meaning tied to the notion of role playing.<sup>43</sup> Individuals occupy certain social positions and perform certain social functions. By virtue of occupying those positions and playing those roles, they will be looked up to and imitated by others who aspire to those roles and positions. This conception assumes a number of facts. First, there is differentiation of roles.<sup>44</sup> Second, individuals appear to others primarily as role players.<sup>45</sup> Third,

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the basis of which the initial psychological relationship was established." MERTON, *supra* note 13, at 357.

<sup>40</sup> I argue that reference individuals are role models in the comprehensive sense. See *infra* part I.B.2. For a general discussion of role models in the comprehensive sense, see *infra* part II.B.

<sup>41</sup> MERTON, *supra* note 13, at 357.

<sup>42</sup> The currently prominent notion of negative role models was not considered a constitutive part of the concept.

<sup>43</sup> The development of this version of the concept of role model might not only be a response to role differentiation, but also a response to the development of the distinction between appearance and reality. What I have in mind here is the emergence of movies where an individual plays a role in a performance that replicates the action of another individual (real or imagined) at another time.

<sup>44</sup> For an interesting discussion of how role identifications and role obligations develop, see Michael O. Hardimon, *Role Obligations*, 91 J. PHIL. 333, 333 (1994) (defining "role obligations" as "the sort of obligations we have (or take ourselves to have) as occupants of social roles: as citizens, family members, teachers, and so forth").

<sup>45</sup> *But cf. id.* at 359 ("[I]t is possible to identify with a role . . . without regarding



individuals will have an impact on others only in relation to those specific roles. I shall inquire whether these assumptions are defensible at a later point in this Article.<sup>46</sup>

For the moment, it is sufficient to conclude that the concept of role model, in its simplest form, refers to a socializing process in a social and political environment where a clear division of roles exists and where people aspire to those roles by attempting to imitate those whom they regard as performing admirably in those roles. This conception assumes that individual role models embody a collection of roles that role imitators can disaggregate in order to service specific concerns.<sup>47</sup>

## 2. The Comprehensive View

As I indicated earlier, however, Merton's conception of role model also applies to an individual who provides a comprehensive example in relation to "a wider array of behaviors and values," someone whom he refers to as a "reference individual."<sup>48</sup> An individual may influence certain people through many aspects of their lives—aspects which transcend a particular (professional) role. Such an individual exerts a comprehensive influence. The most obvious candidates for role models in this sense include parents for children,<sup>49</sup> teachers for students,<sup>50</sup> and peers for teenagers.<sup>51</sup>

Two factors define those I have just listed as potential role models in the comprehensive sense. First, comprehensive role models are likely to spend a great deal of time with those role model followers whom we believe will look up to them. As a result,

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the role as essential to 'who one is' or taking the role to be an essential component of one's 'true self.'").

<sup>46</sup> See *infra* part II.A.

<sup>47</sup> See *infra* notes 85-86 and accompanying text.

<sup>48</sup> MERTON, *supra* note 13, at 356-58; see also *supra* notes 38-41 and accompanying text.

<sup>49</sup> See Joan McCord & William McCord, *The Effects of Parental Role Model on Criminality*, in *ROLE THEORY CONCEPTS*, *supra* note 27, at 370, 371-76 (discussing a study that concludes that children whose parents served as poor role models have a greater tendency to exhibit criminal behavior).

<sup>50</sup> See *supra* note 14 and accompanying text.

<sup>51</sup> See *Vernonia Sch. Dist. v. Acton*, 115 S. Ct. 2386, 2395-96 (1995) ("As to the efficacy of [random drug testing of students who participated in the school's athletics program] for addressing the problem [of teen drug abuse]: It seems to us self-evident that a drug problem largely fueled by the 'role model' effect of athletes' drug use, and of a particular danger to athletes, is effectively addressed by making sure that athletes do not use drugs.").

the role model followers will have a chance to watch closely and study the actions, habits, and commitments of their role models and perhaps will imitate them someday. Given the fact that people in their formative years learn about correct habits and virtuous commitments by observing others, they will probably learn the most from those with whom they spend a considerable amount of time, that is, parents, teachers, and peers.

Second, comprehensive role models possess some kind of power over those individuals for whom they may serve as role models. This power is not always coercive—although coercion may play a part—but there is a degree of vulnerability in the role model follower vis-à-vis the role model. By vulnerability I mean two things. First, the role model follower is subject to constant and imminent sanction, moral or otherwise, from the role model whenever the role model follower acts in ways inconsistent with the desires and commitments of the role model. Parents, teachers, and even peers have the power to sanction. This vulnerability might lead the role model follower to develop a tendency to follow the role model even in relation to activities and commitments that the role model would have preferred that the role model follower disregard. Second, given that individuals develop their identities largely through a process of recognition and affirmation from others and that recognition and affirmation will largely come from a “circle of partners to communication” such as parents, teachers, and peers,<sup>52</sup> the role model follower will probably try to earn “invulnerability and integrity”<sup>53</sup> by purchasing recognition and approval through a process of emulation. A vulnerable individual in this sense is someone who fears a lack of recognition and affirmation, for “invulnerability and integrity . . . depend on approval being

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<sup>52</sup> Axel Honneth, *Integrity and Disrespect: Principles of a Conception of Morality Based on the Theory of Recognition*, 20 POL. THEORY 187, 189 (1992).

<sup>53</sup> *Id.* Honneth reads Hegel and, especially, G.H. Mead as holding the following position:

[H]uman individuation is a process in which the individual can unfold a practical identity to the extent that he is capable of reassuring himself of recognition by a growing circle of partners to communication. Subjects capable of language and action are constituted as individuals solely by learning, from the perspective of others who offer approval, to relate to themselves as beings who possess certain positive qualities and abilities. Thus as their consciousness of their individuality grows, they come to depend to an ever increasing extent on the conditions of recognition they are afforded by the life-world of their social environment.

*Id.* (citations omitted).

forthcoming from others."<sup>54</sup> It makes sense, therefore, to say that those who spend a great deal of time with people who have a certain degree of power over them will probably emulate those people. Time and power are therefore the social capital at the role model's disposal. Indeed, the role model's influence inheres in his power to structure the environment under which the role model follower might imitate the role model's actions and commitments.

### C. *The Emergence of Race and Gender Specific Role Model Rhetoric*

In recent years, at least in the United States, the concept of role model has been extended to relationships beyond the two versions I have outlined. Successful women are praised and held up as role models to other women, even to those who might have different ideological and political commitments.<sup>55</sup> Likewise, successful minorities are held up as role models for members of their racial and ethnic groups.<sup>56</sup> Indeed, for a while the concept of role model seemed to provide, for some, the most secure jurisprudential justification for affirmative action both in the context of education and employment.<sup>57</sup>

Thus, a shift has occurred in American culture in the use of the concept of role model to include gender and race specific emulations. Indeed, in recent years role model rhetoric has been invoked most prominently in relation to minorities, and sometimes in relation to women. Generally, the concept of role model has assumed prominence in both scholarly and popular discourse in

<sup>54</sup> *Id.*; see also GEORGE H. MEAD, *MIND, SELF, & SOCIETY: FROM THE STANDPOINT OF A SOCIAL BEHAVIORIST* 175 (Charles W. Morris ed., 1934) ("The 'I' is the response of the organism to the attitudes of the others; the 'me' is the organized set of attitudes of others which one himself assumes. The attitudes of the others constitute the organized 'me,' and then one reacts towards that as an 'I.'" (footnotes omitted)).

<sup>55</sup> See Patricia Harrison, *Successful Women: No 'One Size Fits All'*, USA TODAY, June 25, 1993, at 12A. Harrison, President of the National Women's Economic Alliance Foundation, criticized Gloria Steinem for referring to the newly elected Republican senator from Texas, Kay Bailey Hutchison, as a "female impersonator":

Whether we are talking about America's new women entrepreneurs or women in the political arena, from Kay Bailey Hutchison to Dianne Feinstein [a Democratic senator from California], they offer a powerful and positive road of possibilities. These are not 'female impersonators.' They are role models and contributors to community and country. Real women doing real things.

*Id.*

<sup>56</sup> See *supra* notes 5-6 and accompanying text.

<sup>57</sup> See *infra* part III.A.1.

relation to those who have been excluded from the centers of political and social power. There has been a focus on the relationship between the members of those minority or marginalized groups who have supposedly succeeded and those members who supposedly need some inspiration in order to succeed. Thus, the debate about athletes as role models<sup>58</sup> quite often involves a debate about African Americans as role models for young African Americans: people implicitly assume that the conversation is not about white athletes being role models for either young blacks or young whites. Likewise, in the debate about teachers as role models in the context of higher education and employment, quite often African Americans or Hispanic Americans are the subjects of discourse.

Before I suggest why recent discussions involving the concept of role model have often focused on minorities, especially African Americans,<sup>59</sup> let me offer some speculation as to why attention has shifted away from the traditional versions of the concept of role model—the role imitation view and the comprehensive view—toward a more race and gender specific conception. First, this shift might be tied to the fact that we live in a multiethnic, multicultural, and multiracial society. The self-image of this country has generally

<sup>58</sup> See *infra* notes 77-81 and accompanying text. Sports journalists are aware of the role they have played in creating the controversy:

[S]ome observers view the athlete-as-role-model very seriously indeed. For example, the veteran New York sports columnist Dick Young has taken Dwight Gooden, the Mets' 22-year-old pitching star, severely to task for failing America's youth by testing positive for cocaine during spring training in March. Young has railed that 'druggies' should be locked up in special concentration camps.

John Papenek, *Athletes or Role Models? Demanding Higher Standards from Players Is Unrealistic*, SPORTS ILLUSTRATED, June 15, 1987, at 84, 84.

The episode involving O.J. Simpson, the former football player and television sports analyst for NBC, has resurrected the issue of athletes as role models in the media. For a sample of the commentary on the issue of the desirability of viewing athletes as role models, see Carl Chancellor, *A Black Role Model? Better Rethink That Idea*, HOUS. CHRON., June 23, 1994, at A33 (arguing that O.J. Simpson, although a star in many fields, is an inappropriate role model for the black community), available in LEXIS, News Library, Majpap File; Donald Kaul, *Simpson Doesn't Deserve Hero's Mantle*, HOUS. CHRON., June 23, 1994, at A32 (noting that, although a football and film star, O.J. Simpson was also a wife beater and adulterer and concluding that "if any [athletes] are worth emulating, it is strictly by accident"), available in LEXIS, News Library, Majpap File; David D. Porter, *O.J. and Justice, Whatever Simpson Is, He Isn't a Hero . . .*, ORLANDO SENTINEL, June 21, 1994, at A9 (arguing that athletes in general are only paid entertainers who do not deserve the status of role model or hero); Staples, *supra* note 34, at A26 ("The only legitimate 'role model' [for children] is the person whom children can see, feel, and interact with in their daily lives.").

<sup>59</sup> See *infra* notes 62-74 and accompanying text.

assumed that the "American Experience" brings together people of different cultural backgrounds, racial origins, and ethnic affiliations and, through a process of assimilation, produces one People with certain distinct commitments, cultural sensibilities, and civic virtues. Put simply, the dominant assumption has been that institutional processes in this country transform individuals of different cultural backgrounds and orientations into individuals who are themselves "intrapyschically multicultural."<sup>60</sup>

That self-image, however, has never really reflected reality,<sup>61</sup> especially for African Americans. This country's institutions often

<sup>60</sup> Amelie O. Rorty, *The Hidden Politics of Cultural Identification*, 22 POL. THEORY 152, 155 (1994) ("[I]ndividuals of multicultural nations are in a sense themselves intrapyschically multicultural. Typically, their shared identity-defining motives—and the vast range of interpretive habits they carry with them—permeate and often outweigh their cultural differences." (footnotes omitted)); see also Amy Gutmann, *The Challenge of Multiculturalism in Political Ethics*, 22 PHIL. & PUB. AFF. 171, 183 (1993) ("Not only societies, but people are multicultural."). Gutmann offers the Muslim, Indian-born British writer, Salman Rushdie, as an example:

I was born an Indian, and not only an Indian, but a Bombayite. . . . My writing and thought have . . . been as deeply influenced by Hindu myths and attitudes as Muslim ones . . . . Nor is the West absent from Bombay . . . . The point is this: Muslim culture has been very important to me, but it is not by any means the only shaping factor.

*Id.* (quoting Salman Rushdie, *In Good Faith*, in IMAGINARY HOMELANDS: ESSAYS AND CRITICISM 393, 404 (1991)).

<sup>61</sup> In an op-ed piece for the *New York Times*, the distinguished scholar Richard Sennett challenges the characterization of multiculturalism as a process of fragmenting and destroying America's "common civic culture." For Sennett, such an America never existed:

From the beginning, American society has been fragmented by differences of wealth, religion and language, as well as by the conflicts between slave and nonslave states. The waves of immigration after the Civil War did not break apart a unified nation; they added new diversities to old divisions.

. . . .

. . . [Phrases such as] national identity or an American character . . . disguise[] inequalities and legitimate[] attacks on people whose lives are different . . . [as not being] 'real Americans.'

Richard Sennett, *The Identity Myth*, N.Y. TIMES, Jan. 30, 1994, § 4, at 17; see also Richard Sennett, *The Rhetoric of Ethnic Identity*, in THE ENDS OF RHETORIC, *supra* note 9, at 191, 206 ("Liberal piety hoped for [the word] 'we' to appear simply as an act of goodwill. The piety is both naive and unworthy of the struggle involved in learning to think fraternally about those one does not resemble.").

Interestingly, another distinguished scholar who sees himself as part of the broader left wrote an op-ed reply to Sennett for the *New York Times*, calling people like Sennett the "unpatriotic left," a phrase that has been used historically to silence and victimize the left. See Richard Rorty, *The Unpatriotic Academy*, N.Y. TIMES, Feb. 13, 1994, § 4, at 15.

treat African Americans as the negation of, or challenge to, the "common civic culture," rather than as a constitutive part of it.<sup>62</sup> Consequently, many African Americans, especially the young, appear to be alienated from many of this nation's institutions, including the two most important assimilative ones: the educational system and the media. As a result, these institutions have not had a substantial impact on the development of these "New World sensibilities,"<sup>63</sup> commitments, and outlooks among African Americans.<sup>64</sup>

In an environment where the major assimilative institutions do not reach a certain segment of the population and in a context where that marginalized group represents a challenge to the very commitments and virtues that supposedly define the society's "New World sensibilities," the only way to convince the marginalized group to accept the virtues that the majority considers the defining features of the society might be to offer up some individuals from

<sup>62</sup> See generally Adeno Addis, "Hell Man, They Did Invent Us": *The Mass Media, Law, and African Americans*, 41 BUFF. L. REV. 523 (1993) (discussing how the mainstream media produces and reproduces a largely negative image of African Americans).

In his book, *Idols of the Tribe: Group Identity and Political Change*, Harold Isaacs best captured the ambiguous status that African Americans have occupied in this society even after their basic humanity was formally, albeit reluctantly, recognized: "Black Americans . . . continued not to belong. They remained firmly placed but always displaced, rooted yet held rootless, included yet relentlessly excluded: their two-ness, *American* and *Negro*, made them national and alien at the same time." HAROLD R. ISAACS, *IDOLS OF THE TRIBE: GROUP IDENTITY AND POLITICAL CHANGE* 199 (1975).

The paradox that Isaacs so lucidly describes is, of course, the process by which blacks in this country have been constructed as the negation of this "common civic culture." Blacks have been treated as the contrast to the virtues and sensibilities that supposedly define this society. They are "firmly placed," "rooted," and "included," *id.*, not only because they are physically here and have no where to go, but also because their presence has profoundly affected and shaped the institutions and values that define this society. Nevertheless, African Americans are "always displaced," "held rootless," and "relentlessly excluded," *id.*, because their presence is seen by the majority as the background (the contrast Other) against which the virtues and commitments of this polity are defined and developed, not as the co-developers of these commitments and sensibilities.

<sup>63</sup> Cornel West describes America as embodying a "radical cultural hybridity, an improvisational New World sensibility." Jervis Anderson, *Life and Letters: The Public Intellectual*, NEW YORKER, Jan. 17, 1994, at 39, 48 (quoting Cornell West discussing the contributions made by both blacks, like Louis Armstrong and Sarah Vaughn, and whites, like Ralph Waldo Emerson and Walt Whitman).

<sup>64</sup> Indeed, for some African Americans the alienation is so profound that they do not identify themselves as Americans. See ANDREW HACKER, *TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL* 34 (1992) (citing August Wilson and Toni Morrison as prominent examples of African Americans who feel such alienation).

within that group as role models. Thus, the concept of role model can be seen as an attempt to develop unifying and assimilative institutions in a divided society, where the example of members of one community is, for various reasons, unavailable for emulation by members of another. After all, Joe Montana, the white former quarterback for the San Francisco 49ers and the Kansas City Chiefs, is not generally regarded as a role model for inner-city black children. Similarly, when commentators continually urge black athletes to be positive role models (or more likely when they castigate them for being negative role models), they implicitly suggest that it is young blacks, not young whites, who will follow their example. Seen this way, it does not seem accidental that this new version of the concept of role model gets special emphasis in this country in relation to African Americans.

There are two other reasons why commentators often apply this concept of role model to African Americans. The first involves an uncontroversial empirical claim: minorities, especially African Americans, are seriously underrepresented in the political, social, and economic life of this country. The Human Development Index, which ranks the nations of the world according to longevity, educational achievement, and per capita income and is reported in the United Nations' 1993 *Human Development Report*, tells the depressing story. The United States ranked sixth based on its entire population, first based on its white population, and thirty-first based on its African American population.<sup>65</sup> Statistical data collected by the United States government tell a similar story: African Americans have a relatively small stake in the nation's wealth<sup>66</sup> and educational institutions,<sup>67</sup> and they are relatively more likely to be affected

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<sup>65</sup> See Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2430 (1994) (citing the UNITED NATIONS DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT 1993 [hereinafter HUMAN DEVELOPMENT REPORT]).

<sup>66</sup> See generally BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1994 (114th ed. 1994) [hereinafter STATISTICAL ABSTRACT]. While the median income of white households is \$32,368, the median income of black households is only \$18,660. See *id.* at 466-67 (tbls. 710 & 712). One third of African Americans live in poverty, as opposed to 11.6% of whites. See *id.* at 478 (tbl. 733). Almost 50% of black children live below the poverty line, compared to 16% of white children. See *id.* at 475 (tbl. 728). The unemployment rate for African Americans is almost twice that for white Americans. See *id.* at 418 (tbl. 651).

<sup>67</sup> In 1992, African Americans accounted for only 2.4% of all doctoral degree recipients. See *Hearings Before the Subcomm. on Education, Arts and Humanities of the Senate Comm. on Labor and Human Resources*, May 17, 1994 (testimony of Arnold L. Mitchem, Executive Director of the National Council on Educational Opportunity Associations), available in Westlaw, Allnewsplus Database (Federal Document Clearing

by crime, either as offenders<sup>68</sup> or as victims.<sup>69</sup> In addition, a disproportionate number of African Americans are born to unmarried women or otherwise become members of single-parent families.<sup>70</sup> From these rather obvious and depressing empirical facts, some observers draw a more contestable inference: one of the reasons why minorities are underrepresented in the various aspects of social and political life is that members of those groups do not see any of their own in positions of significance.<sup>71</sup> This phenomenon, some argue, might discourage many African Americans from pursuing certain goals and from aspiring to certain positions of power or influence in mainstream society. These observers highlight the psychological and perceptual (as opposed to material and structural) impediments to success.<sup>72</sup> The assumption on

House, Inc. 1994). In fact, there was "a decline in African American doctoral recipients from 1982 to 1992, from 3.4% to 2.4% of degrees overall." *Id.*

<sup>68</sup> Although African Americans represented only 12% of the population, they made up 44% of the inmates in state and local jails in 1991. See Michele Ingrassia, *Endangered Family*, NEWSWEEK, Aug. 30, 1993, at 16, 25.

<sup>69</sup> "Almost 66 of every 100,000 black males age 14-17 are victims of major violence," compared to only 8.5 for whites of the same age group. W. John Moore, *Shooting in the Dark*, 26 NAT'L L. J. 358, 359 (1994).

<sup>70</sup> While the rate of out-of-wedlock births has increased sharply over the last three decades for all groups, it is significantly higher in the African American community than in the white community: 68% percent of black children versus 22% of white children are born out-of-wedlock. See STATISTICAL ABSTRACT, *supra* note 66, at 80 (tbl. 100).

<sup>71</sup> Of course, some conservatives draw a different conclusion. They see the underrepresentation as an indication of a lack of natural endowment and/or hard work. Here I am thinking of Charles Murray and David Duke. See, e.g., RICHARD J. HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* 276-80, 320-22 (1994) (arguing that the black population in America has measurably lower cognitive skills than the white population and that this difference accounts for the underrepresentation of blacks in high IQ occupations); Lance Hill, *Nazi Race Doctrine in the Political Thought of David Duke*, in *THE EMERGENCE OF DAVID DUKE AND THE POLITICS OF RACE* 94, 100-02 (Douglas D. Rose ed., 1992) (explaining that David Duke, like Adolf Hitler, believes that "genetic inferiority limits the ability of ethnic groups to absorb 'superior culture'").

<sup>72</sup> The late Justice Thurgood Marshall was resisting this sort of claim when he told Howard University students the following:

[People say,] "You ought to go around the country and show yourself to Negroes; and give them inspiration." For what? Negro kids are not fools. They know when you tell them there is a possibility that someday you'll have a chance to be the o-n-l-y Negro on the Supreme Court, those odds aren't too good.

Bell, *supra* note 12, at 213 (quoting Justice Thurgood Marshall, Speech at Howard University (Nov. 18, 1978)). Richard Delgado similarly observes that the most important reason for rejecting the job of role model is that it



which this argument is necessarily based is that a member of one racial group cannot emulate members of another group. After all, in the absence of such an assumption, it would make little sense to talk about the need to see a member of one's own racial group in a particular position as a figure of inspiration.

Second, quite often the discussion concerning African Americans and their supposed failures as role models involves an implicit assumption that African Americans act as a group and that they are more likely than any other group to emulate their leaders and role models. Elsewhere, I have characterized this phenomenon as the majority's tendency to see African Americans as "types,"<sup>73</sup> rather than as individuals.<sup>74</sup>

My emphasis in the preceding paragraphs on African Americans should not suggest that the extension of the two traditional versions of the concept of role model—the role imitation and comprehensive views—to a race and gender specific version pertains exclusively to African Americans. Quite the contrary, for instance, recall that, in the 1992 presidential campaign, Vice President Dan Quayle publicly criticized television's fictional character Murphy Brown for providing a less than positive role model to young women.<sup>75</sup> Quayle assumed that viewers would likely imitate the attitudes and lifestyles of the fictional characters they watch for entertainment. This episode suggests not only that role model rhetoric is being

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requires that you *lie*—that you tell not little, but big, whopping lies, and that is bad for your soul. Suppose I am sent to an inner city school to talk to the kids and serve as role model of the month. I am *expected* to tell the kids that if they study hard and stay out of trouble, they can become a law professor like me. That, however, is a very big lie: a whopper. . . . Fortunately, most kids are smart enough to figure out that the system does not work this way.

Delgado, *supra* note 15, at 1228-29 (footnotes omitted).

<sup>73</sup> See Adeno Addis, *Recycling in Hell*, 67 TUL. L. REV. 2253, 2262 (1993) (noting that the media is especially guilty of viewing African Americans as "types").

<sup>74</sup> This country's rhetorical commitment to taking individuals seriously has always been in tension with the way it has treated African Americans. African Americans have generally been treated as a group and, as such, have been summarily excluded from various spheres of life. This exclusion was legal and public for a long time. Now, it is more informal and private, but as effective.

It is also interesting to note that, when considering remedies for past exclusion and discrimination that African Americans have suffered, institutions of power insist that the individual, rather than the group, should be the point of departure. See *infra* note 250 and accompanying text.

<sup>75</sup> See *supra* note 7. Recently, Senator Robert Dole, the Republican majority leader and presidential candidate, revived the debate about the role of the entertainment industry in the moral decline of this country. See Michael Janofsky, *Reviews By Weekend Moviegoers Are In. Dole Gets a Thumbs Down*, N.Y. TIMES, June 4, 1995, at 20.

used outside the two traditional conceptions we explored earlier, but also that a role model does not even have to be a real person.<sup>76</sup>

Not too long ago, Charles Barkley, an NBA superstar who plays for the Phoenix Suns, rejected the notion that he or any other celebrity has a duty to act as a role model for America's youth.<sup>77</sup> In an advertisement for Nike that ran during televised basketball games, Barkley said, "I am not a role model. I am not paid to be a role model. I am paid to wreak havoc on the basketball court. Parents should be role models. Just because I dunk a basketball doesn't mean I should raise your kids."<sup>78</sup>

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<sup>76</sup> See *supra* note 75 (discussing how even companies have been talked about as role models).

<sup>77</sup> See Sam Smith, *Full Speed Ahead for Barkley: Sixers' Blunt Star Doesn't Worry About Bruising Egos*, CHI. TRIB., Feb. 1, 1988, § 3, at 1, 12 (admitting that he has occasionally let down his employer, which is "why athletes shouldn't be role models for kids"). As Barkley observed:

I have a sneaker deal myself, but I don't understand why people would buy one sneaker endorsed by one player over the other. Kids idolize professional athletes, which is wrong in itself, and they just copy what they're wearing. I think one of the problems we have in today's society is that it's the parents' job to be the role models. To kids that idolize me, I tell them don't do so just because I can dribble a basketball—that's really sick.

Leah Garchick, *Personals*, S.F. CHRON., Jan. 31, 1990, at A8; see also Terry Blount, *This Story Brought to You By the Chronicle*, HOUS. CHRON., Dec. 1, 1991, at 20 ("I don't believe athletes should be viewed as role models . . . 'Just because you are able to run and jump, that does not make you God.'" (quoting Charles Barkley)). Bo Jackson, a member of the Chicago White Sox at the time, echoed the point: "my view of role models is the same as Barkley's. Parents should be the ones children emulate, not athletes." Bo Jackson, *No: Parents Should Say Be Like Me, Not Like Bo*, USA TODAY, June 23, 1993, at 12C.

<sup>78</sup> E.J. Dionne Jr., *The Role of Role Models: Values and Slam Dunks*, INT'L HERALD TRIB., June 24, 1993, at 7 (quoting Barkley's advertisement). It is fair to point out that Barkley had addressed the role model issue prior to the release of the ad and that Nike, not Barkley, wanted to make use of the subsequent role model controversy. Presumably, the selling capacity of the slogan, and not the merits of the debate, inspired the advertisement.

Not all athletes agree with Barkley. Some think that there is something to the notion of athletes as role models and that they have a special responsibility to provide a good example for youngsters. In response to the Nike commercial, Karl Malone, a forward for the Utah Jazz, expressed his views: "Charles, you can deny being a role model all you want, but I don't think it's your decision to make. We don't *choose* to be role models, we are *chosen*. Our only choice is whether to be a good role model or a bad one." Karl Malone, *One Role Model to Another*, SPORTS ILLUSTRATED, June 14, 1993, at 84. For Malone, being a role model simply comes with the money and the glory. See *id.* He also finds it paradoxical that professional athletes like Barkley would resist the idea of being a role model while at the same time using their prominence and visibility to earn money by endorsing products: "I mean, why do we get endorsements in the first place? Because there are people who will follow our lead and buy a certain sneaker or cereal because we use it." *Id.* Furthermore, Malone

Note that Barkley does not suggest that he *cannot* be a role model to children; he simply wants to restrict the concept of role model to its traditional meaning: in the absence of physical presence and the authority-vulnerability nexus,<sup>79</sup> the role model follower only emulates the role model in relation to the specific role for which he or she is known.<sup>80</sup> In Barkley's case that means playing basketball. In other words, Barkley resists the notion of comprehensiveness that commentators often invoke when they apply the concept of role model to minority athletes:<sup>81</sup> athletes supposedly define for their potential emulators not only the particular professional role for which they are primarily known, but they are also expected to define the good and virtuous life for admirers they do not know personally and with whom they have no contact.

As Part I has demonstrated, the concept of role model has been invoked as a rhetorical device in various ways and contexts. In its early history, commentators used the rhetoric in the role imitation sense to refer to the relationship between role-specific models and role-specific aspirants. They also used the term in its comprehensive sense to refer to the relationship between parents and children, between teachers and students, and among peers. In the last few years, however, commentators have invoked the concept of role model in circumstances and contexts that go beyond the traditional role imitation and the narrowly defined comprehensive views. The notions of entertainers as role models and race and gender specific role models now dominate the conversation about role models. Part II will critically examine these various conceptions of role model to

adds, "I love being a role model, and I try to be a positive one." *Id.*

<sup>79</sup> See *supra* part I.B.2 (discussing the comprehensive view).

<sup>80</sup> See *supra* part I.B.1 (discussing the role imitation view).

<sup>81</sup> For example, the public discussion about whether O.J. Simpson should be seen as a role model is a discourse about role models in the comprehensive sense. It is the demand for comprehensiveness, the expectation that athletes define the good and virtuous life for young people, that makes the concept of role model controversial in this particular sense. If the concept were restricted (as the role imitation view would require) to the particular professional role for which O.J. Simpson was known (as a great football player), there would not (and should not) be any controversy. Just as a great lawyer or a great doctor could be viewed as a role model to aspiring lawyers or aspiring doctors, so too could a great football player be properly viewed as a role model for aspiring football players. The rhetoric of athletes as role models is controversial and logically incoherent, however, when it is invoked in its comprehensive sense, as is often the case.

explore whether they are logically coherent and normatively desirable.

## II. THE CONCEPT OF ROLE MODEL: A CRITICAL EVALUATION

### A. *The Role Imitation View*

That individuals who aspire to occupy certain socially defined roles might imitate the actions and commitments of other individuals in order to perform successfully those roles themselves should come as no surprise nor raise any controversy. Indeed, that is how many of us learn about roles. We define roles not merely in terms of the formal tasks and responsibilities involved, but also based on how certain role occupants perform those tasks and responsibilities. An aspiring lawyer gets an image of what it means to be a good lawyer at least as much from seeing certain role occupants perform that role as from mastering the formal descriptions of what constitutes good lawyering. This holds true for any profession or role,<sup>82</sup> especially when the task or role is complex.<sup>83</sup> Thus, it makes sense to say that role occupants will have an influence on those who aspire to those positions, for they provide aspiring role occupants with a large part of the information that defines those roles. Alfred North Whitehead got it right when he said, "We think in generalities, but we live in detail."<sup>84</sup>

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<sup>82</sup> I mentioned physicians and lawyers earlier, *see supra* notes 35-37 and accompanying text, but learning by example also applies to teachers, artists, and writers. For example, Alice Walker says that, in Zora Neale Hurston's work, she "had discovered . . . a model. . . [who] had provided, as if she knew someday I would come along wandering in the wilderness, a nearly complete record of her life." ALICE WALKER, *Saving the Life That Is Your Own: The Importance of Models in the Artist's Life*, in *IN SEARCH OF OUR MOTHERS' GARDENS* 3, 12 (1983). Walker also quotes a letter from Vincent Van Gogh to Emile Bernard, written in 1889 while Van Gogh was in a mental hospital in the South of France: "Society makes our existence wretchedly difficult at times, hence our impotence and the imperfection of our work. . . . I myself am suffering under an absolute lack of models." *Id.* at 4. Commenting on Van Gogh's observation, Walker notes that "[t]he absence of models, in literature as in life, to say nothing of painting, is an occupational hazard for the artist." *Id.*

<sup>83</sup> *See* Kemper, *supra* note 37, at 35 ("The more complex the task, the more pressing the need for a concrete model. In many areas, it is virtually impossible to try to teach a role without actual models.")

<sup>84</sup> ROLE THEORY EXPECTATIONS, *supra* note 27, at 20. The great cultural critic and critical theorist Walter Benjamin would have concurred. As he eloquently expressed, the things that mattered to him he learned not from formal prescriptions, but from people that played those roles. Thus, for example, in a letter he wrote on April 25, 1930 to his friend Gerhard Scholem, Benjamin declared: "I have come to know living Judaism in absolutely no form other than you." WALTER BENJAMIN, *THE CORRESPON-*

This narrow version of the concept of role model does not, of course, claim that aspiring role occupants imitate the role occupant outside his or her specific roles. It assumes that the lives of individuals can be disaggregated into various roles (for example, doctor, political activist, mother, etc.) and that aspiring role occupants can selectively imitate these various roles. This assumption seems defensible because individuals are constituted of multiple and overlapping identities or roles. As George Herbert Mead observed:

We carry on a whole series of different relationships to different people. We are one thing to one man and another thing to another. . . . We divide ourselves up in all sorts of different selves . . . . We discuss politics with one and religion with another. There are all sorts of different selves answering to all sorts of different social reactions. It is the social process itself that is responsible for the appearance of the self; it is not there as a self apart from this type of experience. A multiple personality is in a certain sense normal . . . .<sup>85</sup>

The only way that we can simultaneously adhere to the notion of distinct individual identity, on the one hand, and the social nature of that identity, on the other, is to recognize that our distinct individual identities result from imitated multiple identities assembled in a distinct way or from overlapping multiple identities imitated from different sources. If that is the case, the disaggregation of roles must play a part in the process of learning and emulation.<sup>86</sup> Assuming the disaggregation of roles and that role model emulators imitate role occupants only in relation to their specific roles, does it automatically follow that imitation would be more pronounced and more likely if the role occupant and the role aspirant are of the same race or gender? Many people who accept

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DENCE OF WALTER BENJAMIN 1910-1940, at 364 (Gershom Scholem & Theodore W. Adorno eds., Manfred R. Jacobson & Evelyn M. Jacobson trans., 1994). Benjamin expressed the same view about two other areas that were central in his life: German literature and Marxism. In each case Benjamin tied his understanding to a particular person he knew or was close to, who performed well in those areas. In 1924, for example, he acknowledged his indebtedness to a recently deceased friend, Florens Christian Rang, "for whatever essential elements of German culture I have internalized," for Benjamin had "seen the life that dwells in these great subjects humanely manifested only in [Rang]." *Id.* at 252.

<sup>85</sup> MEAD, *supra* note 54, at 142.

<sup>86</sup> This is perhaps what Robert Merton meant when he observed: "Just as roles can be segregated from one another in the course of social interaction, so they can be in the form of reference orientations." MERTON, *supra* note 13, at 357.

the role imitation view nevertheless argue that, either as a logical or an empirical matter, people of the same race or gender as the aspiring role occupant do not necessarily have qualitatively more influence on that individual than role occupants of a different race or gender. Their critique of race and gender specific theories of role modeling takes two alternative forms: one responds to the role imitation view of the concept of role model, while the other responds to the notion of regarding the concept of role model as a version of the politics of recognition.

The first version challenges, on empirical grounds, the notion that a role model of the same race or gender as the role aspirant will facilitate the learning of the specific role once the role aspirant has chosen to pursue that particular role. The challenge here is to the claim that black law students might learn better from black lawyers, or that female law students learn better from female lawyers. Judith Jarvis Thomson, for example, argues that "speaking personally" she does not find that this claim matches her own experience:

I do not think that as a student I learned any better, or any more, from the women who taught me than from the men, and I do not think that my women students now learn any better or any more from me than they do from my male colleagues.<sup>87</sup>

Although Thomson makes clear that she is not speaking about the experience of all women, much less about the experience of minorities such as blacks, she argues that her experience and observation must be taken as valid unless empirically shown to be contrary to the evidence.<sup>88</sup>

I tend to agree with Thomson on this count. There is no evidence that aspiring role occupants master a specific role faster or better when the role occupants are of the same gender or race. In other words, race or gender specific theories of role modeling cannot be understood in terms of the role imitation view. This argument differs, however, from another point. Given the history of gender and racial stratification in this country, it seems plausible to assume that race and gender do play a role in mentoring relationships.<sup>89</sup> Take, for example, race and education. When all

<sup>87</sup> Judith J. Thomson, *Preferential Hiring*, in *EQUALITY AND PREFERENTIAL TREATMENT* 19, 23 (Marshall Cohen et al. eds., 1977).

<sup>88</sup> *See id.*

<sup>89</sup> A recent study of the academic performance of male and female students at the University of Pennsylvania Law School suggests that the difference in academic

aspects of life outside an institution are segregated, from housing to social life, such segregation must have an impact on how students and teachers construct their relationships within the institution. After all, mentor/protégé relationships are basically relationships based on the comfort level between teacher and student; thus, they have a social dimension. The daily narratives and institutional realities outside the academy define and reinforce the notion that blacks and whites lead very separate lives and that their relationships are characterized by mutual incomprehension. These narratives and institutional realities must surely have relevance inside the academy when teachers and students struggle to define their relationships. The point here is not to blame white teachers or black students for the state of affairs, but rather to emphasize that the relationships we define and develop inside the academy cannot escape the impact of the relationships and suspicions that prevail in the larger society,<sup>90</sup> and that this fact will likely curtail

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performance between male and female students (with similar credentials entering law school) might be due to the fact that women are excluded from informal learning networks. See Lani Guinier et al., *Becoming Gentlemen: Women's Experiences at One Ivy League Law School*, 143 U. PA. L. REV. 1, 73 (1994) (observing that "relatively few female students are apparently mentored by the [male dominated] faculty"). Based on their findings and other data, the authors "hypothesize that women faculty are more likely to mentor women students, that women students are more likely to perceive women faculty as approachable, and that being able to approach faculty is as critical to students' self-perception of their role in the institution as it is to the substantive learning that takes place in these informal settings." *Id.* at 77-78.

<sup>90</sup> In an article advocating "resistance [against the diversity movement] among those who care about the law and the institutions of law teaching" and "encourag[ing] opposition by those who care about civil rights," Paul Carrington suggests that one of the justifications for advancing diversity in the legal academy is the notion of counseling. Carrington, *supra* note 28, at 1105, 1147-50. In addition to robust intellectual exchange, compensation for past discrimination, and developing legal institutions that can be inclusive and can be trusted by all segments of society, Carrington argues:

The other tendered justification [for diversity] is that female law students need to learn from female law teachers, black law students need to learn from black law teachers, and so forth. This justification proceeds from the premise that law teachers are professional counselors and role models for students and that the common bond of race or gender is important to the effective performance of those duties.

*Id.* at 1147-48. Furthermore, Carrington claims that both are marginal functions of law teachers. See *id.*

Like most of the literature on role models, it is not clear what Carrington means when he invokes the notion of role models. The use of the conjunctive "and" between "counselors" and "role models" as well as his discussion in subsequent paragraphs suggest that he sees a difference between counseling and role modeling.

Carrington seems to use the term "role model" in two different senses. First,

he uses it to describe what I have referred to as the role imitation theory:

To the extent that role modeling is important for law teachers of any status, the primary qualification would seem to be a demonstrated capacity to adhere to high standards of professional ethics and public responsibility, not race or gender. One should not fail when possible to replicate in a law teacher the personal characteristics of George Wythe, a person of legendary integrity, but there is little reason to suppose that the traits of public virtue or good citizenship are linked to race or gender.

*Id.* at 1148. As I have argued, this is a legitimate use of the term, but Carrington also seems to use the term as a synonym for mentoring and counseling:

The idea that race or gender is important in mentoring relationships has the unwelcome characteristic of being segregationist in effect. *It suggests to students and faculty that a Mexican-American student, for example, ought to have a Mexican-American role model, not a black or a white role model. It suggests that persons desiring career counseling should expect to receive it from one of their own.*

*Id.* at 1149 (emphasis added). As I argued earlier, mentoring and role modeling are two separate processes. *See supra* part I.A. Apparently Carrington does not appreciate this distinction. Nor does he see any place for race or gender specific conceptions of the concept of role model under either the role imitation view or in a mentoring relationship.

Carrington's suggestion that role modeling and counseling are similar appears to be inconsistent with his earlier observation that role modeling and counseling are two separate activities. *Cf. Carrington, supra* note 28, at 1148 ("[R]ole modeling should not be confused with counseling."). I agree with Carrington's earlier observation that role modeling and counseling are two different activities. First, unlike role modeling, counseling suggests that the relationship between the counselor and the counseled is personal and reciprocal. One can be a role model to those one does not even know, but one can only counsel specific people one knows. Second, unlike a role model, a counselor is not held up as a candidate for emulation, but simply as someone who imparts a certain body of information that the counselee may or may not find useful. Also, although counseling, like mentoring, links two specific individuals, the two are different in the following crucial sense: while a mentor generally takes an interest in the professional life of the protégé, a counselor might simply be interested in imparting a body of information about one narrow aspect of the life of the counseled. Put simply, while mentoring often involves counseling, counseling does not necessarily involve mentoring.

Carrington's belief that mentoring relationships should not be either race or gender specific ignores the fact that, as I argued earlier, the racial divisions outside the academy have an effect on how students and teachers structure relationships. I think Carrington is right that some white teachers are wonderful mentors to minority students and that some minority faculty are great mentors to nonminority students, and, ideally, this would always be so; however, I think Carrington is mistaken in taking isolated positive examples as proof that segregation outside the academy does not have an impact on the process of teacher-student relationships. If the interaction between white and black students in higher educational institutions, including law schools, is any indication, one cannot escape the conclusion that the prevalence of segregation in the larger society does indeed structure their relationships inside these institutions. We should not mistake our aspiration for reality; ignoring reality only impedes progress toward the ideal.

As to Carrington's contention that counseling is not part of what it means to be an effective teacher and instructor, I think he is wrong as an empirical matter. Many



the informal learning process for minority students.<sup>91</sup>

The first version of the critique, in my view, misses the point. When people refer to minorities and women as role models they rarely claim that role aspirants master a particular role better or faster if they learn it from a person of the same race or gender. Rather, they often claim that, given the dearth of minorities and women in certain professions, it might be necessary for aspiring minority and female role occupants to see minorities and women in

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faculty members whom I know set aside office hours during the week to make themselves available to students who wish to come and talk to them. They understand their jobs to include talking to their students outside the classroom environment on a regular basis. My own experience tells me that students come to see their teachers not only about specific topics covered in class, but also about legal education and legal careers in general, for example, study strategies or course choices, about career options, and certainly about providing letters of recommendation. Students' formal evaluations of a particular teacher might be influenced as much by whether the teacher is sympathetic and helpful outside the classroom as by how well he or she performs inside the classroom, and students' faculty and course reviews do, in fact, play a considerable role in the promotion and tenure process. Insofar as teachers and students both view counseling as part of the job description and insofar as administrations and faculty weigh those activities in their formal and informal evaluations of faculty members, the claim that counseling is "not central to the teacher's task" seems wrong to me. *Id.*

Finally, Carrington observes that role modeling is only "a marginal function of law teachers." *Id.* The reason he offers is that, "[g]iven the gulf between academic law and law practice, it seems unlikely that many professional school students should rely heavily upon teacher-scholars as role models." *Id.* I find this line of reasoning extremely puzzling. Given the fact that the overwhelming majority of law students first encounter the law and the notion of what constitutes good lawyering from us, it is unclear to me why students should not or would not take their professors as their role models. It also seems to be an astonishing surrender of professional responsibility for Carrington: to assume that, in the contest between the academy and the practicing bar over the notion of what constitutes good lawyering, students are likely to believe that the bar offers the better vision; even more astonishing is that he does not seem to be disturbed by this assumption. Even if we were to accept that the bar offers a better vision of the practice, is not the better approach to work within the academy to reform the curriculum and the pedagogy to make legal education more responsible and responsive, instead of simply wishing, and claiming, that students will not take our colleagues as role models for a vision of the practice? *Cf.* Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992) (suggesting that the visions of lawyering held by both the academy and the practicing bar are unattractive). In any case, legal practice is not the only career that law school graduates enter. Some of our students, for example, go into teaching. Why should we abdicate role modeling to the bar with respect to those students who enter other fields of employment?

<sup>91</sup> As I shall argue later, racial segregation in society at large also makes race relevant to the process of role modeling within the academy. *See infra* part III.A. But I also argue that race specific role modeling cannot be understood within the role imitation view, but is rather best understood and described in terms of what I call the politics of recognition. *See infra* note 249 and accompanying text.

those roles to reassure themselves that they can indeed occupy those roles and perform those functions and to show them how those who share similar historical and institutional vulnerabilities can best occupy, perform in, and redefine those roles. This process is what Berenice Fisher might have had in mind when she observed that "the meaning of being a role model [in relation to women] grows out of discovering shared struggles and shared vulnerabilities in relation to the world."<sup>92</sup> This second version of race and gender specific role modeling seems more plausible than the role imitation view.<sup>93</sup>

Serving as a role model in the second sense is not about mastering a specific body of knowledge—it is about the politics of recognition. Under this conception, the role model provides institutional affirmation for the aspiring role occupant. He or she signals that the community does not continue to devalue the lives of these groups.<sup>94</sup> He or she provides a counternarrative intended

<sup>92</sup> Fisher, *supra* note 2, at 232. Fisher's general comment seems to be validated by the experience of some female students as reported in a survey of medical education. One first-year woman commented that she was

interested in learning how women physicians cope with the problem of being physician, wife, and mother and a woman in a predominantly male field. . . . I feel that I need more female physician role models. I find myself referring to physicians as "he"—it is discouraging that all my professors also use "he" when referring to physicians.

Roeske & Lake, *supra* note 2, at 462.

Harvard Law School students expressed similar sentiments in their suit against the university for allegedly discriminatory practices committed by the Law School against members of marginal groups, including women of color. Their complaint maintained that the absence of women of color on the faculty injured them by denying them "access to . . . role models." Harvard Law Sch. Coalition for Civil Rights v. President of Harvard College, 595 N.E.2d 316, 319 (Mass. 1992) (quoting plaintiffs' Amended Complaint). Their claim seems to suggest that students who have historically suffered similar vulnerabilities as their potential role models are denied visible guidance as to how they can overcome these vulnerabilities and thus effectively perform in their chosen role. For a further discussion of the controversy at Harvard Law School, see *supra* note 5.

<sup>93</sup> See Thomson, *supra* note 87, at 23 ("[This] second claim, however, does seem to me to be plainly true: black and women students do need role models, they do need concrete evidence that those of their race or sex can become accepted, successful, professionals—plainly, you won't try to become what you don't believe you can become.").

<sup>94</sup> Thomson observes:

[Blacks and women] have not merely not been given that very equal chance at the benefits generated by what the community owns which is so firmly insisted on for white males, they have not until lately even been felt to have a right to it. And even those [who] were not themselves down-graded for being black or female have suffered the consequences of the down-grading

to destabilize the narrative of exclusion that accompanied the marginalization and devaluation of members of those groups.<sup>95</sup> As I noted earlier, this version of the concept of race and gender specific role modeling has also come under criticism. Critics maintain that including the notion of role model as part of the politics of recognition undermines a central moral and political precept in this society—namely, individuality and individual agency—by tying the notion of role model to group membership and affiliation. I shall return to the politics of recognition in Part II.C, and I shall respond to this criticism in Part IV, but first I will explore further the second traditional version of the concept of role model: the comprehensive view.

### B. *The Comprehensive View*

As I noted earlier, under some circumstances an individual might serve as a role model in relation to a variety of roles as opposed to one particular role,<sup>96</sup> similar to Robert Merton's "reference individual."<sup>97</sup> For Merton, "[t]he person who identifies himself with a reference individual will seek to approximate the behavior and values of that individual in his several roles."<sup>98</sup> But as I argued earlier, the comprehensive view is only plausible when two factors exist: when the role model and the role model follower (or the supposed emulator) are tied by physical proximity and by an authority-vulnerability social nexus.<sup>99</sup> That being the case, the

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of other blacks and women: lack of self-confidence, and lack of self-respect. For where a community accepts that a person's being black, or being a woman, are right and proper grounds for denying that person full membership in the community, it can hardly be supposed that any but the most extraordinarily independent black or woman will escape self-doubt. All but the most extraordinarily independent of them have had to work harder—if only against self-doubt—than all but the most deprived white males, in the competition for a place amongst the best qualified.

*Id.* at 36.

<sup>95</sup> Thomas Nagel has referred to this narrative of exclusion as "an insult of the most fundamental kind." Thomas Nagel, *Introduction to EQUALITY AND PREFERENTIAL TREATMENT*, *supra* note 87, at xii ("Blacks were excluded because they were thought inferior and undesirable; they were really discriminated *against*, because they were black, and it was an insult of the most fundamental kind.").

<sup>96</sup> See *supra* parts I.B.1-2 (describing role imitation and comprehensive versions of the concept of role model).

<sup>97</sup> MERTON, *supra* note 13, at 356-58 (discussing the conceptual distinction between "reference individuals" and the more restricted notion of "role models").

<sup>98</sup> *Id.* at 356.

<sup>99</sup> See *supra* part I.B.2.

concept of a comprehensive role model only applies in relation to people such as parents, school teachers, and peers. Contrary to current role model rhetoric, it would be logically erroneous to apply this concept to people such as athletes.<sup>100</sup> Athletes can only serve as comprehensive role models for their children or for people to whom they are in some way tied. They can serve as role models in the role imitation sense for anyone who aspires to be an athlete, but, despite the conventional wisdom and current popular usage, the notion of the athlete as a role model in the comprehensive sense seems logically unsound and normatively undesirable.

What is it that pushes people to assume that professional athletes—who are generally young men in their twenties still struggling to define themselves,<sup>101</sup> quite often without extensive formal education,<sup>102</sup> while engaged in enterprises that glorify

<sup>100</sup> Consider the debate surrounding O.J. Simpson. When journalist Barry Cooper writes that “[e]ven if [Simpson is] acquitted of murder charges, he’s finished as a role model,” Barry Cooper, *Simpson’s Fall a Loss for African-Americans*, ORLANDO SENTINEL, June 19, 1994, at D1, available in LEXIS, News Library, Majpap File, he is clearly not saying that aspiring football players will never model themselves after Simpson when it comes to rushing a football. Rather, Cooper suggests that young people will not want to model their general lives on a person like Simpson. As another journalist observes:

There was, for example, the assertion that [the O.J. Simpson case] showed conclusively how mistaken it was to view athletes as role models. Leave aside that such a statement is premature in an unresolved case. It is entirely true that athletic prowess does not automatically translate into good character. It is also true that role models other than athletes deserve more prominence. But even if Mr. Simpson were found guilty, how would it be possible to go from there to sweeping conclusions about all athletes? How many athletes are arrested for murder? How many more visit schools, encourage kids to study, urge teenagers off drugs?

*The O.J. Simpson Case*, WASH. POST, June 22, 1994, at A20. My purpose here is not to assess the validity of these writers’ observations concerning what can or cannot be inferred about the moral character of athletes in general from this particular case. Rather, my point is simply that these writers invoke the notion of role model in the comprehensive sense.

<sup>101</sup> See Taylor Buckley, *Coleman a Victim of Unrealistic Public Expectations*, USA TODAY, Aug. 5, 1993, at 3C (“Why do we insist that these otherwise-immature and very unworldly people, merely by virtue of their physical gifts and training, be social role models? Do we train them for this?”); see also Frank Deford, *Designated Heroes*, N.Y. TIMES, July 6, 1994, at A19 (“[A]thletes are, for the most part, young men footloose and fancy free, possessing great wealth and little responsibility, who have been bootlicked and pushed ahead in line since they were children and are therefore likely to Let Us Down.”).

<sup>102</sup> The college graduation rate for student-athletes, especially black male student-athletes, is very low. A recent report of the National Collegiate Athletic Association (NCAA) compared a group of student-athletes who entered Division I colleges in 1984 and 1985, before the adoption of an NCAA bylaw that raised the eligibility

violence<sup>103</sup> and combat<sup>104</sup>—should serve as comprehensive role

standards for student-athletes by requiring at least a “C” (2.0) grade point average in college-preparatory courses and at least a score of 700 on the SAT or 15 on the ACT admissions exams, with a group who entered in 1986, after the provision, commonly known as Proposition 48, had come into effect. See NATIONAL COLLEGIATE ATHLETIC ASS’N, NCAA RESEARCH REPORT 92-01, at 3 (1993). The overall graduation rate for the first group was 48.2% and the overall graduation rate for the second group was 56.5%; the rate for black male student-athletes increased as well, but from a very dismal 29.5% in the first group to 39.5% in the second group; and the rate among black male student-athletes in so-called “revenue sports” (football and basketball) increased from only 28.5% in the first group to 33.4% in the second group. See *id.*; see also Harold B. Hilborn, *Student Athletes and Judicial Inconsistency: Establishing a Duty to Educate As a Means of Fostering Meaningful Reform of Intercollegiate Athletics*, 89 NW. U. L. REV. 741, 745 (1995) (“These [graduation rate] statistics say nothing of the quality of education, the student-athletes’ fields of study, the means by which the few passed their courses, or admission standards.”).

Some estimate that “20% to 25% of the black athletes at four year colleges are functionally illiterate.” Derek Q. Johnson, *Educating Misguided Student Athletes: An Application of Contract Theory*, 85 COLUM. L. REV. 96, 97 (1985). At the extreme, some student-athletes graduate from college without knowing how to read or write, like former professional football player Dexter Manley, who confessed that he was illiterate. See Tom Friend, *Pro Football; For Manley, Without Football Life Is Impossible to Tackle*, N.Y. TIMES, Feb. 26, 1995, § 8, at 1 (“When he learned, at age 29, he said he was preparing for life after football”).

<sup>103</sup> Many athletes who are supposed to be role models play in contact sports such as football and basketball. In the National Football League (NFL), beating up on the opposition is central to the enterprise, and violence is a virtue, not a vice. Timm Rosenbach, a former quarterback for the Phoenix Cardinals, told a sports writer for the *New York Times* that he thought he “was turning into some kind of animal.” Mariah B. Nelson, *Bad Sports*, N.Y. TIMES, June 22, 1994, at A21.

You go through a week getting yourself up for a game by hating the other team, the other players. You’re so mean and hateful, you want to kill somebody. Football’s so aggressive. Things get done by force. And then you come home, you’re supposed to turn it off? “Oh, here’s your lovin’ daddy.” It’s not that easy. It was like I was an idiot. I felt programmed. I had become a machine.

*Id.*

Some have argued that sports cultivate a culture of violence. Nelson argues that the revelation that O.J. Simpson often abused his recently murdered wife, Nicole Brown Simpson, should not surprise us. See *id.* Spousal abuse commonly occurs among famous athletes. For example, baseball star Darryl Strawberry, “admitted beating his wife and pointing a gun in her face.” *Id.* Golf pro John Daly was arrested for “allegedly hurling his wife against a wall, pulling her hair and trashing the house” and “pleaded guilty to a misdemeanor harassment charge.” *Id.*

Nelson also points out that such abuse is not limited to the spouses and girlfriends. For example, Wimp Sanderson had to resign from his position as the men’s basketball coach at the University of Alabama after his secretary won a large settlement for allegations of physical abuse. See *id.* Sanderson explained that his secretary received a black eye after “colliding with his outstretched hand.” *Id.*

From these examples, Nelson concludes that through “hockey fights, football tackles [and] baseball brawls, intentionally hurtful acts are portrayed as natural—for men. Society’s concept of violence is inextricably interwoven with its concept of

models for emulation by young people (usually blacks)? And why is it that prominent people in the public sphere insist that fictional characters behave in a way that will set a positive example for others? One reason might be that this role model rhetoric allows those in positions of power to divert attention away from the real question of power and distribution of resources in this society.<sup>105</sup> Thus, rather than engaging in a debate about the institutional failures that led to the increase in single parenthood, policymakers attack fictional television characters like Murphy Brown for setting a bad example.<sup>106</sup> Rather than dealing with the shortcomings of

expected, condoned male behavior." *Id.* At a time when violence is destroying the communities of the young people who supposedly view these athletes as role models, do we really want to glorify activities that produce such violent confrontations?

<sup>104</sup> I think Catharine MacKinnon had a point when she wrote:

[A]thletics to men is a form of combat. It is a sphere in which one asserts oneself against an object, a person, or a standard. It is a form of coming against and subduing someone who is on the other side, vanquishing enemies. . . . Physicality for men has meant male dominance; it has meant force, coercion, and the ability to subdue and subject the natural world, one central part of which has been us.

CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 121 (1987).

Although no one has conducted a systematic study of the rate of violence against women by men who play contact sports, there is some (preliminary) indication that on college campuses athletes "appear to be disproportionately involved in incidents of sexual assault." Robert Lipsyte, *Why Do Male Athletes Assault Women? Research Begins*, N.Y. TIMES, Nov. 11, 1994, at B14 (quoting TODD W. CROSSET ET AL., MALE STUDENT-ATHLETES REPORTED FOR SEXUAL ASSAULT: A SURVEY OF CAMPUS POLICE DEPARTMENTS AND JUDICIAL AFFAIRS OFFICES (North Am. Soc'y for Sports Soc. 1994)); see also Mike Rubin, *Illegal Procedures: Rap Sheets, Pay Offs, and Coaching Scams of College Football's Real-Life Top 20*, VILLAGE VOICE, Jan. 16, 1996, at 27, available in LEXIS, News Library, Curnws File.

<sup>105</sup> See MILLS, *supra* note 20, at 612 ("With ideas one can conceal or expose the holders of power. And with ideas of more hypnotic though frivolous shape, one can divert attention from problems of power and authority and social reality in general." (emphasis added)).

<sup>106</sup> During the 1992 presidential campaign, Vice President Quayle garnered an enormous amount of public attention by condemning the fictional television character Murphy Brown for conceiving a child out of wedlock. See *supra* note 7.

In Hollywood, a world away, people who are paid to create fantasy are wondering aloud how the wheels of government became so consumed with a situation comedy.

"I thought [William Bennett's comment that the cartoon character Bart Simpson was 'a lousy role model'] was just another Dan Quayle joke," Matt Groening, creator of "The Simpsons," a favorite target of the Bush administration, said in an interview.

"It turns out not to be a joke. It shows that the level of discourse in this country has been reduced to the level of distracting entertainment."

*Quayle Speaks, supra* note 7, at 6; see also Janofsky, *supra* note 75, at 20 (noting that

the educational system and the general neglect of urban America, policymakers debate whether athletes are acting as positive role models for inner-city youth.

Perhaps it is not surprising that entertainers, both real and fictional, are now considered role models in the comprehensive sense precisely at the moment when circumstances have seriously undermined the influence of traditional comprehensive role models, such as parents and teachers, for a large segment of the population. As the economic capital of teachers has declined, that of entertainers has grown astronomically. While a teacher often earns barely enough to support a family, a successful entertainer (either an athlete or a media star) usually commands a six- or seven-figure salary. Quite often the decline of an institution's economic capital also leads to the decline of its symbolic capital<sup>107</sup> because, in this or any other strongly market-oriented society, the prestige and influence of an institution directly relates to the economic capital invested in that institution.<sup>108</sup>

The rise of the rhetoric of entertainers as role models indicates that the prestige and power of traditional figures of influ-

most moviegoers "disagreed with Senator Bob Dole's fingerpointing at Hollywood . . . as the cause[] of a morality meltdown").

<sup>107</sup> The notion of capital figures prominently in the work of the French sociologist-philosopher Pierre Bourdieu. Bourdieu argues that the logic of capital orders the struggle among forces for legitimate authority and position. He defines capital in an expansive way, including economic capital (the most obvious and well-understood form of capital), cultural capital, and symbolic capital. As Bourdieu puts it, capital refers to "all the goods, material and symbolic, without distinction, that present themselves as *rare* and worthy of being sought after in a particular social formation." PIERRE BOURDIEU, *OUTLINE OF A THEORY OF PRACTICE* 178 (Richard Nice trans., 1977).

Cultural capital includes such things as culturally defined tastes, consumption patterns, education, and art forms. Cultural capital also refers to things such as prestige and status. Symbolic capital includes culturally significant attributes that one can appropriate in the struggle for legitimate position and authority just as one can appropriate economic capital in pursuit of the same end. For a thorough description of Bourdieu's conception of capital, see Pierre Bourdieu, *The Forms of Capital*, in *HANDBOOK OF THEORY AND RESEARCH FOR THE SOCIOLOGY OF EDUCATION* 241 (John G. Richardson ed., 1986) and PIERRE BOURDIEU, *DISTINCTION: A SOCIAL CRITIQUE OF THE JUDGEMENT OF TASTE* 13-16 (Richard Nice trans., 1984) (1979) [hereinafter BOURDIEU, *DISTINCTION*] (presenting analyses that link cultural practices and tastes to educational capital and social origin or to inherited capital).

<sup>108</sup> This phenomenon illustrates Bourdieu's observation that capital is convertible; that is, one kind of capital can be exchanged for another. See BOURDIEU, *DISTINCTION*, *supra* note 107, at 114-68 (explaining that individuals and classes will shift their capital allocations to permit social mobility toward areas that carry more prestige and away from areas that carry less).

ence, such as parents and teachers, has declined and is being supplanted by figures from the entertainment industry. But it seems erroneous to believe that they could perform the role model functions traditionally performed by parents and teachers, not only because the two characteristics that define comprehensive role modeling—physical presence and an authority-vulnerability social nexus—are not present, but also because there are few indications that entertainers or athletes ought to serve as models for the good and-virtuous life. Indeed, at least in relation to athletes, the reverse appears to be the case. Just because an institution is well-endowed with economic capital, and thus carries a great deal of symbolic capital, it does not follow that it can, therefore, perform the traditional role modeling functions of other institutions. Perhaps the solution lies in strengthening the power and prestige of families and the educational system by reversing the decline of their economic and symbolic capital, which has been brought about by governmental policies and the market, rather than blaming entertainers for the disintegration of the good and moral life or worse, hoping that the entertainment industry will perform the role modeling functions that should be performed by parents and teachers.

Indeed, given the lack of empirical data to support the claim that people emulate the actions of athletes and television characters in a comprehensive sense, combined with the fact that many athletes are immature young people who are still trying to discover themselves, why do people insist on regarding these people as role models? As I mentioned earlier, focusing on the behaviors and actions of certain individuals and groups to explain social decay may allow those in positions of power to avoid dealing with the institutional and structural conditions that led to social decline. The pathologies of inner-city crime, family breakdowns, drug dependency, and the prevalence of hopelessness and defeatism are often caused by governmental policies and market forces. It is easier for those in power to blame black athletes or a television program than to take responsibility for these structural and institutional problems which they have helped create or sustain.

There might be another reason. Not only does this role model rhetoric divert our attention away from the material basis of social decay, thus making it more difficult to formulate a proper dialogue about the actual causes of these problems, but it also sends a message to those who are underrepresented in the social and



political life of the community and overrepresented in its problem areas that unfairness is only a perception or an attitude problem.<sup>109</sup> When members of the dominant group use the concept of role model to condemn the conduct of supposed role models, they send the message that, if the perception of role model followers was not distorted by the misconduct of the supposed role model, social conditions would improve. When, in rare circumstances, members of the dominant group invoke the concept of role model to praise either the conduct or the position of the supposed role model, they are also suggesting that the exclusion of role model followers primarily results from their own erroneous perception of structural and institutional exclusions. According to this rhetoric, the role model has a responsibility to advertise these misperceptions to the world. This rhetoric simultaneously allows members of the dominant group to reassure themselves of their innocence and generosity. By framing the problem as one of perception, members of the dominant group can see themselves and their institutions as innocent bystanders, free of blame for the unfavorable condition of underrepresented groups. If members of the dominant group and their institutions are not responsible for the underrepresentation of those groups that supposedly need role models, whenever a member of such a group is installed in a position of power, he or she assumes that position through the grace, goodwill, and generosity of the dominant group rather than through the requirements of justice or the capacity and qualifications of the supposed role model. This version of the concept of role model, therefore, deemphasizes the structural and institutional aspects of exclusion as well as the qualifications of the role model<sup>110</sup> while simultaneously

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<sup>109</sup> Indeed, a statement issued by Stephen Higgins, Director of the Bureau of Alcohol, Tobacco, and Firearms, in response to allegations of widespread sexual harassment and racial discrimination within the agency, illustrates how role model rhetoric can be used to divert attention away from real institutional and structural problems. "There are people working with us who perceive they are not being treated fairly. . . . [W]e need to do more about it. People look for *role models* in the higher ranks, and until we get more blacks and women in the executive ranks, you will have a *perception of unfairness*." Stephen Labaton, *Report to Fault Firearms Bureau for Raid on Cult*, N.Y. TIMES, Aug. 30, 1993, at A1, A15 (quoting Stephen H. Higgins (emphasis added)). According to the Director, the purpose of a role model is to reassure role model followers that structural or institutional problems do not exist and to calm those who are "unduly" anxious about unfairness in the system. See *id.*

<sup>110</sup> I think Anita Allen is right when she observes that, in law schools or any other area of employment, receiving a position based on one's potential as a role model for future applicants "trumpets [one's] necessity," while simultaneously "whisper[ing] one's] inferiority." Allen, *supra* note 22, at 37; see also Guinier, *supra* note 15, at 1112-

highlighting the generosity and kindness of the dominant group that selects that role model.

It is quite clear, therefore, that this version of the concept of role model implicitly puts the blame for the underrepresentation of excluded groups in particular enterprises either on a lack of natural endowment among members of those groups or on cultural defects (or perceptual problems) that impede group members from succeeding. According to this argument, if some minorities can make millions of dollars in sports, then the only reason that others have not done as well in other areas of life is that they do not have the desire or the traits necessary to succeed. Viewed this way, the concept of role model diverts attention away from the problems of power and social structure. Ironically, this diversion depends on two contradictory messages. On the one hand, the message for the intended emulator seems to be that, because there are no institutional or structural impediments to success, if individuals adjust their erroneous perceptions to the contrary, work hard, and possess the necessary natural endowment, success will surely follow. On the other hand, the message to the individual selected as a role model is quite often that he or she achieved that position not because of merit, but because of his or her representational and symbolic value. Praising the supposed role model to his or her intended role model followers as an example of success is, therefore, insincere.

The notion of comprehensive role modeling is implausible when extended beyond an environment where the role model and the role model emulator are tied by physical space and an authority-vulnerability social nexus, for example, when the rhetoric of role models is applied to professional athletes. The politics of recognition offers a possible ground for justifying the use of the concept of role model in this extended, race-specific sense. But in some areas, such as sports, the rhetoric of role models cannot possibly be understood or defended in terms of the politics of recognition. Given the fact that many minorities are well-represented in athletics, the need for recognition in that area is simply not an issue; therefore, when people insist that athletes serve as role models, they cannot be talking about the need for affirmation. Indeed, the problem is not the lack of affirmation of minorities in athletics, but the tendency of the majority to see the achievements and aspirations

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28 (arguing that affirmatively assisting minorities so that they may achieve prominent positions makes them seem more like tokens than achievers).

of minorities predominantly in terms of athletics and entertainment. In many ways the rhetoric of athletes as role models simply reaffirms the stereotype that African Americans as a group gravitate towards certain roles,<sup>111</sup> such as sports and entertainment, and that role occupants in those fields define the good life for all African Americans, even those who might have neither the capacity

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<sup>111</sup> Indeed, it is this assumption that seems to have led the Supreme Court to reject the dearth of minority contractors in Richmond, Virginia as a factual basis for establishing racial discrimination in the construction industry and, hence, to reject a set-aside program to aid minority contractors attempting to enter that industry. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 486 (1989). Justice O'Connor, writing for the majority, observed: "It is sheer speculation how many minority firms there would be in Richmond absent past societal discrimination," therefore the extreme underrepresentation of minorities in the industry could not be "probative of any discrimination in the local construction industry." *Id.* at 499, 503. Why not? "There are numerous explanations for this dearth of minority participation . . . [one of which is] black and white career and entrepreneurial choices. Blacks may be disproportionately *attracted* to industries other than construction." *Id.* (emphasis added). As I have argued elsewhere, Justice O'Connor simply assumed that the high proportion of African Americans in some fields (such as sports), and their extreme underrepresentation in others (such as construction) accurately reflected the choices and inclinations of members of this group. See Addis, *supra* note 62, at 545-49. A substantial number of white Americans would probably agree with Justice O'Connor on this point. Stereotypes about the career choices of African Americans are common. Perhaps what Justice O'Connor and those who share her view regard as deliberate career choices are in large measure a result of social constraints that prevent African Americans from entering certain fields and encourage them to gravitate towards other fields from which they are not structurally excluded. By characterizing this gravitation within the African American community as a matter of attraction, Justice O'Connor finds unconstrained choice where it does not exist.

What is also strange about O'Connor's assumption (and the assumption of those who share her views) regarding African Americans' gravitation towards certain fields is that she never attempts to explain why this gravitation might logically occur. It is especially troubling when one considers the fact that the notion of group-gravitation is fundamentally inconsistent with the central ideology of this country that individuals structure their lives as individuals rather than as members of a group. See *id.* at 547-50; see also *infra* note 250. Ironically, the supremacy of individual choice over group-determination was the central theme of Justice O'Connor's decision in *Croson*. See *Croson*, 488 U.S. at 493; cf. *Shaw v. Reno*, 113 S. Ct. 2816, 2827 (1993) ("A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin . . . reinforces the perception that members of the same racial group . . . think alike, share the same political interests, and will prefer the same candidates at the polls."); *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting) ("At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens 'as individuals, not 'as simply components of a racial, religious, sexual or national class.'" (quoting *Arizona Governors Comm. v. Norris*, 463 U.S. 1073, 1083 (1983) (quoting *City of Los Angeles Dep't of Water and Power v. Manhart*, 435 U.S. 702, 705 (1977))).

nor the desire to occupy those particular positions. In this respect, the invocation of the concept of role model in athletics is in fact a rhetorical continuation of the process of misrecognition. But, as I shall argue in the rest of this Article, there are some circumstances in which the notion of race (or gender) specific role model can best be understood and defended in terms of the politics of recognition.

### C. *The Concept of Role Model and the Politics of Recognition*

*[M]oral progress is born of the struggle for recognition.*<sup>112</sup>

The dominant political fact of the late twentieth century has been the politics of recognition. Many of the disputes in many countries and regions of the world can be understood, to a large extent, as skirmishes and struggles of groups and communities animated by the desire for recognition. The form of recognition desired and the manner in which it is pursued naturally differs from one community to another. Thus, in Canada,<sup>113</sup> the former Yugoslavia,<sup>114</sup> and some parts of the former Soviet Union,<sup>115</sup> the

<sup>112</sup> Honneth, *supra* note 52, at 200.

<sup>113</sup> The status of Quebec in the Canadian federation has been a point of discussion and deliberation in Canada for a long time. Indeed, there is now a political party in the Federal Parliament, Bloc Québécois that advocates for the independence of Quebec and, by virtue of the number of its members, has assumed the role of "Her Majesty's Loyal Opposition, our government-in-waiting." Mordecai Richler, *O Quebec*, NEW YORKER, May 30, 1994, at 50, 51. In October, 1995, the province held a referendum on whether it should secede or remain part of Canada. Secession was rejected by the narrowest of margins: 50.6% to 49.4%. See Clyde H. Farnsworth, *Quebec, By a Razor-Thin Margin, Votes 'No' on Leaving Canada*, N.Y. TIMES, Oct. 30, 1995, at A1. It does not seem likely that the issue of Quebec's independence will dissipate any time soon. Lucien Bouchard, the most popular leader of the separatist movement, has recently become the Premier of Quebec, and "most polls indicate that support within Quebec for independence is even higher today than in October." Clyde H. Farnsworth, *Quebec Separatist Becomes Premier, Pledging Economic Agenda*, N.Y. TIMES, Jan. 29, 1996, at A7.

<sup>114</sup> See generally Hurst Hannum, *Self-Determination, Yugoslavia, and Europe: Old Wine in New Bottles?*, 3 TRANSNAT'L L. & CONTEMP. PROBS. 57 (1993) (providing a brief assessment of the European approach to the conflicts in the former Yugoslavia). For a longer and more extended treatment of the concept of self-determination, see generally Hurst Hannum, *Rethinking Self-Determination*, 34 VA. J. INT'L L. 1 (1993).

<sup>115</sup> For example, the *Economist* called Crimea "[t]he most likely spark that could make this Ukrainian tinder-box burst into flames." *Looking into the Abyss*, ECONOMIST, May 28, 1994, at 45. In 1954, Nikita Khrushchev carved Crimea, whose population is 70% Russian, out of the Russian Republic and handed it to Ukraine. Now, after the collapse of the Soviet Union, Crimea contemplates either independence or some form of association with Russia. See Alessandra Stanley, *Crimea Is Waging a War of Nerves with Ukraine*, N.Y. TIMES, May 27, 1994, § 1, at 2.

basic goal of various ethnic minorities has been to challenge the very authority of the State by attempting to free themselves, as a group, from its jurisdiction.<sup>116</sup> Recognition here is manifest through the ultimate form of self-determination: political divorce from the currently constituted territorial unit.<sup>117</sup> In an international political arrangement that puts a premium on the state system, communities with a distinct culture, tradition, and history often seek to be recognized as independent states by other sovereign states. Once a community receives such recognition, it achieves formal equality on the international plane, which validates its identity and signifies to the rest of the world that it has control over its own affairs.<sup>118</sup>

In other circumstances, such as in South Africa until recently and in the United States in the not-too distant past, excluded communities struggled for recognition by asserting their right to participate in the (formal) political life of the community. Because their exclusion was premised on the explicit assumption that members of these groups did not possess the requisite qualities to actively participate in the life of the community, the struggle for

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For a discussion of other border disputes within the former Soviet Union, see John Lloyd & Leyla Boulton, *Myriad Territorial Disputes Set to Take Centre-Stage*, FIN. TIMES, Aug. 28, 1991, § 1, at 2 (noting 15 major border disputes); Serge Schmemmann, *Ethnic Battles Flaring in Former Soviet Fringe*, N.Y. TIMES, May 24, 1992, § 1, at 10 (noting the unresolved conflicts that have arisen in Moldova, Armenia-Azerbaijan, and Georgia); Michael Specter, *A 40-Mile Chain Against Russian Troops*, N.Y. TIMES, Dec. 21, 1994, at A18 (reporting that Abkhazia, an autonomous region in Georgia with a Muslim minority, has been fighting the national government for independence and discussing the secessionist war in the Russian Republic, where Chechnya has been attempting to secede).

<sup>116</sup> For a survey of current ethnic conflicts throughout the world and the challenge they pose to the post-cold war international system, see David Binder & Barbara Crossette, *As Ethnic Wars Multiply, U.S. Strives for a Policy*, N.Y. TIMES, Feb. 7, 1993, § 1, at 1.

<sup>117</sup> See ALLEN BUCHANAN, SECESSION: THE MORALITY OF POLITICAL DIVORCE FROM FORT SUMTER TO LITHUANIA AND QUEBEC 27-149 (1991) (developing a moral theory of secession while also examining its legality); Adeno Addis, *Individualism, Communitarianism, and the Rights of Ethnic Minorities*, 67 NOTRE DAME L. REV. 615, 623-28 (1992) (positing that normatively justifiable secession by ethnic minorities may in certain circumstances fail to address the underlying conditions that gave rise to the demand for secession).

<sup>118</sup> What I mean by formal equality is that once a community constitutes itself as a state that community benefits from the formal rules of current international law. Its borders and internal affairs remain inviolate against other states, it has the right to be admitted to the United Nations, its vote in the United Nations General Assembly will be accorded the same weight as the vote of any other sovereign nation, and it can exchange ambassadors with other nations.

recognition by members of these excluded groups took the form of asserting their rights to be recognized as "responsible moral agents" by the formal political process and to have an equal opportunity to participate in the shaping of the life of the community.<sup>119</sup>

In the United States today and in other multi-ethnic countries, however, where excluded groups are formally recognized as equal participants in the public life of the community, the demand for recognition by members of minority communities is premised on the claim that, although formally admitted to participate in the political process, their stories, histories, and cultures are informally excluded from or downgraded by myth-constituting institutions and processes such as the educational system and the media.<sup>120</sup> The recent movements for diversity and multiculturalism in the United States are informed by this desire for and necessity of recognition. To be validated means much more than to be recognized as a formal participant in the political process. It also means to see the processes, the "horizon[s] of significance," the culture, tradition and history that go toward defining one's self affirmed and validated.<sup>121</sup>

Thus, the centrality of the politics of recognition is tied to the current understanding of how the identities of groups and individuals are constituted. As Charles Taylor put it: "Our identity is partly shaped by recognition or its absence, often by the *mis*recognition of others . . ." <sup>122</sup> The idea is that our identities are relationally constituted,<sup>123</sup> and that "nonrecognition or misrecognition can

<sup>119</sup> According to Ronald Dworkin, a feature of any just political society is that its government treats "all its adult members, except those who are incompetent, as responsible moral agents." Ronald Dworkin, *The Coming Battles over Free Speech*, N.Y. REV. BOOKS, June 11, 1992, at 56; see also RONALD DWORCKIN, *TAKING RIGHTS SERIOUSLY* (1977).

<sup>120</sup> For a discussion of how the media devalues the lives and histories of minorities, especially those of African Americans, see Addis, *supra* note 73, at 2253-71 (arguing that the devaluation of African Americans in the media is inextricably tied to the devaluation of African Americans in the criminal justice system); see also Addis, *supra* note 62, at 527-28 ("The stereotypical pictures of African Americans painted daily in the mass media are made possible because African Americans are seen and treated as subjects of deliberation, rather than as deliberating subjects. Both as victims and as resisters, stories about African Americans are largely told by others.").

<sup>121</sup> CHARLES TAYLOR, *THE ETHICS OF AUTHENTICITY* 52 (1992) ("Recognizing difference, like self-choosing, requires a horizon of significance. . . ."). "Things take on importance against a background of intelligibility. Let us call this a horizon. It follows that one of the things we can't do, if we are to define ourselves significantly, is suppress or deny the horizons against which things take on significance for us." *Id.* at 37.

<sup>122</sup> Taylor, *supra* note 24, at 25.

<sup>123</sup> Taylor observes that "[t]he crucial feature of human life is its fundamentally

inflict harm, can be a form of oppression, imprisoning someone in a false, distorted, and reduced mode of being."<sup>124</sup> Nonrecognition can take various forms. Sometimes it takes an almost literal form, such as when an employee of a store ignores an African American customer as if that person did not exist.<sup>125</sup> In these situations, nonrecognition is often the equivalent of a death ritual performed to render the nonrecognized individual socially invisible.<sup>126</sup> At other times, nonrecognition takes a subtler and more

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*dialogical* character . . . . We define our identity always in dialogue with, sometimes in struggle against, the things our significant others want to see in us." *Id.* at 32-33; see also WILLIAM E. CONNOLLY, *IDENTITY/DIFFERENCE: DEMOCRATIC NEGOTIATIONS OF POLITICAL PARADOX* 64 (1991) ("My identity is what I am and how I am recognized rather than what I choose, want or consent to. It is the dense self from which choosing, wanting, and consenting proceed."); MERTON, *supra* note 13, at 292-93 ("The individual experiences himself as such, not directly, but only indirectly, from the particular standpoints of other individual members of the same group, or from the generalized standpoint of the social group as a whole to which he belongs." (quoting MEAD, *supra* note 54, at 138)); MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* (1990) (arguing that "many categories used to describe people's differences are invented only at the moment when summoned into the service of defining someone"); IRIS M. YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 43 (1990) ("Group identification arises . . . in the encounter and interaction between social collectivities that experience some differences in their way of life and forms of association, even if they also regard themselves as belonging to the same society.").

<sup>124</sup> Taylor, *supra* note 24, at 25. Referring to the damage that misrecognition can do to groups or individuals, Taylor observes that a "person or group of people can suffer real damage, real distortion, if the people or society around them mirror back to them a contemptible picture of themselves." *Id.*

<sup>125</sup> Nonrecognition can manifest itself in all sorts of venues, including sidewalks. Angela Harris writes:

I didn't really start to feel black until I went to Chicago, several years later. I lived in Hyde Park and went to graduate school and was constantly run off the sidewalk: by undergraduates in safety pins and neon hair, deep in angst-ridden conversation; by hard-eyed business school women in pinstripe suits; by blond young men in shorts going to or from sporting activities. Again and again I would approach a group, expecting it to part as I walked into it; again and again I would end up in the February mud or be jostled aside. I was furious at my invisibility. Too lady-like to protest, I would direct angry stares at their disappearing backs. But I envied them too.

Harris, *supra* note 23, at 109-10 (footnotes omitted).

<sup>126</sup> By referring to this process of nonrecognition as a ritual I mean to suggest two things. First, I want to highlight the fact that the process is routine, both in terms of the fact that it is practiced by a large percentage of the majority race (hence giving it a collective dimension) as well as the fact that individuals perform this act on a regular basis (hence reproducing the act over a period of time). See ORLANDO PATTERSON, *SLAVERY AND SOCIAL DEATH* 37 (1982) ("The social aspect of symbolic behavior refers to the ritual processes by . . . which symbolic ideas are acted out in terms of real human interactions. Where the experience . . . symbolized extends over

complicated form, when for example, a debate about social policy within a certain segment of the population (say women) completely ignores the concerns of a minority subgroup within that segment of the population (say women of color). This form of nonrecognition led Sojourner Truth to retort: "Ain't I a woman?"<sup>127</sup> In many ways the resistance of minority women scholars to what they consider the essentializing scholarship of many white feminist scholars echoes Truth's "Ain't I a woman?" retort.<sup>128</sup>

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a long period of time there is a tendency for a clearly defined symbolic pattern to develop . . ."). Second, it is a ritual in the sense that for those who perform it, "[nonrecognition] is a code for understanding their interpretation of life." TALAL ASAD, *GENEALOGIES OF RELIGION* 78 (1993) (citing G.S. WORGUL, *FROM MAGIC TO METAPHOR: A VALIDATION OF THE CHRISTIAN SACRAMENTS* 224 (1980)). From the ritual performer's point of view the nonrecognition ritual symbolically represents the social death of the nonrecognized individual, thus resurrecting an earlier social environment. As Patterson argues, slavery perhaps expresses the ultimate form of social death. See 1 ORLANDO PATTERSON, *FREEDOM: FREEDOM IN THE MAKING OF WESTERN CULTURE* 9-10 (1991) ("[T]he slave is always an excommunicated person. He, more often she, does not belong to the legitimate social or moral community; he has no independent social existence; he exists only through, and for, the master; he is, in other words, natively alienated."); see also *id.* at 21 ("A slave is a dead man.").

For an interesting inquiry into the genealogy of rituals, see Chapter Two of ASAD, *supra*.

<sup>127</sup> In 1851, Sojourner Truth, an African American woman, asked this question in a speech she gave to a women's rights convention which was almost exclusively white and that almost exclusively addressed the rights and interests of white women. Truth told her audience:

That man over there says women need to be helped into carriages, and lifted over ditches, and to have the best place everywhere. Nobody ever helps me into carriages, or over mud-puddles, or gives me any best place! And ain't I a woman? Look at me! Look at my arm! I have ploughed, and planted, and gathered into barns, and no man could head me! And ain't I a woman? I could work as much and eat as much as a man—when I could get it—and bear the lash as well! And ain't I a woman? I have borne thirteen children, and seen them most all sold off to slavery, and when I cried out with my mother's grief, none but Jesus heard me! And ain't I a woman?

Susan Moller Okin, *Gender Inequality and Cultural Difference*, 22 *POL. THEORY* 5, 21 n.3 (1994). For the text of Truth's slave narrative in its original form, see *Reminiscences By Frances D. Gage: Sojourner Truth*, in 1 *HISTORY OF WOMAN SUFFRAGE* 115, 116 (Elizabeth C. Stanton et al. eds., 1969).

<sup>128</sup> See, e.g., Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 *STAN. L. REV.* 581, 585 (1990) (arguing that, although feminist legal scholarship is "powerful and brilliant in many ways," it presumes a unitary women's experience which silences black women and other groups traditionally silenced by the mainstream); BELL HOOKS, *AIN'T I A WOMAN: BLACK WOMEN AND FEMINISM* 1, 24 (1981) (claiming that, if women are to be "committed to the feminist revolution," they must first "confront[] the reality of white female racism"). For one of the first sustained critiques of essentialism in feminist scholarship, see ELIZABETH V. SPELMAN, *INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT* at ix (1988) ("[T]he notion of a generic 'woman' functions in feminist thought much the way the notion of generic



Nonrecognition also occurs when dominant groups categorize members of minority groups in certain roles. In this country, for example, the dominant culture traditionally considers African Americans physically capable but intellectually lacking. As a consequence, certain roles remain out of reach for African Americans, while other roles are considered a natural fit. Thus, while the dominant group recognizes that African Americans can excel in both athletic and artistic endeavors, the widespread view among members of the majority race is that African Americans do not possess the appropriate skills to fill leadership positions, even in those areas where they excel, such as professional sports. Al Campanis, while Vice President of the Los Angeles Dodgers, expressed what I believe to be a widely held belief when he declared that African Americans "may not have some of the necessities to be, let's say, a field manager or perhaps a general manager [of a baseball team]." <sup>129</sup>

Before I explore the conceptual issue of misrecognition or nonrecognition, let me just briefly mention the various ways in which groups and individuals who have been targets of nonrecognition have generally responded to the social threat of banishment. Some have challenged the very institutions that cultivated the culture of nonrecognition or misrecognition, such as the educational system and the media. <sup>130</sup> This challenge to nonrecognition animates the multiculturalist movement. Here the struggle for recognition is positive and political, and thus has a transformative potential.

Other recipients, however, exhibit a dangerously pathological response to the daily threat of social death and nonrecognition. A good example is the experience of young African American males who live in America's inner cities. This group frequently invokes the term "dissing": to be "dissed" is to be disrespected, not recognized, or misrecognized. <sup>131</sup> When an inner-city youth is

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'man' has functioned in Western philosophy: it obscures the heterogeneity of women and cuts off examination of the significance of such heterogeneity for feminist theory and political activity.")

<sup>129</sup> *Nightline* (ABC television broadcast, Apr. 6, 1987). A 1990 survey conducted by the National Opinion Research Center found that 62% of whites thought that African Americans were less likely to be hardworking, and 53% believed that African Americans were not as smart as whites. See *Survey: White Racism Alive and Well*, THE TIMES-PICAYUNE (New Orleans), Jan. 9, 1991, at A4 (citing NATIONAL OPINION RESEARCH CENTER, GENERAL SOCIAL SURVEY (1990)). For the dearth of minority administrators in sports, see Addis, *supra* note 62, at 558-59.

<sup>130</sup> See *supra* note 120 and accompanying text.

<sup>131</sup> The *Chambers Dictionary* defines "diss" as "to reject or dismiss with contempt."

"dissed" (or perceives himself to be "dissed"), he may feel compelled to reassert himself and reaffirm his agency, quite often by taking inordinately harsh measures against the perceived "dissers," including even bodily harm or death. Ironically, the supposed "dissers" is usually another young African American male in more or less the same social and economic condition as the "dissed." Often it is very difficult for outside observers to comprehend why the "dissed" felt so disrespected by the speaker, his victim, let alone why this act of nonrecognition necessitated such a harsh retaliation.

One way to understand these murderous assertions of agency is to realize that, for these young men, whose daily encounters with the members and institutions of the majority are characterized by disrespect and devaluation and who internalize that devaluation over time, the only avenues left for them to pursue a semblance of respect are the streets and their neighborhoods. What these young men are robbed of in their daily lives—the recognition and respect most fundamental to their identities—they attempt to regain on the streets by engaging in disputes over the most trivial and mundane aspects of existence, sometimes using exaggerated and even violent means. I do not mean to suggest that every brutal act or inner-city conflict among young African American males can be explained as a response to disrespect and nonrecognition. There are numerous reasons for the conflict and destruction among young African American males, such as joblessness, drug dependency, and the demise of the family unit. Many times, however, a young African American male's exaggerated response can only be explained as a reassertion of agency (the restoration of his "dissed manhood");<sup>132</sup>

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THE CHAMBERS DICTIONARY 487 (1994). Apparently, *Webster's New World Dictionary* will also include the word in its next edition. See "Gustnado" Dissed By Dictionary 110—Yes, "Diss" Among Them—Official Addition to Lexicon, *HERALD-SUN*, July 30, 1995, at G3.

<sup>132</sup> Consider, for example, a recent story involving a 16-year-old who shot a 12-year-old who comically nagged him "for a quarter outside a neighborhood grocery store." A police officer observed: "He shot him over a quarter . . . . But it comes to the bigger issue of disrespect between the younger boy and the older boy. He came into a rage. . . . He was upset about being dissed." Carey Goldberg, *Boy, 12, Dies in a Rage of Bullets, and a 16-Year-Old Is Held*, *N.Y. TIMES*, July 20, 1995, at B1, B3. The shooter told the police that "he felt justified because of the disrespect" the deceased had shown him. *Id.*; see also Linda Fairstein, *Family Violence in the United States and Abroad*, 15 *N.Y.L. SCH. J. INT'L & COMP. L.* 229, 234 (1995) ("[I]n the Bronx . . . a thirteen-year-old boy shot and killed the five-year-old girl who lived next door to him because she had dissed him by stepping on his shadow."); Marc Fleisher, *Down the Passage Which We Should Not Take: The Folly of Hate Crime Legislation*, 2 *J.L. & POL.* 1, 41 n.119 (1994) ("A man was walking down the street and came upon a group of black teenagers who passed him on both sides. He inadvertently brushed shoulders

in these cases, the youth's need for reassertion seems to be in direct proportion to the intensity and frequency of his devaluation in the larger society.

Of course these two potential responses to disrespect and nonrecognition do not exhaust the ways in which people can and do cope with the daily threat of misrecognition and nonrecognition. I mention them, however, to indicate how people, as individuals and as groups, respond to the phenomenon. But what of the conceptual question of respect and disrespect, recognition and misrecognition (or nonrecognition)? In a very interesting article, Axel Honneth explores the relationship between disrespect and integrity. Having defined his project as one of clarifying the "interrelation between disrespect and human integrity,"<sup>133</sup> Honneth argues that, "we owe our integrity, in a subliminal way, to the receipt of approval or recognition from other persons."<sup>134</sup> Disrespect and the denial of recognition is injurious because it impairs people "in their positive understanding of self—an understanding acquired by intersubjective means."<sup>135</sup>

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with one of them who turned around and said: 'Hey man, you dissed me.' The teenager then pummeled the man, knocking him to the ground, and shot him, leaving him in the street where he was almost hit by oncoming traffic.").

Teenage pregnancy can also be understood as a partial attempt to reassert agency obliterated in daily life. One author reports that unwed teenage mothers frequently get pregnant in an effort to rebuild their self-worth in an environment that continually tells them and their young male partners that they are not worth much:

Being pregnant means being the center of attention, wanting to keep a boyfriend, or wanting to create something special. Getting a girl pregnant is often an attempt to prove to peers and parents that one is now a man. . . . A teenager wants to have a baby in order to feel important and dignified, to feel good about herself because she has not felt good enough before. Becoming a parent is an attempt to secure intimacy, love, and safety, to claim identity and a new status.

DANIEL B. FRANK, *DEEP BLUE FUNK & OTHER STORIES: PORTRAITS OF TEENAGE PARENTS* 11 (1983).

<sup>133</sup> Honneth, *supra* note 52, at 188. Ernst Bloch suggested a similar idea in his famous work, *Natural Law and Human Dignity* (Dennis J. Schmidt trans., 1986).

<sup>134</sup> Honneth, *supra* note 52, at 189 ("[The] invulnerability and integrity of human beings . . . depend on approval being forthcoming from others.").

<sup>135</sup> *Id.* Honneth describes three forms of disrespect. The first and most obvious is "disrespect that pertains to a person's physical integrity." *Id.* at 190. This form of disrespect refers to interference with a person's control over his or her physical self. The ultimate example of such disrespect is, of course, slavery. The slave did not own his or her body; the master did. Torture and rape are current examples. "Through the experience of this type of disrespect, therefore, the person is deprived of that form of recognition that is expressed in unconditional respect for autonomous control over his own body, a form of respect acquired just through experiencing emotional attachment in the socialization process." *Id.*

Implicit in the notion of misrecognition or disrespect is the possibility of recognition. As Honneth put it, "[t]here can be no meaningful use whatsoever of the concepts of 'disrespect' or 'insult' were it not for the implicit reference to a subject's claim to be granted recognition by others."<sup>136</sup> Thus, the demand for recognition is a demand to be treated as a responsible moral agent because disrespect and nonrecognition are social rituals that destroy moral agency.

Honneth and Taylor articulate what is an almost obvious and intuitively correct observation: individual and group identities are constituted through interactions with others. This view, which was first systemically and coherently presented by George Herbert Mead,<sup>137</sup> and was recently reformulated by Jürgen Habermas,<sup>138</sup>

The second form of disrespect deals with a normative injury to the self, as opposed to physical degradation. When an individual or group is structurally and systematically excluded from enjoying certain rights afforded to others in society, these exclusions are often accompanied by a background narrative that inflicts an enormous insult on the members of the minority group.

The distinguishing feature of [this form] of disrespect . . . thus lies not solely in comparative restrictions on personal autonomy but in the combination of these restrictions with the feeling that the subject lacks the status of full-fledged partners to interaction who all possess the same moral rights. For the individual, having socially valid legal rights withheld . . . signifies a violation of the person's . . . expectation that he or she will be recognized as a subject capable of reaching moral judgments. . . . Through the experience of this type of disrespect, therefore, the person is deprived of that form of recognition that takes the shape of cognitive respect for moral accountability.

*Id.* at 191.

The third form of disrespect is tied to the second. One way to discount a person's status as a responsible moral agent is to downgrade his or her horizons of significance, or "forms of living and convictions," through structural isolation. *Id.* Multiculturalists complain that this form of disrespect defines the attitude of the majority towards the culture and history of minorities.

These three forms of disrespect not only exclude and devalue minority groups, but they also lead members of these groups to unconsciously embrace a devalued form of their identity because "self-confidence and self-respect [are to some extent learned] from the perspective of the approving reactions of partners to interaction." *Id.* at 193. The district court in *Oliver v. Kalamazoo Board of Education* made a similar observation: "the Kalamazoo Board of Education's . . . failure to hire more Black personnel compounded its acts of unconstitutional segregation because it intensified the 'unrealistic self-images and detrimental attitudes' which the racial isolation had inflicted on Black and White students." 498 F. Supp. 732, 744 (W.D. Mich. 1980) (quoting *Oliver v. Kalamazoo Bd. of Educ.*, 368 F. Supp. 143, 180 (W.D. Mich. 1973)).

<sup>136</sup> Honneth, *supra* note 52, at 189.

<sup>137</sup> The relational construction of identity or self is the prime concern of George Mead's work. See MEAD, *supra* note 54, at 135-226 (arguing that the self develops through social interaction). He observes: "The 'I' is the response of the organism

maintains that the self is essentially a process rather than a substance.<sup>139</sup> As Mead put it:

The self is something which has a development; it is not initially there, at birth, but arises in the process of social experience and activity, that is, develops in the given individual as a result of his relations to that process as a whole and to other individuals within that process.<sup>140</sup>

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to the attitudes of the others; the 'me' is the organized set of attitudes of others which one himself assumes. The attitudes of the others constitute the organized 'me,' and then one reacts toward that as an 'I.'" *Id.* at 175. William James suggested the distinction between "I" and "me" as far back as 1890. See 1 WILLIAM JAMES, *THE PRINCIPLES OF PSYCHOLOGY* 291, 371 (1890) (referring to the empirical person as "me," and the source of subjective thought as "I"). For James, the "I" constituted the self as a subject, while the "me" signaled the self as an object. See WILLIAM JAMES, *PSYCHOLOGY: BRIEFER COURSE* 176 (1935).

At another point Mead says, "We cannot realize ourselves except in so far as we can recognize the other in his relationship to us. It is as he takes the attitude of the other that the individual is able to realize himself as a self." MEAD, *supra* note 54, at 194.

<sup>138</sup> See 2 JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION* (Thomas McCarthy trans., 1987) (1981). In Chapter Five, *The Paradigm Shift in Mead and Durkheim: From Purposive Activity to Communicative Action*, Habermas draws heavily on Mead's work to develop what Habermas believes to be a more defensible theory of the social "self." See *id.* at 1-111. He writes that "individuality too is a socially produced phenomenon that is a result of the socialization process itself and not an expression of residual, natural needs that escape that process. . . . [T]he process of socialization is at the same time one of individuation." *Id.* at 58.

<sup>139</sup> See MEAD, *supra* note 54, at 178 ("The self is not so much a substance as a process in which the conversation of gestures has been internalized within an organic form."). Of course, by saying that the self is essentially a process, I do not deny that the individual is also constituted by a physical body, an undeniable substance with certain needs and desires. Rather, I mean to suggest the following points. First, those desires assume an intentional dimension and find meaningful objects through interaction with other needs and desires. As Habermas argues, a person can be aware of himself as a desiring subject, as an "I," only through language and communication with others. See HABERMAS, *supra* note 138, at 57-76. Second, most of the social roles and responses that define the individual develop through a continuous process of interaction with others.

<sup>140</sup> MEAD, *supra* note 54, at 135. Actually, Mead sees two stages in the development of the self:

At the first of these stages, the individual's self is constituted simply by an organization of the particular attitudes of other individuals toward himself and toward one another in the specific social acts in which he participates with them. But at the second stage in the full development of the individual's self that self is constituted not only by an organization of these particular individual attitudes, but also by an organization of the social attitudes of the generalized other or the social group as a whole to which he belongs. These social or group attitudes are brought within the individual's field of direct experience, and are included as elements in the

These interactions sometimes involve a process where one individual or group refuses to recognize the capacity of another individual or group to act as equal moral agents. When accompanied by the resources of power, this nonrecognition or misrecognition generates a continual ritual of social death. As I noted earlier, this type of ritual sometimes manifests itself when one group excludes another group from certain roles, seeing the excluded Other as the negation of the moral and normal order inhabited by the excluding group.<sup>141</sup>

Thus, when we talk about educational role models in a race and gender specific sense, we do not mean that role aspirants will master a particular body of knowledge faster and better when they learn it from a supposed role model of the same race or gender. Nor do we mean that the supposed role models will or should define the good and virtuous life for emulation by the potential role model follower by serving as comprehensive role models. Rather, we mean that the presence of members of traditionally excluded groups will provide visible reassurance to the aspiring role occupants that the dominant group does not devalue them and their horizons of significance and that they "share[] with all other members of [their] community the qualities of . . . morally accountable subject[s]."<sup>142</sup> In other words, the presence of supposed role models of the same race or gender provides a counternarrative to the dominant narrative that has reinforced the exclusion of these marginalized groups.

In the next Part, this Article explores how the concept of role model has fared in the courts, that is, what versions of the concept of role model the courts have embraced, if any, and whether they are logically defensible and normatively sensible.

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structure or constitution of his self, in the same way that the attitudes of particular other individuals are; and the individual arrives at them, or succeeds in taking them, by means of further organizing, and then generalizing, the attitudes of particular other individuals in terms of their organized social bearings and implications.

*Id.* at 158; see also ERVING GOFFMAN, *FRAME ANALYSIS: AN ESSAY ON THE ORGANIZATION OF EXPERIENCE* 188 (1974) (arguing that the self is, at least partly, a function of the social roles it enacts).

<sup>141</sup> See CONNOLLY, *supra* note 123, at 64 ("Identity requires difference in order to be, and it converts difference into otherness in order to secure its own self-certainty."); see also *supra* note 135 and accompanying text (discussing the damage to identity caused by the exclusion of an individual or group).

<sup>142</sup> Honneth, *supra* note 52, at 194.

### III. ROLE MODELS, JURISPRUDENCE, AND THE POLITICS OF RECOGNITION

Quite often in this country, when a concept achieves some prominence in the discursive landscape, it eventually finds its way into the legal domain because legal institutions in this country play a central role in the resolution of social and political disputes, perhaps more so than in any other country or society. What may have initially appeared to be a theoretical construct or a rhetorical device to map and understand social arrangements is often tested in court as a conceptual device to resolve disputes arising from those arrangements. Of course, when the law embraces a particular concept, that concept has an advantage over competing alternatives because it is no longer solely the subject of philosophical musings and political theory. It comes to determine the ways and means by which our social and political life is ordered and regulated.

#### A. *Supreme Court Jurisprudence*

##### 1. Endorsing the Comprehensive View

The concept of role model got its sustained and perhaps well-known judicial articulation in the early 1980s in a case involving the retention of minority teachers at a time of retrenchment. In *Wygant v. Jackson Board of Education*,<sup>143</sup> a collective bargaining agreement between the Jackson, Michigan Board of Education and a teachers' union was challenged by a group of white school teachers. The agreement stated, among other things, that in the event layoffs became necessary, those teachers with the most seniority would be retained, provided that the percentage of minority personnel laid off would not exceed the current percentage of minority personnel employed.<sup>144</sup> Under the terms of this agreement, the white

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<sup>143</sup> 546 F. Supp. 1195 (E.D. Mich. 1982), *aff'd*, 746 F.2d 1152 (6th Cir. 1984), and *rev'd*, 476 U.S. 267 (1986).

<sup>144</sup> The agreement provided that:

In the event that it becomes necessary to reduce the number of teachers through layoff from employment by the Board, teachers with the most seniority in the district shall be retained, except that at no time will there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff. In no event will the number given notice of possible layoff be greater than the number of positions to be eliminated. Each teacher so affected will be called back in reverse order for positions for which he is certificated maintaining the above minority balance.

teachers who were "at the bottom of the seniority scale among white teachers" would bear "the white group's proportionate share of layoffs that became necessary."<sup>145</sup> These white teachers argued that the agreement, which made it possible for minority teachers with less seniority to keep their jobs while more senior nonminority teachers were dismissed, violated the Equal Protection Clause of the Fourteenth Amendment.<sup>146</sup> Given the fact that before 1953 no African American teachers worked in Jackson's public schools and that there had been, until recently before the case, "'substantial' and 'chronic' underrepresentation of minority teachers on the Jackson School District faculty,"<sup>147</sup> the school board and the teachers' association argued before the court that the agreement was necessary to achieve the desirable goal of "multi-ethnic representation of the teaching faculty."<sup>148</sup> Otherwise, it was clear that much of the recent gain in minority teacher employment would be negated because, under the principle of "last hired, first fired," a disproportionate number of minority teachers did not enjoy the protection of seniority.<sup>149</sup>

The district court upheld the constitutionality of the agreement and, in the process, advanced a theory to justify such schemes.<sup>150</sup>

*Id.* at 1198.

<sup>145</sup> *Wygant*, 476 U.S. at 299 (Marshall, J., dissenting).

<sup>146</sup> *See id.* at 271-73.

<sup>147</sup> *Wygant*, 546 F. Supp. at 1201. In its opinion, the district court briefly reviewed the previous relationship between African American teachers and the Jackson Public School System. No black teacher was hired by the system until 1953, when one black was hired among 61 hires; by 1961 there were only ten minority teachers among a total of 515 teachers in the system; it was only in 1969 that the Jackson School District started to think seriously about efforts to recruit minority teachers; and at the time of the collective bargaining agreement, in 1971, "15.9 percent of the student body was minority, while only 8.3-8.5 percent of the faculty was minority." *Id.* at 1197.

<sup>148</sup> *Id.* at 1198 (quoting the agreement's self-declared purpose as "to have at least the same percentage of minority racial representation on each individual staff as is represented by the student population of the Jackson Public Schools").

<sup>149</sup> *See id.* at 1197.

<sup>150</sup> *See id.* at 1201. The court reasoned that the agreement was a proper remedy aimed at the effects of prior discrimination:

[T]he Fourteenth Amendment would permit the Jackson School Board and the Jackson Education Association to voluntarily adopt . . . an affirmative action plan to protect minority teachers from the effects of layoffs.

The objective of this affirmative action plan to remedy past "substantial" and "chronic" underrepresentation of minority teachers on the Jackson School District faculty is plainly constitutional.

*Id.*



The court argued:

[I]t is appropriate to compare the percentage of minority teachers to the percentage of minority students in the student body, rather than with the percentage of minorities in the relevant labor market . . . because teaching is more than just a job. Teachers are *role-models for their students*. More specifically, *minority teachers are role-models for minority students*. This is vitally important because societal discrimination has often deprived minority children of other role-models.<sup>151</sup>

The district court apparently believed that teachers serve as role models in the comprehensive sense. Students will emulate them not only in relation to their professional roles ("teaching is more than just a job"), but also in relation to their general commitment to institutions and institutional life and their views about social life and institutional arrangements. The fact that the district court viewed teachers as role models in the comprehensive sense is neither surprising nor wrong. As I argued earlier, teachers and parents can legitimately be viewed as role models in the comprehensive sense, because they satisfy the criteria of physical presence combined with an authority-vulnerability social nexus.<sup>152</sup> Children are more likely to learn about correct commitments and virtuous ethical behavior from their teachers because they spend a considerable amount of time together and because teachers exercise a great deal of sanctioning power over students.

The Supreme Court has also adopted the view of teachers as role models in the comprehensive sense. In *Ambach v. Norwick*,<sup>153</sup> the Court upheld a state law which specified that only United States citizens or persons who indicated an intention to apply for citizenship could receive a teaching certificate on the ground that "a teacher serves as a *role model* for his students, exerting a subtle but important influence over their perceptions and values."<sup>154</sup>

<sup>151</sup> *Id.* (emphasis added).

<sup>152</sup> See *supra* part I.B.2 (discussing the comprehensive view).

<sup>153</sup> 441 U.S. 68 (1979).

<sup>154</sup> *Id.* at 78-79 (emphasis added). Other courts have also concluded that teachers are role models in the comprehensive sense, for example:

The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order. Consciously or otherwise, teachers—and indeed the older students—demonstrate the appropriate form of . . . conduct and deportment in and out of class. Inescapably, like parents, they are role models.

*Pfeiffer v. Marion Ctr. Area Sch. Dist.*, 917 F.2d 779, 785 (3d Cir. 1990) (quoting

Thus, the issue in *Wygant* was not whether black students would learn a formal body of knowledge better and faster from black teachers, although as I argued earlier, this might be the case in mentoring relationships;<sup>155</sup> the district court in *Wygant* did not find that the minority teachers were race specific role models in the role imitation sense. Likewise, the issue in *Ambach* was not whether citizenship per se enables a teacher to teach a particular subject (for example, science or even social science) better or improve the students' ability to learn these subjects;<sup>156</sup> the majority in *Ambach* clearly focused on the notion of teacher as role model in the comprehensive sense, not on the possibility that a noncitizen would be a less demanding or a less competent teacher. In *Ambach* and *Wygant*, the Supreme Court and the district court, respectively, viewed the teacher as a role model in the comprehensive sense and were concerned about the possibility that either a nonminority or a noncitizen might be a less effective teacher because of that status.<sup>157</sup> As the Supreme Court put it, through "the example he

Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986)); see also Dupree v. School Comm., 446 N.E.2d 1099, 1101 (Mass. App. Ct. 1983) ("Teachers, too, are in a position of special public trust. As role models for our children, they have an 'extensive and peculiar opportunity to impress [their] attitudes and views upon their pupils." (quoting Faxon v. School Comm., 120 N.E.2d 772, 774 (Mass. 1954))).

I argued earlier that peers can also serve as comprehensive role models for children. Justice Scalia did not completely miss the mark when he invoked this version of the concept of role model in *Vernonia School District v. Acton* as a justification for a school policy that required random drug testing of students participating in interscholastic athletics. "It seems to us self-evident," he observed, "that a drug problem largely fueled by the 'role model' effect of athletes' drug use . . . is effectively addressed by making sure that athletes do not use drugs." *Vernonia Sch. Dist. v. Acton*, 115 S. Ct. 2386, 2395-96 (1995).

Let me clarify the extent of my endorsement of Scalia's rhetorical move, lest readers misunderstand me. By suggesting that Scalia properly views teenage peers as comprehensive role models I do not necessarily endorse Scalia's conclusion that schools can randomly drug test those designated as role models without violating their Fourth Amendment rights. Whether student-athletes constitute role models for other students is a separate question from whether school officials can constitutionally compel those students to submit to random drug testing.

Second, my endorsement of Scalia's role model argument does not depend on the students' status as athletes. Any students with access to any socially desirable good can legitimately serve as potential role models.

<sup>155</sup> See *supra* notes 89-90 and accompanying text.

<sup>156</sup> See *Ambach*, 441 U.S. at 80 ("Certainly a State also may take account of a teacher's function as an example for students, which exists independently of particular classroom subjects.").

<sup>157</sup> For other Supreme Court decisions that refer to teachers as role models, see *Edwards v. Aguillard*, 482 U.S. 578, 583-84 (1987) ("The Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and

sets, a teacher has an opportunity to influence the attitudes of students toward government, the political process, and a citizen's social responsibilities."<sup>158</sup> Noncitizen teachers, the Court assumed, might not provide the appropriate influence in the development of these attitudes.<sup>159</sup>

## 2. Confronting the Issue of Race Specific Role Modeling

Even if we view teachers as role models in the comprehensive sense, however, we still need to ask why it would make sense to argue, as the district court in *Wygant* did, that black students need a black teacher on whom to model themselves. The district court gave this answer: "*This is vitally important because societal discrimination has often deprived minority children of other role-models.*"<sup>160</sup> This observation lends itself to one of two interpretations. First, the district court might have meant that discrimination against minorities, especially African Americans, has deprived minority students of successful minority role models—individuals whom young minorities might emulate—in all contexts, educational and otherwise. Alternatively, in using the term "other role-models," the district court might have meant that, given the history of this country and the narratives of difference that surround it, white teachers simply cannot serve as role models to black students. How can an African American student consider the Other as an example for emulation

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secondary schools. . . . Students in such institutions are impressionable and their attendance is involuntary. . . . The State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure." (citations omitted)).

<sup>158</sup> *Ambach*, 441 U.S. at 79.

<sup>159</sup> It is not quite clear, however, why we should think that a person who has lived in this country for only ten years and has been a citizen for merely one year will be a better role model than a person who has lived in this country for 30 years but has yet to become a citizen. People choose to become citizens for various reasons, just as they decline to take up citizenship for many reasons. Taking up citizenship does not necessarily indicate that one has mastered the values of his or her new country or has a total commitment to the institutions and values of the country in the same way that the absence of citizenship does not automatically suggest a lack of knowledge of and/or commitment to the values and institutions of this country.

<sup>160</sup> *Wygant v. Jackson Bd. of Educ.*, 546 F. Supp. 1195, 1201 (E.D. Mich. 1982) (emphasis added), *aff'd*, 746 F.2d 1152 (6th Cir. 1984), *and rev'd*, 476 U.S. 267 (1986); *see also* *Oliver v. Kalamazoo Bd. of Educ.*, 498 F. Supp. 732, 754 n.73 (W.D. Mich. 1980) ("In a school system . . . which has a multi-cultural and multi-racial student body, it is important that all students have a sufficient number of role models. This is particularly true of races that have historically been discriminated against throughout the country, such as Hispanics and Native Americans.").

when many institutions routinely describe that student as radically different from the Other in relevant aspects? In other words, the district court's holding may rest on the following reasoning: given the fact that discrimination against African Americans has historically rested on the proposition that African Americans lack the intellectual capacities that white Americans possess, the notion of a white teacher serving as an example of what a black child can achieve intellectually might lack credibility to that child.

Either interpretation of the district court's rationale for appropriating the concept of role model only makes sense in terms of the politics of recognition. The district court does not mean that black children will learn a particular subject better and faster from black teachers (role model in the role imitation sense), nor does it suggest that black teachers will provide better examples than white teachers of the ideal and virtuous life (role model in the comprehensive sense). Rather, the district court argues that the presence of minority teachers in the classroom constitutes a visible and credible recognition and affirmation of those black students. Historically, the dominant narrative in this country has asserted, often implicitly, but at times explicitly, that minorities—especially African Americans—are intellectually inadequate and thus different from white Americans. It is therefore unlikely that a black child would view a white teacher as a symbol or model of what that child can accomplish. Thus, the presence of a minority teacher will provide a more credible signal to the black child of that child's intellectual potential. In addition, that presence will indicate that social institutions no longer devalue members of the community to which the black child belongs and the traditions and “horizons of significance” that define the community.<sup>161</sup> This line of analysis suggests that minority role aspirants need affirmation and recognition from minority role models.<sup>162</sup>

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<sup>161</sup> See *Wygant*, 476 U.S. at 315 (Stevens, J., dissenting) (“In the context of public education, it is quite obvious that a school board may reasonably conclude that an integrated faculty will be able to provide benefits to the student body that could not be provided by an all-white, or nearly all-white, faculty.”).

<sup>162</sup> See *Oliver*, 498 F. Supp. at 748 (“[T]he need for the role models [at schools] is important because they can encourage minority students to higher aspirations and at the same time work to dispel myths and stereotypes about their race.”); see also *Latin Am. Citizens Council v. Clements*, 914 F.2d 620, 659 n.14 (5th Cir. 1990) (“Black and Hispanic judges serve as role models for other minority group members, who may not have envisioned a legal or judicial career as a real possibility in the past.”); *Barhold v. Rodriguez*, 863 F.2d 233, 238 (2d Cir. 1988) (“‘Role models,’ in contrast, are people whose very existence conveys a feeling of possibility to others; they give hope

The Sixth Circuit upheld the district court's decision,<sup>163</sup> and in the process endorsed the district court's theory of role model.<sup>164</sup> The Supreme Court, however, disagreed with this analysis and reversed the lower courts' decisions.<sup>165</sup> Justice Powell, joined by Chief Justice Burger, Justice Rehnquist, and Justice O'Connor explicitly rejected the role model theory as one with "no logical stopping point," which would allow "the Board to engage in discriminatory hiring and layoff practices long past the point required by any legitimate remedial purpose."<sup>166</sup> Furthermore, Justice Powell reasoned that

because the role model theory does not necessarily bear a relationship to the harm caused by prior discriminatory hiring practices, it actually could be used to escape the obligation to remedy such practices by justifying the small percentage of black teachers by reference to the small percentage of black students.<sup>167</sup>

Indeed, Justice Powell found the race specific role model theory uncomfortably similar to the separatist theory approved in *Plessy v. Ferguson*<sup>168</sup> and rejected in *Brown v. Board of Education*.<sup>169</sup>

that a previously restricted opportunity might now be available.").

<sup>163</sup> See *Wygant*, 746 F.2d at 1157 ("We believe that it is within the power and authority of the parties to this agreement [to adopt the protective affirmative action policy], and that their action is in no respect in violation of the United States Constitution or federal law.").

<sup>164</sup> The court of appeals fully cited the district court's statement on role models and endorsed it with the following remark: "We agree with and adopt [the district court's] conclusions as stated above." *Id.*

<sup>165</sup> See *Wygant*, 476 U.S. at 278.

<sup>166</sup> *Id.* at 275. Justice Powell found the role model theory very similar to another affirmative action theory the Court has also rejected: societal discrimination. "Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy. The role model theory announced by the district court and the resultant holding typify this indefiniteness." *Id.* at 276.

<sup>167</sup> *Id.* In her concurring opinion, Justice O'Connor, while agreeing with Justice Powell's decision to reject the role model theory, carefully distinguished it from diversity—an independent rationale that was not an issue before the Court in *Wygant*. See *id.* at 288 n.\* (O'Connor, J., concurring) ("The goal of providing 'role models' discussed by the courts below should not be confused with the very different goal of promoting racial diversity among the faculty.").

<sup>168</sup> 163 U.S. 537, 540 (1896) (striking down a Louisiana statute that provided for "equal but separate [train] accommodations for the white, and colored races").

<sup>169</sup> 347 U.S. 483, 493 (1954) (holding that "segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive[s] the children of the minority group of equal educational opportunities"). Justice Powell argued: "Carried to its logical extreme, the idea that black students are better off with black teachers could lead to the very

The fact that the Supreme Court finds no irony in comparing the exclusionary theory approved in *Plessy v. Ferguson* and the inclusive policy at issue in *Wygant* manifests a disturbing comfort with a jurisprudence of false symmetry. To compare an inclusive policy that attempts to incorporate minorities into the nation's social and political life to a system designed to exclude minorities from the life of the community on the explicit proposition that those minorities are not equal moral agents strains any sense of reality.<sup>170</sup> The theory at issue in *Wygant* parallels the reasoning in *Brown*, not *Plessy*, a fact that the Court has enigmatically overlooked.<sup>171</sup>

system the Court rejected in *Brown v. Board of Education*." *Wygant*, 476 U.S. at 276.

<sup>170</sup> As Justice Stevens observed in his *Wygant* dissent:

There is . . . a critical difference between a decision to *exclude* a member of a minority race because of his or her skin color and a decision to *include* more members of the minority in a school faculty for that reason.

The exclusionary decision rests on the false premise that differences in race . . . reflect real differences that are relevant to a person's right to share in the blessings of a free society. . . . [T]hat premise is 'utterly irrational,' and repugnant to the principles of a free and democratic society . . . . The inclusion of minority teachers in the educational process inevitably tends to dispel that illusion . . . .

*Id.* at 316 (Stevens, J., dissenting) (quoting *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 452 (1985)).

<sup>171</sup> Unlike the theory approved in *Plessy*, but like that approved in *Brown*, the policy in *Wygant* sought to integrate rather than segregate. *See id.* (Stevens, J., dissenting) ("The inclusionary decision is consistent with the principle that all men are created equal; the exclusionary decision is at war with that principle."). Unlike the narrative of devaluation and misrecognition that accompanied the law in *Plessy*, the narratives in *Brown* and *Wygant* emphasized the valuation and affirmation of the moral agency of those traditionally deemed to lack moral responsibility. *See id.* (Stevens, J., dissenting) ("The inclusion of minority teachers in the educational process inevitably tends to dispel [the narrative of misrecognition] whereas their exclusion could only tend to foster it."). And unlike *Plessy*, where the policy at issue sought to keep the divisions of the community permanent on the proposition that the two communities had different levels of moral and intellectual attainments, the objectives at issue in *Brown* and *Wygant* sought to develop one community in the context of a history of comprehensive exclusion of minorities.

I make these seemingly obvious observations because the Court has neglected them by increasingly embracing false symmetries: the symmetries between exclusionary policies, instituted for the specific purpose of denying minorities any rights on the ground of their alleged moral and intellectual unfitness, and inclusive policies, intended to admit historically excluded groups to the social and political life of the community. *See, e.g.*, *Miller v. Johnson*, 115 S. Ct. 2475, 2492 (1995) (finding that a Georgia proposal to restructure a congressional district to include a greater portion of minorities offended the Equal Protection Clause for lack of a proper "ameliorative purpose"); *Adarand Constructors v. Peña*, 115 S. Ct. 2097, 2119 (1995) (Thomas, J., concurring in part and concurring in the judgment) (opposing the position expressed by Justice Stevens that there is no "moral [and] constitutional equivalence' . . . between laws designed to subjugate a race and those that distribute

In subsequent decisions, the Supreme Court has reaffirmed its position on the issue of whether the concept of role model should serve as a justification for diversifying spheres of life. In *City of Richmond v. J.A. Croson Co.*,<sup>172</sup> for example, the Court rejected Richmond's set-aside program for minority building contractors by

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benefits on the basis of race in order to foster some current notion of equality" (quoting *Adarand*, 115 S. Ct. at 2120 (Stevens, J., dissenting)) (first alteration in original); *Shaw v. Reno*, 113 S. Ct. 2816, 2827 (1993) (stating that a reapportionment plan that purposefully includes individuals of the same race in one district "bears an uncomfortable resemblance to political apartheid").

Justice Powell may have initially formulated the jurisprudence of false symmetry in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). In a rhetorical move that has become famous, Powell struck down an affirmative action program with the following language: "The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal." *Id.* at 289-90. The observation seems eminently sensible. Who can disagree that equal protection means equal protection to all. But, of course, the question is not whether equal protection should vary depending on the race of the claimant, but rather what constitutes equal protection in a social and political environment where one social group has been systematically denied equal protection over an extended period of time and where the effects of that exclusion implicitly and explicitly structure the distribution of social goods and services in the present time. To compare governmental actions that attempt to remedy this unequal distribution of social goods and political power with the exclusionary and oppressive policies that legitimated and cultivated the caste system manifests an amazing disregard for the debilitating impact that this caste system has had and continues to have on American society.

Affirmative steps to remedy this debilitating culture of exclusion do not threaten to make equal protection mean one thing to one individual and something else to another. Rather, the Court's treatment of the current caste system as neutral imperils the equal application of equal protection. Case in point, the Supreme Court has, until recently, traditionally refrained from striking down a state's drawing of voting districts on equal protection grounds, even if those districts were drawn to advantage a particular ethnic group or political party (as long as the districting was not designed to disenfranchise an historically unpopular and disadvantaged group). In *Miller* and *Shaw* the Supreme Court held that it would treat a district designed to give blacks a majority, and hence an opportunity to elect their representatives, differently for equal protection purposes. The Court held that such districts warranted strict scrutiny and would likely fail as unconstitutional. As Justice Ginsburg noted in her *Miller* dissent, although ethnicity defines some of the current voting districts as a matter of political reality, "[u]ntil now, no constitutional infirmity has been seen in districting Irish or Italian voters together, for example, so long as the delineation does not abandon familiar apportionment practices." *Miller*, 115 S. Ct. at 2506 (Ginsburg, J., dissenting). She observes that, if other ethnic groups "may seek and secure group recognition in the delineation of voting districts," it seems utterly incomprehensible that African Americans, "the very minority group whose history in the United States gave birth to the Equal Protection Clause," should be treated differently. *Id.* (quoting *Shaw*, 113 S. Ct. at 2845 (Stevens, J., dissenting)).

<sup>172</sup> 488 U.S. 469 (1989).

observing: "Like the 'role model' theory employed in *Wygant*, a generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy. It 'has no logical stopping point.'"<sup>173</sup>

### 3. Fundamental Flaws in the Supreme Court's Role Model Jurisprudence

#### a. *Overlooking the Politics of Recognition*

In both *Wygant* and *Croscon*, the Supreme Court simply misunderstood what injury this race specific concept of role model was meant to address. The injury goes beyond the explicit exclusion of blacks from particular fields.<sup>174</sup> It encompasses the concern that a web of narratives developed along with these specific exclusions, narratives that attempted to legitimize those exclusions by constructing an identity of the excluded group to explain why members of that group could not enter those fields.<sup>175</sup> These narratives have had double targets and double impacts: they attempt to reassure the excluder of the moral and just nature of the exclusion and, more importantly, to convince the victim that he or she was responsible for his or her own marginalization. Their impact has been to reassure the excluders of their innocence while simultaneously reinforcing the self-devaluation and self-doubt of the excluded.<sup>176</sup>

Given this history, society ought to focus its efforts to remedy past discrimination, at least partly, on countering this web of

<sup>173</sup> *Id.* at 498 (quoting *Wygant*, 476 U.S. at 275).

<sup>174</sup> See *Oliver v. Kalamazoo Bd. of Educ.*, 498 F. Supp. 732, 747 (W.D. Mich. 1980) ("[A] school district's unconstitutional hiring practices can have an impact which affects not only those in the labor market who were excluded from work, but also others, most notably students. In such a case, a court must use care in fashioning a remedy because what might be sufficient to remedy one group's injuries may do nothing towards making the other group whole. This is because both may have been harmed in different ways by the district's failure to hire minorities.").

<sup>175</sup> See *id.* at 737 ("The adverse impact which racial isolation has upon Black . . . children in terms of unrealistic self-images and detrimental attitudes is only intensified by a conspicuous absence of Black adults in positions of leadership and respect." (quoting *Oliver v. Kalamazoo Bd. of Educ.*, 368 F. Supp. 143, 190 (W.D. Mich. 1973))).

<sup>176</sup> In this respect, these historical narratives closely parallel current role model rhetoric, which simultaneously reinforces the dominant group's innocence and generosity. See *supra* note 110 and accompanying text.



narratives that has constructed the identity of marginalized groups, an identity defined by devaluation and misrecognition and one that has taken root both among members of the marginalized and among those of the majority group.<sup>177</sup> A race specific theory of role modeling is, therefore, about the politics of recognition. It suggests that the employment or inclusion of a minority under the rubric of affirmative action can best be defended not on the notion that there might or might not have been explicit past discrimination by a particular institution, even though in most instances that will be the case, but rather as a recognition of the fact that the organized exclusion of minorities in this country has constructed an identity of these excluded groups that simultaneously justified their marginalization and exclusion to the majority group while inducing the minority group to adopt, often unconsciously, a deprecatory self-image.<sup>178</sup> An individual from the marginalized group who occupies a prominent position in society can counter that imprisoning narrative and thus fuel a process of reassurance for members of the out-group and a process of relearning for members of the in-group.<sup>179</sup>

The reply to Justice Powell's concern in *Wygant* that the role model theory "has no logical stopping point"<sup>180</sup> is, therefore, that it *does*. That stopping point will occur at the social and political moment when the politics of misrecognition and devaluation against out-groups cease to define the political and social environment of this country.<sup>181</sup> We have not reached this point yet. In fact, as Cass Sunstein properly observes, a caste system continues to define the existence of black citizens in this country.<sup>182</sup>

<sup>177</sup> See *Wygant*, 476 U.S. at 313 (Stevens, J., dissenting) ("Rather than analyzing a case of this kind by asking whether minority teachers have some sort of special entitlement to jobs as a remedy for sins that were committed in the past, . . . we should first ask whether the Board's action advances the public interest in educating children for the future."); see also *Oliver*, 498 F. Supp. at 751 n.61 ("An employer's actions can also discriminate against nonemployees (e.g., students), and they have just as much right to be made whole as do employees. To accomplish this, a court must be able to strike at those things which, if left untouched, would perpetuate the discrimination against these individuals . . .").

<sup>178</sup> See Taylor, *supra* note 24, at 25-26.

<sup>179</sup> See *Wygant*, 476 U.S. at 315 (Stevens, J., dissenting) ("It is one thing for a white child to be taught by a white teacher that color, like beauty, is only 'skin deep'; it is far more convincing to experience that truth on a day-to-day basis during the routine, ongoing learning process.")

<sup>180</sup> *Id.* at 275.

<sup>181</sup> See *infra* note 194 and accompanying text.

<sup>182</sup> See Sunstein, *supra* note 65, at 2429. The comprehensive and systematic nature

b. *Ignoring Logical Inconsistencies*

Ironically, while the Supreme Court rejected the role model theory as an “amorphous” remedial measure in one context,<sup>183</sup> it considered the notion sufficiently precise to justify exclusion and discrimination in another context. Thus, in *Ambach v. Norwick*,<sup>184</sup> the Supreme Court upheld a New York statute that permitted only United States citizens or persons who intended to apply for citizenship to receive a public school teaching certificate<sup>185</sup> on the

of the devaluation of the lives and social welfare of black citizens led Sunstein to suggest that the treatment of blacks by the status quo might well be a caste system, which he defines as a system in which “social and legal practices [translate] highly visible and morally irrelevant differences into systemic social disadvantage . . . [without] a very good reason for society to do so.” *Id.* at 2411. At another point Sunstein observes: “In the area of race and gender, daily denials of basic respect, usually based on prejudice of some sort, are a large part of what it means to have a caste system.” *Id.* at 2432.

Indeed, there are numerous stories and studies that show that a great deal of the devaluation of the social welfare of black citizens results from the racism that defines daily life in America, for example:

In 1990, the Urban Institute sent out young blacks and young whites with equivalent résumés and references, and who had been trained to behave identically, to apply for entry-level jobs. The whites did substantially better . . . [A] black face is still a net minus in the climb up the American greasy pole.

Michael Kinsley, *The Spoils of Victimhood: The Case Against the Case Against Affirmative Action*, NEW YORKER, Mar. 27, 1995, at 62-63. A few years ago the ABC news program *Prime Time Live* virtually replicated the Urban Institute’s conclusions using hidden cameras. See *Prime Time Live: True Colors* (ABC television broadcast, Nov. 26, 1991).

For statistics demonstrating the systematic disparity between the lives and social welfare of black and white citizens in this country and suggesting that the lives of black citizens are consistently and institutionally devalued, see generally HUMAN DEVELOPMENT REPORT, *supra* note 65; STATISTICAL ABSTRACT, *supra* note 66.

<sup>183</sup> See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 497-98 (1989) (criticizing the concept of role model as having “no relation to some basis for believing a constitutional or statutory violation had occurred [and claiming that] it could be used to ‘justify’ race-based decisionmaking essentially limitless in scope and duration”); *Wygant*, 476 U.S. at 276 (criticizing the concept of role model as “too amorphous a basis for imposing a racially classified remedy”).

<sup>184</sup> 441 U.S. 68 (1979).

<sup>185</sup> One of the plaintiffs who challenged the constitutionality of the law came to this country from Scotland, was a permanent resident, had lived in the United States for almost a decade and was married to a United States citizen when she applied for certification to teach nursery school through sixth grade. See *id.* at 71. She was a “*summa cum laude* graduate of a Massachusetts college and [had] received an A average in full-time graduate work in the State University of New York at Albany. She has taught both in this country and in Great Britain.” *Id.* at 85 n.4 (Blackmun, J., dissenting).

ground that "a teacher serves as a role model for his students, exerting a subtle but important influence over their perceptions and values."<sup>186</sup> Justice Powell, the same Justice who, in *Wygant*, deemed the role model theory too ambiguous to justify race-based decisionmaking,<sup>187</sup> seemed quite confident that the notion was precise enough to justify the state's exclusion of resident aliens from the teaching profession and to prevent that exclusion from violating of the Equal Protection Clause of the Fourteenth Amendment.<sup>188</sup>

In *Ambach*, the Court clearly considered teachers to be role models in the comprehensive sense.<sup>189</sup> According to the Court, students will emulate their teachers, not only in how they view the teaching profession, but also in how they think about the good and virtuous civic life. As explained earlier, this is a defensible view of the concept of role model. Teachers, parents, and sometimes peers can act as role models in the comprehensive sense because the relationship between the role model and the role aspirants is characterized by physical presence and an authority-vulnerability social nexus.<sup>190</sup> Thus, my complaint is not that Justice Powell's conclusion in *Ambach* is logically indefensible, because as a general matter teachers indeed serve as role models in a comprehensive sense,<sup>191</sup> but rather that it is difficult to reconcile his contrasting

<sup>186</sup> *Id.* at 69-70 & n.1. The statute at issue in the case, N.Y. EDUC. LAW § 3001 (McKinney 1970), provided that "No person shall be employed or authorized to teach in the public schools of the state who is . . . [n]ot a citizen." § 3001. This restriction, however, did not apply to a noncitizen teacher who "shall make due application to become a citizen and thereafter within the time prescribed by law shall become a citizen." § 3001(3).

Justice Blackmun in his dissent pointed out, with some degree of amusement I suppose, that the list of occupations restricted to citizens or to those who have declared their intent to become citizens also included "shorthand reporter, funeral director, masseur, physical therapist, and animal technician." *Ambach*, 441 U.S. at 82 n.1 (Blackmun, J., dissenting).

<sup>187</sup> See *Wygant*, 476 U.S. at 276.

<sup>188</sup> See *Ambach*, 441 U.S. at 73-74 (stating that "some State functions are so bound up with the operation of the State as a governmental entity as to permit the exclusion from those functions of all persons who have not become part of the process of self-government").

<sup>189</sup> See *id.* at 79-80 ("[I]t is clear that all public school teachers, and not just those responsible for teaching the courses most directly related to government, history, and civic duties, should help fulfill the broader function of the public school system . . . [A] State properly may regard all teachers as having an obligation to promote civic virtues and understanding in their classes, regardless of the subject taught." (emphasis added)); see also *Lorain Journal Co. v. Milkovich*, 474 U.S. 953, 958-59 (1985) (Brennan, J., dissenting) (emphasizing the role of public schools in preparing students for the duties of citizenship).

<sup>190</sup> See *supra* part I.B.2.

<sup>191</sup> One could properly fault Powell, however, for failing to support his rather

views of the notion of role model in *Wygant*. If the concept of role model was a determinate concept in *Ambach*, legitimately conferring benefits on some while denying benefits to others, why was it such an amorphous concept in *Wygant*, such that the Court rejected the theory as incapable of justifying broad remedial measures?

It is true that there are a number of factual differences between the two cases. In *Wygant* the teachers who challenged the agreement were already employed within the system, while in *Ambach* the teachers who challenged the state statute were applying for the first time;<sup>192</sup> in *Wygant* the case involved the history of racial discrimination in the educational system and its remedy, while in *Ambach* it involved alienage. In my view neither of these differences logically suggests that the concept of role model should apply in one context, but not in the other. With respect to the first distinction made, one could argue, as the court implied in *Wygant*, that discriminatory layoffs impose a more unacceptable burden on innocent individuals than does discriminatory hiring. According to this reasoning, the white teachers in *Wygant* had a more legitimate expectation for equal treatment (no layoffs without receiving an equal opportunity to compete with black teachers) than the alien teachers in *Ambach* who sought an equal opportunity to compete at the time of hiring. In my view, such a position is not persuasive.<sup>193</sup> Even if we assume that the white

cursory conclusion with a more extended argument as to why teachers should be considered role models in the comprehensive sense. The same can be said about Justice Scalia's invocation of the concept of role model with respect to student-athletes in *Vernonia Sch. Dist. v. Acton*, 115 S. Ct. 2386, 2395-96 (1995). As a general matter, student-athletes can logically serve as role models for their peers in a comprehensive sense. Scalia, however, invoked the concept of role model in an utterly conclusory manner. He made no attempt to explain why he invoked the term or precisely how it should apply to the given situation. Apparently, the term carried its own meaning. It was, as he saw it, "self-evident." *Id.*

<sup>192</sup> The *Wygant* Court relied on this distinction in making its decision:

In cases involving valid *hiring* goals, the burden to be borne by innocent individuals is diffused to a considerable extent among society generally. Though hiring goals may burden some innocent individuals, they simply do not impose the same kind of injury that layoffs impose. Denial of a future employment opportunity is not as intrusive as loss of an existing job.

*Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 282-83 (1986).

<sup>193</sup> Surely the unequal treatment would have a similar effect on both plaintiffs, whether the alleged discrimination was meted out at the point of entry or exit. Those who are already in the system and are treated unequally lose their jobs, and those who are treated unequally when they apply for jobs do not get the jobs they might otherwise receive.

teachers in *Wygant* had a better claim to their positions (a more legitimate expectation for equal treatment) than the alien teachers in *Ambach* had in relation to the positions for which they applied, it does not follow that the African American teachers in *Wygant* could not properly serve as valid role models for their African American students. Whether it is logically sound to claim that African American teachers act as role models for African American students

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We could argue that the white teachers in *Wygant* had a more legitimate expectation than the alien teachers in *Ambach* because a teacher's seniority correlates with the level of his or her commitment (financial as well as social) to the surrounding community and the degree of stability in his or her family life. Therefore, people who demand an equal opportunity to protect their seniority have a more legitimate moral claim than those who demand equal opportunity at the point of entry.

Although this is a plausible conclusion, I think there are problems with this argument. First, in *Wygant* seniority was not a primary moral value around which other values were to be negotiated. Indeed, seniority derived its moral force from the same agreement that recognized the retention of minority teachers as an important value. The agreement could have easily provided that merit, rather than seniority, would be the dispositive factor with regard to layoffs, without raising any constitutional problems. See *id.* at 299 (Marshall, J., dissenting) ("The compromise was . . . presented to the teachers, who ratified it by majority vote. Each of the six times that the contract has been renegotiated, [the provision regarding minority preferences during layoffs] has been presented for reconsideration to the members of the Union, at least 80% of whom are white, and each time it has been ratified."). Thus, the notion of seniority discussed in *Wygant* deserved no greater constitutional protection than did the retention of minority teachers or the claim for equal treatment in *Ambach*.

Even if we assume that there is some moral force to the idea that those who have invested their time, money, and emotional energy in a particular community can bring better claims than those who have not yet made such investments, this is still an arbitrary distinction to some degree. Under this assumption, a person who has lived in a particular community for ten years will supposedly have made more investments than an individual who has lived in that community for eight or nine years, even though empirical evidence might contradict this assumption. In other words, seniority might not be a good predictor of a person's commitment to and investment in a particular community. My point here is not that a legislature or a school board could not determine that seniority on the whole (pedagogically, politically, or as a measure of human capital) is a good thing and therefore should be protected, but that no one has persuasively shown that seniority should be protected as a constitutional value, nor has anyone shown that this value is so important that local authorities should not balance it against other important constitutional values such as remedying past discrimination and encouraging diversity. See *id.* at 282 n.10 ("The Constitution does not require layoffs to be based on strict seniority."); see also *id.* at 296 (Marshall, J., dissenting) ("[L]ayoffs are unfair. But unfairness ought not be confused with constitutional injury."); cf. *id.* at 286 (O'Connor, J., concurring) ("[A] remedial purpose . . . [can] be accepted as legitimate as long as the public actor has a firm basis for believing that remedial action is required. Additionally, . . . a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' . . . to support the use of racial considerations in furthering that interest." (citations omitted)).

should not be contingent on the strength or weakness of white teachers' claims to equal treatment.<sup>194</sup>

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<sup>194</sup> Perhaps what troubled the Court about applying role model rhetoric in affirmative action cases such as *Wygant* and *Crosby* is the concern that the concept of role model has the potential to become a permanent feature of political life in this society, and thus to exclude a certain segment of the population from social and political life whenever race is at issue. See *id.* at 275 ("The role model theory [endorsed by the district court] allows the Board to engage in discriminatory hiring and layoff practices long past the point required by any legitimate remedial purpose."). The Court might have thought that these concerns do not arise in cases where race is not involved, for in those cases there will be a clear social moment when the use of the concept of role model to exclude one group so as to include another group will be unnecessary. In *Ambach*, for example, Justice Powell seemed to suggest that the social moment occurred when the resident alien plaintiffs became U.S. citizens. As members of an excluded group, each permanent resident alien had the power within himself or herself to escape that condition of exclusion by simply taking the oath of citizenship. See *Ambach*, 441 U.S. at 80 ("Appellees, and aliens similarly situated, in effect have chosen to classify themselves."). In the affirmative action context, however, the Court clearly believed that there could be no such social moment that could render the role model argument clearly unnecessary. See *Wygant*, 476 U.S. at 276 ("[Under this role model theory] a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future.").

This argument has a number of weaknesses. In *Ambach*, the resident aliens could avoid being discriminated against by complying with the Court's role model rhetoric and thus becoming American citizens. But it seems rather odd that the Court would be willing to force a resident alien to relinquish his or her native citizenship (which obviously conferred at least some benefits) in order to enter the teaching profession, which he or she was otherwise qualified to join, while characterizing nonminority teachers who were initially forced to relinquish their teaching positions under a role model theory (which obviously constituted a significant loss to the plaintiffs) as innocent victims. In what sense are the resident aliens any less innocent victims than the nonminority teachers who almost lost their jobs to minority teachers?

More importantly, the Court's concern that the use of the concept of role model in racial contexts will have "no logical stopping point" simply begs the issue. If the Court is correct, it is only because either racism is so entrenched and persistent in our society that the role model argument will remain continually relevant or, alternatively, although racism has practically vanished from our society, the role model argument will remain necessary to support African Americans who will always lag behind because of their inability (lack of natural endowment) to compete with white Americans.

If the former analysis is correct, then the "no end in sight" argument has no force. There is, of course, an end. The elimination of racism would render the rhetoric of role model unnecessary. In the meantime, however, the concept of role model must remain relevant. To the extent that the Court sees no end in sight, this conclusion must rest on its pessimism regarding the plight of racism. On the other hand, if it is the latter assumption—namely, that African Americans will always lag behind because of their natural inability to compete with whites—that has informed the Court's reluctance to embrace the concept of role model, as it might well be, then the Court owes us an explanation for the basis of that assumption.

c. *Disregarding Empirical Evidence*

The factual differences between *Wygant* and *Ambach* and the empirical evidence do not logically suggest that the rhetoric of role model is dangerously amorphous and jurisprudentially unsuitable in one context while determinate and jurisprudentially useful in another context. In *Ambach* there was no conclusive, empirical evidence to suggest that students are more likely to learn correct attitudes and virtuous commitments from a United States citizen than from a permanent resident alien who, for example, has lived in this country for thirty years.<sup>195</sup> Likewise in *Wygant*, the Court had no real evidence to suggest that minority students are just as likely to be affirmed and inspired by a white teacher as they are by a minority teacher who shares their life experiences and their vulnerabilities. Nevertheless, the Court accepted the former proposition and discounted the latter, apparently based on intuition. As Justice Powell explained in *Ambach*:

Although the findings of scholars who have written on the subject are not conclusive, *they generally reinforce the common-sense judgment, and the experience of most of us*, that a teacher exerts considerable influence over the development of fundamental social attitudes in students, including those attitudes which in the broadest sense of the term may be viewed as political.<sup>196</sup>

Based on this "common-sense judgment" and the "experience of most of us," Powell apparently concluded that citizen-teachers act as better role models than noncitizen-teachers<sup>197</sup> but rejected the possibility that African American teachers will act as better

<sup>195</sup> See *Ambach*, 441 U.S. at 84 (Blackmun, J., dissenting) ("The appellees, to be sure, are resident 'aliens' in the technical sense, but there is not a word in the record that either appellee . . . is unqualified in any way . . . to teach."). I agree with T. Alexander Aleinikoff's observation that "[w]hat makes America attractive to immigrants are precisely those values that Americans celebrate: liberty, equality, opportunity, government under law. Indeed, those who have chosen to join us—and to give up a less happy existence elsewhere—may well feel more committed to these values than those of us who happen to have been born here." T. Alexander Aleinikoff, *Citizens, Aliens, Membership and the Constitution*, 7 CONST. COMMENTARY 9, 31 (1990); see also Gerald M. Rosberg, *The Protection of Aliens from Discriminatory Treatment By the National Government*, 1977 SUP. CT. REV. 275, 315 (noting that "[a]s a test of affinity, an alienage classification is seriously over-and underinclusive").

<sup>196</sup> *Ambach*, 441 U.S. at 79 n.9 (emphasis added).

<sup>197</sup> See *id.* at 79.

role models for African American students than white teachers.<sup>198</sup> And whose intuitions and experiences does the phrase "most of us" include? Certainly not the African American children who see the presence of African American teachers in their schools as visible affirmation that the majority culture and its institutions do not devalue their lives and their horizons of significance, and who, through the politics of recognition, may realize that they are capable of performing certain roles and occupying certain positions that traditionally have remained beyond their reach. Thus, it appears that, when Powell accepted the notion of role model as a helpful concept and when he rejected it as dangerously amorphous, his conclusions rested not on empirical evidence but rather upon his notion of what "the experience of most of us" suggests.

Several general conclusions emerge from the comparison of the Supreme Court's decisions in *Ambach* and *Wygant*. First, the Court invokes the concept of role model as a key rhetorical device to defend a normative position without making an extended argument to justify that position, as was the case in *Ambach*. At the same time, it debunks the concept as amorphous and frivolous when the normative position that the concept is invoked to support appears not to correspond with the experiences of members of the Court, as seems to have been the case in *Wygant*. Second, the specific experiences of members of the Court are invoked and described as the experience of "most of us." Once an experience is denominated as the "experience of most of us," it can apparently compensate for a lack of empirical data or logic to support a particular conclusion.<sup>199</sup> By relying on the

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<sup>198</sup> See *Wygant*, 476 U.S. at 276.

<sup>199</sup> Relying on some version of community, or what is quite often referred to as the interest or experience of the community, to legitimate a legal decision is not new to either legal scholars or judges and quite often occurs in both private law and public law.

For example, Melvin Eisenberg argues that, in private law adjudication "propositions of morality, policy and experience" constitute doctrinal social propositions if those social propositions are "rooted in aspirations for the community as a whole and . . . have substantial support in the community." MELVIN A. EISENBERG, *THE NATURE OF THE COMMON LAW* 1, 2, 15 (1988).

Harry Wellington has argued for a similar process in the public law realm. See Harry H. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 244 (1973) (arguing that requiring courts to apply "our" moral point of view constrains judicial reasoning by forcing judges to adhere to conventional morality, rather than their own); Harry H. Wellington, *History and Morals in Constitutional Adjudication*, 97 HARV. L. REV. 326, 334



notion of the "experience of most of us," the Court enshrines a particular activity or social arrangement as authoritative based on its supposed congruence with "our experience" and "to delegitimize or obscure other[]" experiences, often to the disadvantage of marginalized groups.<sup>200</sup>

Thus, the experience of marginalized groups, especially African Americans, suggests that, in a racially divided society that has largely constituted the identity of the majority group by defining the minority as its negation—primarily as intellectually inadequate—it is unlikely that members of the minority will feel affirmed and recognized by seeing members of the majority in positions of intellectual authority, but the Court's view of experience apparently suggests the opposite result. For the Court, this racial history does not have any significant bearing on how people interact with one another and perform their roles. The Court seems to be saying that we are simply teachers and students, people who occupy certain positions and play certain professional roles unmodified (or not overdetermined) by our racial affiliation.<sup>201</sup> On the other hand, our status as American citizens becomes a very important factor

(1983) (book review) (arguing that the Supreme Court should look to the "moral ideal of the community" as a legitimate "source of law").

Bruce Ackerman also incorporates notions of community into his work. Ackerman argues that "the People . . . are the source of rights; the Constitution does not spell out rights that the People must accept." BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 15 (1991). What "We the People" as a political community do at "our" most enlightened and deliberative moments apparently creates a constitutional transformation in our society, even though the Constitution provides a specific procedure for constitutional amendment. But as Don Herzog observes in a review of Ackerman's book, "the people aren't some harmonious unified community. They—we—are profoundly divided: the currently fashionable troika is race, class, gender, but of course there are many more cleavages." Don Herzog, *Democratic Credentials*, 104 *ETHICS* 467, 470 (1994) (book review). That being the case, Ackerman's "higher lawmaking moments of dualist democracy" collapse into "crass majoritarianism," undermining the democratic credential of his claim. *Id.* at 472. As Herzog aptly observes, "[c]asting democracy as a matter of counting heads or aggregating preferences is an impoverished approach." *Id.* "[T]he history of social and political theory is [partly] a series of debates over how to identify the people." *Id.* at 473. Therefore, merely invoking the authority of "We the People," even with capital letters, will not change the essentially contestable nature of "the people" and "the community" as legitimizing concepts. *Id.*

<sup>200</sup> See Fraser & Gordon, *supra* note 1, at 311 ("We contend that unreflective uses of [a] keyword . . . enshrine certain interpretations of social life as authoritative and . . . delegitimize or obscure others, generally to the advantage of dominant groups in society and to the disadvantage of subordinate ones.")

<sup>201</sup> See *supra* note 111.

in the Court's application of the concept of role model.<sup>202</sup> Apparently, we are not simply teachers, we are *American* teachers or *non-American* teachers. Thus, although national origin affects the way in which the Court defines a particular role, racial background is apparently irrelevant in the transformation and performance of a role. Evidently, it is a matter of public knowledge that teachers influence the values and attitudes of their students, and that alien teachers may exert an undesirable influence, but it is apparently unclear that African American teachers will provide a more credible narrative of recognition and affirmation for African American students than white teachers. In reality, however, this view of the world is utterly unreasonable. In this country "race matters," both in terms of how roles are performed and how relevant people view role performers in relation to their lives.<sup>203</sup>

### B. *The Concept of Role Model in the Lower Courts*

The comparison of the two cases seems also to suggest that the Court embraces the concept of role model as a precise and meaningful jurisprudential device when it is invoked to exclude marginal groups from political and social life but rejects it as jurisprudentially suspect when the concept is relied upon by a minority group that seeks admittance into the various spheres of life.<sup>204</sup> *Chambers v. Omaha Girls Club, Inc.*<sup>205</sup> marks another example of the federal courts' adopting the rhetoric of role model as a sufficiently precise jurisprudential guide when dealing with a legal issue that involves a member of a marginalized group

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<sup>202</sup> See *Ambach v. Norwick*, 441 U.S. 68, 75 (1979) ("[A]n oath of allegiance or similar ceremony cannot substitute for the unequivocal legal bond citizenship represents.").

<sup>203</sup> See WEST, *supra* note 21; see also JEFF SPINNER, THE BOUNDARIES OF CITIZENSHIP 30 (1994) ("The formation of identity in the United States has been overwhelmed by the distinction between Blacks and whites.").

<sup>204</sup> For example, in *Ambach*, the Supreme Court used role model rhetoric to affirm the exclusion of noncitizen teachers from public schools on the ground that they would act as negative role models for their young, impressionable students. See *Ambach*, 441 U.S. at 79-81. By sanctioning the preference of citizens for the teaching profession, the Court agreed with the State of New York that citizens, even those who might have just taken up citizenship after having resided in the country only for the minimum five-year period (the probationary period), are more likely than permanent resident aliens, who might have lived in the country for 30 years or more, to serve as the appropriate positive role models for students.

<sup>205</sup> 834 F.2d 697 (8th Cir. 1987).

supposedly acting as a negative role model. In *Chambers*, the Eighth Circuit adopted the concept of role model as a legitimate judicial standard for determining whether an employee should be discharged. The plaintiff, a young, single black female, was employed as an arts and crafts instructor by the Omaha Girls Club, a private social club that offered programs designed to help young girls "maximize their life opportunities."<sup>206</sup> The Club expected its instructors "to act as role models for the girls, with the intent that the girls will seek to emulate their behavior."<sup>207</sup> To implement this "role model rule," the Club banned "single parent pregnancies" among its staff.<sup>208</sup> During the course of her employment, the plaintiff became pregnant and was subsequently discharged for violating Club policy.<sup>209</sup>

The plaintiff argued that the role model policy and the Club's decision to fire her under the terms of that policy violated Title VII's prohibition against race and sex discrimination.<sup>210</sup> The Eighth Circuit concluded, however, that "the Club's role model rule [was] justified by business necessity" because "there [was] a manifest relationship between the Club's fundamental purpose and the rule."<sup>211</sup> The court also found that "the rule qualifie[d] as a bona fide occupational qualification,"<sup>212</sup> despite the district court's

<sup>206</sup> *Id.* at 698-99.

<sup>207</sup> *Id.* at 699.

<sup>208</sup> *Id.* at 699 n.2 ("The following are not permitted and such acts may result in immediate discharge: . . . Negative role modeling for Girls Club Members . . . includ[ing] such things as single parent pregnancies." (quoting the Club's personnel policies)).

<sup>209</sup> *See id.* at 699.

<sup>210</sup> *See id.* at 700. Title VII provides that "[i]t shall be an unlawful employment practice for an employer . . . to discharge . . . or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . ." 42 U.S.C. § 2000e-2(a) (1994).

<sup>211</sup> *Chambers*, 834 F.2d at 701, 705. The Club's fundamental purpose included the following objectives:

Develop and implement programs to enable girls to build positive self esteem through skill development and application.

....

... Provide opportunities for girls to explore the full range of their personal options . . . and career choices in order to take control of their lives.

....

Promote a broad view of responsibility as a citizen of a larger community through education and civic activity.

*Id.* at 698 n.1 (quoting the trial record).

<sup>212</sup> *Id.* at 705. The bona fide occupational qualification defense provides

finding that the policy "would impact black women more harshly" due to the "significantly higher fertility rate among black females."<sup>213</sup>

Even though there was no evidence showing that teenage African American females would emulate young, single African American mothers and thus "provoke teenage pregnancies,"<sup>214</sup> and even though the court was "uncertain whether the role model rule by its nature [wa]s suited to validation by an empirical study,"<sup>215</sup> and even though "[c]ourts have consistently rejected the argument that stereotyped customer preferences justify discriminatory practices,"<sup>216</sup> the Eighth Circuit concluded that the concept of negative role model was a meaningful jurisprudential construct<sup>217</sup>

"an extremely narrow exception" to the general rule requiring equality of employment opportunity. *Jatczak v. Ochburg*, 540 F. Supp. 698, 702 (E.D. Mich. 1982) (citations omitted). As the Fifth Circuit observed, "discrimination based on sex is valid only when the *essence* of the business operation would be undermined by not hiring members of one sex exclusively." *Diaz v. Pan Am. World Airways*, 442 F.2d 385, 388 (5th Cir. 1971). To prevail on this claim, an employer must prove "that there is a 'positive relationship' between the rule or policy and the employer's programs." *Chambers v. Omaha Girls Club*, 629 F. Supp. 925, 950 (D. Neb. 1986) (citations omitted), *aff'd*, 834 F.2d 697 (8th Cir. 1987). The district court in *Chambers* found that the defendant established that "its only purpose" was to provide young women "with exposure to the greatest number of positive options in life," that "teenage pregnancy is contrary to this purpose and philosophy," and "that it honestly believed that to permit single pregnant staff members to work with the girls would convey the impression that the Girls Club condoned pregnancy for the girls in the age group it serves." *Id.* Therefore, the district court concluded that "the defendants have met the burden of showing that a manifest relationship exists between the Girls Club's fundamental purpose and its single pregnancy policy." *Id.* Based on this finding the Eighth Circuit confirmed that "the [role model] rule qualifie[d] as a bona fide occupational qualification." *Chambers*, 834 F.2d at 705.

<sup>213</sup> *Chambers*, 834 F.2d at 701 (quoting *Chambers*, 629 F. Supp. at 949).

<sup>214</sup> *Id.* at 707 (McMillan, J., dissenting) (citing *Avery v. Homewood Bd. of Educ.*, 674 F.2d 337, 339 (5th Cir. 1982)).

The district court, and now this court, accepts without any proof [Omaha Girls Club's] assumption that the presence of an unwed pregnant instructor is related to teenage pregnancies. [Omaha Girls Club] failed to present surveys, school statistics or any other empirical data connecting the incidence of teenage pregnancy with the pregnancy of an adult instructor. . . . [The Club] instead relied on two or three highly questionable anecdotal incidents to support the rule.

*Id.* (McMillan, J., dissenting) (citations omitted).

<sup>215</sup> *Id.* at 702.

<sup>216</sup> *Jatczak*, 540 F. Supp. at 703 (citing *Diaz*, 442 F.2d at 389).

<sup>217</sup> As the Eighth Circuit observed, the "role model rule has a manifest relationship to the Club's fundamental purpose." *Chambers*, 834 F.2d at 704. In a similar case, the same rationale prevailed:

that could be used to exclude individuals from the labor market.<sup>218</sup> Why was it so easy for the Eighth Circuit to find a “manifest relationship” between the role model rule and the Club’s fundamental purpose in *Chambers* and for the Supreme Court to see a relationship between positive role modeling and citizenship in *Ambach*, on the one hand, but so difficult for the courts to find a sufficiently close relationship between the history and structural reality of racial discrimination and the politics of misrecognition on the other? Put simply, why do courts fail to see a “manifest relationship” between the purpose of remedying past discrimination and role modeling?

What explains the fact that some cases, *Chambers* and *Ambach* for example, sanction reliance on the concept of role model to pursue certain goals, while cases like *Wygant* and *Croson* explicitly reject the use of the concept of role model as a means of pursuing policy goals? The fact that the latter group of cases involved the troubling process of classification by race might account for the courts’ divergent approaches. This argument presents a number of problems, however. To begin with, it may simply be inaccurate. The role model rule in *Chambers* focused to a large extent on race. Although the rule did not explicitly classify by race, the plaintiff established a prima facie case of disparate impact by demonstrating that the role model policy excluded young African American women at a higher rate than young white women.<sup>219</sup> Even assuming that

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[T]he decision to dismiss plaintiff was premised upon plaintiff’s stated intent to offer herself, in her condition of unwed pregnancy, as an “alternative lifestyle” role model to the young women . . . in her community project. . . . [T]his course of conduct and philosophy is contrary to the Purpose and philosophy of the YWCA and violated plaintiff’s agreement to espouse these principles in her employment.

Harvey v. YWCA, 533 F. Supp. 949, 954-55 (W.D.N.C. 1982).

<sup>218</sup> Regina Austin notes the irony of the Club’s policy and the decision of the court:

Firing a young unmarried, pregnant black worker in the name of protecting other young black females from the limited options associated with early and unwed motherhood is ironic, to say the least. The Club managed to replicate the very economic hardships and social biases that, according to the district court, made the role model rule necessary in the first place.

Austin, *supra* note 15, at 553.

<sup>219</sup> The district court addressed the issue of race discrimination “only insofar as [the role model rule] may have an impact upon the class of black women.” *Chambers*, 629 F. Supp. at 944. In ruling upon the plaintiff’s disparate impact claim, the district court “relied on statistics showing that black women generally . . . are more likely to

classification by race distinguished the two groups of cases and that the courts simply intended to reject racial classifications as normatively undesirable, it is not clear to me why it should logically follow from that normative position that the concept of positive role model is therefore amorphous and unsound in cases involving race. Whether or not African Americans serve as role models for other African Americans, as an empirical or logical matter, does not depend on whether one believes that classification by race is normatively undesirable. The fact that the Court thinks racial classification is morally unsound does not transform the concept of role model, which the Court has held to be precise and determinate in the nonrace context, into an amorphous and frivolous concept. One, of course, could argue that role modeling is not a necessary means to achieve diversity or to remedy past discrimination,<sup>220</sup> but the Court did not engage in such analysis. It simply dismissed the concept as amorphous.<sup>221</sup>

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become pregnant than white women." *Chambers*, 834 F.2d at 701 n.12.

<sup>220</sup> When analyzing racial classifications, courts apply a strict scrutiny standard of review. Courts will only uphold a racial classification as constitutional if it accommodates a compelling government interest through the least restrictive means necessary. See *Adarand Constructors v. Peña*, 115 S. Ct. 2097, 2113 (1995).

Racial classifications rarely survive the strict scrutiny standard of review. Although the application of strict scrutiny almost always leads to the invalidation of the government policy in question, the doctrinal formulation holds up the possibility that there may be times when such classifications could be upheld. Indeed, Justice O'Connor, writing for the 5-4 majority in *Adarand*, went out of her way to "dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'" *Id.* at 2117 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring)). "The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." *Id.*

<sup>221</sup> In this society where the politics of misrecognition and nonrecognition has been practiced against African Americans for a long time and has manifested itself through a narrative of social and intellectual inadequacy, surely a governmental policy that develops a strong counternarrative to challenge the threat of institutional exclusion is a necessary response to the "lingering effects of racial discrimination." *Id.* Indeed, in this racially divided society, the concept of role model is necessary for any counternarrative to be credible both to the narrator of nonrecognition and the target of that narrative. See *Oliver v. Kalamazoo Bd. of Educ.*, 498 F. Supp. 732, 753 (W.D. Mich. 1980) (noting that laying off minority teachers "would take away badly needed student role models" which "would have a psychological impact on the students and the general community who could perceive the District's actions as being inequitable and a disavowal of its promises to desegregate").

### C. Summary

The concept of role model has had a strange career in the courts. While courts consider it "amorphous" and jurisprudentially suspect in certain circumstances, they embrace it as a useful jurisprudential device in other situations.<sup>222</sup> While some individuals are excluded from certain areas of life because they apparently set negative examples, others are included as positive role models.<sup>223</sup> When the courts draw these distinctions, they rarely offer justifications for their decisions, other than what Justice Powell referred to as the "experience of most of us."<sup>224</sup> But, of course, when that experience is challenged, both in terms of its empirical validity and its normative force, it will not be adequate merely to invoke the experiences as the basis for the legitimacy of a decision.

The courts invoke role model rhetoric in inconsistent, even paradoxical, ways. At times they adopt the concept to legitimate the politics of difference (citizen teachers are different from noncitizen teachers), while at other times they reject it on the basis of the politics of identity (members of the majority and the minority do not have different needs). This inconsistency might be a function of a number of factors. First, in both legal literature and general discourse the term role model is often invoked, but rarely analyzed. When invoked, it is rarely used as a method of analysis, but simply as a shorthand for making and contesting normative claims.<sup>225</sup> When a particular activity or commitment is seen to be desirable, commentators use the concept of role model as a rhetoric of approval. But when the desirability of such commitment or activity is in doubt, the concept of role model is used as a rhetoric of disapproval. In either case, those who invoke it offer neither empirical data nor the force of logic to justify their use. To quote Martha Nussbaum, writing in another context, these commentators act "as if they were in the know about some new and decisive discovery that removes the need for argument."<sup>226</sup> Thus, part of the inconsistency surrounding the concept of role model can be attributed to the fact that people invoke the rhetoric in a conclusory

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<sup>222</sup> Compare *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986) with *Vernonia Sch. Dist. v. Acton*, 115 S. Ct. 2386, 2395-96 (1995).

<sup>223</sup> Compare *Chambers*, 834 F.2d at 705 (8th Cir. 1987) with *Ambach v. Norwick*, 441 U.S. at 69-70 (1979).

<sup>224</sup> *Ambach*, 441 U.S. at 79 n.9.

<sup>225</sup> See *supra* note 191.

<sup>226</sup> Nussbaum, *supra* note 10, at 205.

manner rather than as a method of analysis. Second, courts consistently apply the term in an inconsistent manner. Apparently, courts consider the term too ambiguous when it is used as a tool of inclusion, but consider it jurisprudentially precise when it is used as a tool of exclusion.<sup>227</sup> In this process, history, logic, and empirical evidence are substituted with what is supposedly our ordinary and general experience.<sup>228</sup>

Unfortunately, it is this "general experience" that seems to have led the current Supreme Court to a rather puzzling, and in my view tragic, state of affairs, where, as a general matter, minorities who bring claims of disadvantage are greeted with moral skepticism,<sup>229</sup>

<sup>227</sup> See *supra* note 222.

<sup>228</sup> I should qualify my observations with regard to this last point. Some of the lower courts have rejected the negative role model concept as a business necessity defense in employment discrimination cases involving discrimination against women because they were unwed mothers or single and pregnant or because they did not fit customers' stereotyped preferences for male employees. See *Andrews v. Drew Mun. Separate Sch. Dist.*, 507 F.2d 611, 617 (5th Cir. 1975) ("The third rationale proffered by the school district in hopes of salvaging the [role model] rule, that the presence of unwed parents in a scholastic environment materially contributes to school-girl pregnancies is without support, other than speculation and assertions of opinion . . ."); *Jaczak v. Ochburg*, 540 F. Supp. 698, 704 (E.D. Mich. 1982) ("The Court is not convinced by the testimony in this case of the necessity of a male role model . . . [G]ender plays no significant role in the ability of a person to properly supervise the clientele of the Sheltered Workshop [a work training program for mentally ill young adults].").

One possible explanation for the difference between these cases, which involved women, and cases such as *Ambach* and *Wygant*, which involved aliens and African Americans, may be that gender stereotypes have declined over the past decades; therefore, courts might now believe that these stereotypes no longer reflect "the experience of most of us." But stereotypes about aliens and African Americans are still pervasive in our society. Those who are in positions of power often have very little social and personal interaction with these two groups; therefore, they tend to rely upon these myths and stories that the dominant narrative circulates. See *Addis*, *supra* note 73, at 2262.

<sup>229</sup> For example, in *Croson*, Justice O'Connor stated that the dearth of minority contractors in Richmond, Virginia might be due to numerous factors that have little to do with racial discrimination, one of which, she surmised, might be the different career choices of whites and blacks. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 503 (1989) ("There are numerous explanations for this dearth of minority participation, including . . . black and white career and entrepreneurial choices. Blacks may be disproportionately attracted to industries other than construction. . . . The mere fact that black membership in th[is] trade . . . is low, standing alone, cannot establish a prima facie case of discrimination." (citation omitted)); see also *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986) ("There are numerous explanations for a disparity between the percentage of minority students and the percentage of minority faculty [in the Jackson school district], many of them completely unrelated to discrimination of any kind. In fact, there is no apparent connection between the two groups.").



while whites who bring claims of disadvantage to challenge any affirmative steps taken by the government to remedy past and current discrimination increasingly receive constitutional recognition and protection, even when the challengers cannot show that the remedy causes them any cognizable injury.<sup>230</sup> Ironically, courts create this distinction by invoking the same rhetorical devices—such as “apartheid,” “segregation,” “racism”—that courts of an earlier era used to undermine and dismantle the officially sanctioned subordi-

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<sup>230</sup> In *Shaw v. Reno* and *Miller v. Johnson*, the Supreme Court held that individual white voters could state a cause of action under the Equal Protection Clause by alleging that their congressional district was so “bizarre” or “extremely irregular on its face,” *Shaw v. Reno*, 113 S. Ct. 2816, 2824 (1993), that it can only be understood as an “effort to segregate citizens into separate voting districts on the basis of race without sufficient justification,” *id.* at 2830, or by offering direct evidence “that race was the predominant factor motivating the legislature’s decision to place a significant number of voters within or without a particular district.” *Miller v. Johnson*, 115 S. Ct. 2475, 2481 (1995). In *Shaw*, the white plaintiffs from North Carolina who challenged the constitutionality of their district could not prove that the shape of the district deprived them of their right to vote or diminished the political strength of their racial group. See *Shaw*, 113 S. Ct. at 2822-23. Indeed, whites held a voting majority in ten of the twelve congressional districts in North Carolina. See *id.* at 2838 (White, J., dissenting). Although African Americans constituted 20% of the voting population, North Carolina had not sent an African American to Congress since Reconstruction. See *id.* at 2943 (Blackmun, J., dissenting).

Given the clear history and current reality of racial bloc voting among whites, see Richard Briffault, *Race and Representation After Miller v. Johnson*, 1995 U. CHI. LEGAL F. 23, 55-56, 69-71, it is “a fiction” to claim that North Carolina’s districting plan, which was drawn to give African Americans an opportunity to exercise their rights under the Fifteenth Amendment, “might have violated [the white] appellants’ constitutional rights.” *Shaw*, 113 S. Ct. at 2834 (White, J., dissenting). The very real injury that African Americans have suffered and still suffer in white-majority districts from the very real phenomenon of racial bloc voting among whites was apparently insufficiently weighty to defeat the fictitious injury that appellants supposedly suffered from the creation of minority districts.

It seems rather odd that people who live fairly comfortably in an intensely race-conscious district and who would probably not vote for a black candidate would suddenly demand a color-blind district when their newly drawn district acquires an African American majority. In the current environment, the alternative to minority districts amounts not to color-blindness, but rather to black-blindness. I also find it somewhat puzzling that white plaintiffs, who probably live in all-white neighborhoods, would consider an African American majority district segregated and, therefore, a violation of their own constitutional rights. Furthermore, it is interesting to explore the assumption behind the appellants’ challenge, namely, that an African American majority district will always elect an African American candidate. This may be a plausible assumption, although the district did not remain in place long enough to confirm that prediction. But apparently the white challengers did not worry about the historical fact that majority white districts will almost always elect white candidates. As one commentator put it: “A status quo that disenfranchises minorities is now constitutionally preferable to race-conscious redistricting.” David Kairys, *Race Trilogy*, 67 TEMP. L. REV. 1, 8 (1994).

nation and devaluation of African Americans. Courts apparently see a moral symmetry between exclusions informed by racism on the one hand, and governmental actions designed to remedy the effects of such exclusions on the other. When minorities challenge the disadvantages caused by institutional racism, the current Supreme Court preaches restraint and requires detailed empirical evidence.<sup>231</sup> But when members of the majority challenge the disadvantages allegedly caused by the remedial policies that favor minorities, the Court engages in judicial activism and requires only a small amount of empirical evidence, if any, apparently because "our general experience" supplements the lack of empirical data. Thus, the Court's role model jurisprudence is consistently inconsistent and therefore, perfectly consistent with the Court's recent jurisprudence in other areas, especially affirmative action.

One way to reduce this inconsistency in role model jurisprudence is to clearly define what we mean when we refer to the concept of role model, so that it can be used as a method of analysis rather than as a mere conclusory device. Therefore, I have argued that the concept can only be used legitimately under three conditions: in the context of role imitation, which is not controversial;<sup>232</sup> in a comprehensive sense in certain specific relationships, such as the relationship between parents and children, school teachers and their students, and among peers;<sup>233</sup> and in aid of the politics of recognition.

#### IV. ROLE MODELS AND THE POLITICS OF RECOGNITION: REPLIES TO OBJECTIONS IN THE GUISE OF CONCLUDING REMARKS

The rhetoric of "role model" has become a prominent part of the discursive landscape in this country. From popular discourse to academic musings to judicial decisions, we find the term quite frequently. It has become a key term, functioning as a site on which visions and experiences of social life are "negotiated and contested."<sup>234</sup> Commentators invoke the concept under various circumstances to challenge or defend various normative positions, quite often without any attempt to explain how the concept relates to that

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<sup>231</sup> See *Wygant*, 476 U.S. at 277 ("Evidentiary support for the conclusion that remedial action is warranted becomes *crucial* when the remedial program is challenged in court by nonminority employees." (emphasis added)).

<sup>232</sup> See *supra* parts I.B.1 and II.A.

<sup>233</sup> See *supra* parts I.B.2 and II.B.

<sup>234</sup> Fraser & Gordon, *supra* note 1, at 310.

particular normative proposition. Indeed, commentators often invoke the term as if it carried an uncontested and clear meaning, thereby dispensing with the need for an extended explanation. For example, when Justice Scalia used the term in *Vernonia* to uphold the constitutionality of a school's policy mandating random drug testing for student-athletes, he thought it was "self-evident" that athletes' drug use had a "role model" effect.<sup>235</sup> He apparently thought that the term carried its own meaning and, therefore, could be used as a key jurisprudential device with no more than a few words of explanation. To some extent, Scalia might be right. Like any other key expression, such as "quota," "dependency," and "welfare,"<sup>236</sup> the term carries "unspoken assumptions and connotations that can powerfully influence the discourse[] [it] permeate[s]—in part by constituting a body of *doxa*, or taken-for-granted commonsense belief that escapes critical scrutiny."<sup>237</sup>

Throughout this Article, I have attempted to puzzle out, partly through a genealogical inquiry, the various meanings that the concept of role model carries in its taken-for-granted appearance and to determine whether any of those meanings are empirically informed, logically sound, or normatively defensible. I have argued that, broadly speaking, commentators invoke the concept of role model traditionally, and in my view legitimately, in two contexts: specific role imitation and comprehensive role modeling. Outside these two situations, however, the only legitimate and defensible circumstance where the concept of role model can be used is in relation to the politics of recognition. Nevertheless, commentators regularly apply the concept to other circumstances where the use of other concepts and images would be more appropriate. Indeed, commentators often invoke the concept of role model not to shed light upon "problems of power and authority and social reality in general,"<sup>238</sup> but to divert attention away from these real issues.

<sup>235</sup> *Vernonia Sch. Dist. v. Acton*, 115 S. Ct. 2386, 2395-96 (1995).

<sup>236</sup> Another popular term frequently invoked but rarely defined is "self-determination." When groups assert their right of self-determination, they announce an irrefutable basic principle that needs no explanation and to which other principles and interests must defer; however, this seemingly clear principle of governance is rather opaque. When we ask ourselves what constitutes self-determination, who decides which group can exercise its right to self-determination, and how small the self-determining unit can be, we realize that the concept of self-determination does not carry its own clear meaning after all.

<sup>237</sup> Fraser & Gordon, *supra* note 1, at 310.

<sup>238</sup> MILLS, *supra* note 20, at 612.

In this Part, I will address some of the possible objections to the concept of role model as a version of the politics of recognition. These objections are likely to come both from those who generally support diversity and those who oppose it, but I will primarily address the objections from those who are generally sympathetic to diversifying spheres of life but remain skeptical about using the concept of role model in that struggle.

There are likely to be two main objections to my proposal. First, some might argue that embracing the concept of role model as a version of the politics of recognition will lead to the practice of tokenism and the devaluation of the supposed role model's merit. This is what I shall refer to as the "devaluation of the individual agent" argument. Second, others might argue that adopting this version of the concept of role model will lead to cultural assimilation, transforming those who supposedly need role models into some version of the majority. I shall refer to this as the "loss of cultural integrity" argument.<sup>239</sup>

As I argued earlier, the fear of tokenism is real.<sup>240</sup> If the value of an employee or an educator is seen exclusively in terms of his or her symbolic role, there is a distinct possibility that a desire for "diversity" will lead to only token representation. After all, if employers only hire a particular individual to symbolize the possibilities of success for members of the group to which the supposed role model is said to belong, then employers will consider one or two such individuals sufficient to convey the possibility of success to those who have eyes and the desire to see. For this reason, many minority legal scholars are skeptical about using the concept of role model as a justification for diversifying spheres of life.<sup>241</sup>

Using the concept of role model in service to the politics of recognition, however, need not lead to this result for two reasons. First, if the concept of role model provides a counternarrative to the historical and dominant narrative in this country, the narrative of exclusion and devaluation, then the credibility of this counternarrative will be undermined to the extent that tokenism and the act of limited inclusion define the process of diversity. Given the history of exclusion in this country, inclusion through tokenism is

<sup>239</sup> Delgado, *supra* note 15, at 1227 ("To be a good role model, you must be an assimilationist, never a cultural or economic nationalist, separatist, radical reformer, or anything remotely resembling any of these.").

<sup>240</sup> See *supra* note 23 and accompanying text.

<sup>241</sup> See *supra* note 22.

likely to convince neither the role model nor the members of the group to which the role model belongs that the institutional practice of devaluing their lives is now over. Indeed, tokenism might create the perception that the concept of role model is simply part of the same old story of exclusion. Such a perception would defeat the whole purpose of role model rhetoric by impeding the purpose of the politics of recognition instead of encouraging members of the marginalized group to believe that they too can perform those roles and fill those positions previously beyond their reach. The credibility of the counternarrative, in the eyes of the intended role model and the aspiring role occupants, will be enhanced once there is a "critical mass" of members of the marginalized groups in any particular enterprise.<sup>242</sup> The credibility of the counternarrative will also depend on whether the story it tells appears to be normal to members of the marginalized group, as well as to members of the majority.<sup>243</sup> As one report put it: "Until more children look into the eyes of teachers and see themselves reflected—and until many teachers look into the eyes of children and see themselves reflected—many of those children will feel excluded from the educational enterprise."<sup>244</sup> A critical mass of minorities in any particular enterprise will transform the exceptional into the normal.

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<sup>242</sup> See, e.g., *Oliver v. Kalamazoo Bd. of Educ.*, 498 F. Supp. 732, 747-48 (W.D. Mich. 1980).

[A] well-respected authority on matters concerning school desegregation and co-author of the court-ordered study of the Kalamazoo School District . . . [gave] uncontradicted testimony. . . that in a district like Kalamazoo . . . unitary status cannot be achieved until a 'critical mass' of Black teachers and administrators has been hired. In determining what number, or percentage, of Black teachers will form a critical mass for Kalamazoo, [the expert suggested that the] major consideration was to achieve a number which would insure that Black students had enough role models. . . . [The expert stated that in] a multi-racial student body, the need for role models is important because they can encourage minority students to higher aspirations and at the same time work to dispel myths and stereotypes about their race.

*Id.*

<sup>243</sup> I think Anita Allen was right when she observed that "[t]he concept of black women teaching in white schools is suspect in part because the experience of having black women as teachers is unfamiliar to many faculty and students." Allen, *supra* note 22, at 26; see also Greene, *supra* note 23, at 83 ("After a few years of teaching law, it occurred to me that the hostility and bitterness that I and other African-American female law teachers experienced might be related to the scarcity of our presence . . .").

<sup>244</sup> Weber, *supra* note 4, at 1111 n.76 (citing COMMITTEE ON POLICY FOR RACIAL JUSTICE, *VISIONS FOR A BETTER WAY: A BLACK APPRAISAL OF PUBLIC SCHOOLING* 34 (1989)).

Sheldon Goldman, a political scientist and a student of judicial appointments, made a similar point in a recent review of President Clinton's appointments to the federal bench. After observing that Clinton has changed the face of the federal judiciary by appointing an unprecedented number of minorities and women,<sup>245</sup> Goldman explains why increased diversity is important. "Women and racial minorities (particularly African Americans) historically have faced tremendous obstacles to becoming lawyers and federal judges . . . [Their appointment] in significant number suggests that the selection process does not discriminate against these groups."<sup>246</sup> The only credible way to reinforce the message of nonexclusion "is to have a physical presence on the bench. . . . It's also important . . . to have a bench . . . that looks more like America [because that tends to] . . . destroy those very damaging stereotypes of women and minorities."<sup>247</sup> Judge Johnson of the Fifth Circuit supports Goldman's observation by explicitly invoking the notion of role model: "Black and Hispanic judges serve as role models for other minority group members, who may not have envisioned a legal or judicial career as a real possibility in the past."<sup>248</sup>

I think it is plausible to assume that the presence of a critical mass of marginalized groups in a particular enterprise, say teaching, would not only enhance the credibility of a counternarrative in the eyes of aspiring role occupants, and thus enhance the possibility of role emulation, but would also facilitate a substantive transformation of the enterprise. In the teaching field, for example, the

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<sup>245</sup> See Sheldon Goldman & Matthew D. Saronson, *Clinton's Nontraditional Judges: Creating a More Representative Bench*, 78 JUDICATURE 68, 68 (1994) (noting that as of July 1, 1994, "[m]ore than three-fifths of all appointees . . . have been women and minorities.").

<sup>246</sup> *Id.* In another article, Goldman shows that 2.1% of President Reagan's appointments to the district court bench were African Americans, compared with 6.8% by President Bush and 13.9% by President Carter. See Sheldon Goldman, *Bush's Legacy: The Final Imprint*, 76 JUDICATURE 282, 287 (1993). Indeed, of all the presidents from Johnson to Bush, Reagan appointed the smallest percentage of African Americans to the district court bench. See *id.* The percentage of African Americans appointed to the circuit courts of appeals over the past few years is even lower: only 1.3% of Reagan's appeals court appointees were African Americans, compared to 5.4% by Bush and 16.1% by Carter. See *id.* at 293.

<sup>247</sup> Marcia Coyle, *Clinton's Judicial Choices Change the Bench's Face*, NAT'L L.J., Oct. 24, 1994, at A16 (quoting Sheldon Goldman (final alteration added)).

<sup>248</sup> *Latin Am. Citizens Council v. Clements*, 914 F.2d 620, 659 n.14 (5th Cir. 1990); see also *Barhold v. Rodriguez*, 863 F.2d 233, 238 (2d Cir. 1988) ("Role models' . . . are people whose very existence conveys a feeling of possibility to others; they give hope that a previously restricted opportunity might now be available.").

presence of a good number of minority teachers, rather than a few tokens, will make those teachers feel more secure and thus more likely to introduce a more inclusive pedagogy as well as a more inclusive narrative. A credible narrative of recognition at the point of entry (that is, hiring a critical mass) will likely enhance the possibility of transforming the dominant narrative of misrecognition (or nonrecognition) that currently defines the domain of the enterprise. Put simply, addressing the issue of physical loneliness will enable minorities and women to lessen and even remove the issue of intellectual and historical loneliness.<sup>249</sup>

Second, the concept of role model need not lead to tokenism because it is not the only justification for increasing diversity. People are selected to perform certain roles and occupy certain positions for many reasons. The politics of recognition is only one reason, albeit an important one. An individual's character, "qualifications," and merit are also important factors. Using the

<sup>249</sup> By historical and intellectual loneliness, I mean the loneliness one feels when one sifts through an historical or intellectual description and does not see oneself—one's history and one's concerns—reflected in the texts and narratives. Cf. Fisher, *supra* note 2, at 215 (discussing Alice Walker's thoughts on the subject). The presence of a critical mass of formerly excluded groups will encourage members of both the minority and the majority to reduce the social and intellectual loneliness that members of the minority feel by broadening the intellectual and historical scope of the dominant narrative. Alice Walker observes that engaging her ancestors and embracing other African American writers like Zora Neale Hurston gives her the feeling that she is "with a great many people . . . all very happy to see me consulting and acknowledging them, and eager to let me know, through the joy of their presence, that, indeed, I am not alone." *Id.* (quoting WALKER, *supra* note 82, at 13).

But I must not be misunderstood. To apply the concept of role model to the politics of recognition in a credible manner, there need not necessarily be any similarity between the intellectual orientations and social commitments of the supposed role model and the members of the marginal group who are supposed to emulate that particular individual. Thus, a conservative African American law professor who associates herself with law and economics jurisprudence can serve as a role model for African American students who consider themselves socially progressive and politically liberal. Why? Because the historical basis for the narrative of devaluation, misrecognition, and exclusion in this country has been one's membership in a particular racial group, not one's intellectual orientation or social commitment. Thus, an African American law professor, regardless of her intellectual orientation, can act as a role model for African American law students because she represents a visible counter to the imprisoning narrative of devaluation and misrecognition. What makes an African American professor a credible role model for African American students is not her intellectual orientation, but rather the common struggles and vulnerabilities that she and her students share as African Americans living in the United States. More importantly, the professor might teach her students how to cope with, and even overcome, the struggles and vulnerabilities that she has encountered.

concept of role model as a justification for diversity will only increase the possibility of tokenism and the devaluation of the "merits" of supposed role models if we assume that the concept of role model is the only justification for inclusive policies. That is surely not the case. Seen this way, the concept of role model as a version of the politics of recognition does not undermine the agency of the individual role model. It is simply one of the multiple roles the individual agent plays and the multiple identities that define him or her.

Those who oppose diversity also are likely to argue that the concept of role model as a version of the politics of recognition undermines individual agency. But the individual agency that these critics want to protect is not the agency of the specific individual, but rather individual agency as an abstract principle. Their argument goes something like this: by invoking the concept of role model as a narrative of recognition and as a means of increasing diversity, we must assume that people act as members of a group rather than as individuals. Thus, the concept of role model undermines one of the basic principles of American society, namely, that when making choices individuals look for inspiration from various sources unencumbered by the burdens of group membership. The concept also threatens to institutionalize the very evil that the politics of recognition is meant to overcome: group consciousness based on race or gender.

This argument is the same general objection that opponents raise against all inclusive (affirmative action) policies,<sup>250</sup> and it is

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<sup>250</sup> See, e.g., *Miller v. Johnson*, 115 S. Ct. 2475, 2486 (1995) ("At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens 'as individuals, not 'as simply components of a racial, religious, sexual or national class.'") (quoting *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting) (quoting *Arizona Governing Comm. v. Norris*, 463 U.S. 1073, 1083 (1983))); *Adarand Constructors v. Peña*, 115 S. Ct. 2097, 2119 (1995) (Thomas, J., concurring) ("There can be no doubt that the paternalism that appears to lie at the heart of this [affirmative action] program is at war with the principle of inherent equality that underlies and infuses our Constitution." (citing the Declaration of Independence)); *Shaw v. Reno*, 113 S. Ct. 2816, 2827 (1993) ("When a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole. This is altogether antithetical to our system of representative democracy."); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) ("The Equal Protection Clause of the Fourteenth Amendment provides that 'No State shall . . . deny to *any person* . . . the equal protection of the laws.' As this Court has noted in the past, the 'rights created by the first section of the Fourteenth



as unconvincing as it is familiar. First, it is empirically suspect because, in a country where the distribution of goods and services is still strongly affected by race, where people's interactions are conditioned by race more than any other characteristic, where the minority has been defined as the social and intellectual negation of the majority such that members of the majority are virtually unavailable for emulation by members of the minority, and where people's lives are devalued by virtue of their membership in a particular group rather than on account of their individual failings or misbehaviors, it seems implausible to me to argue that invoking the concept of role model as a version of the politics of recognition would be inconsistent with the supposedly basic governing principle of free individual agency. It is an unfortunate fact of social and political life in this country that the basic principle that currently defines social relationships is not individual agency, but rather group membership, at least with respect to African Americans. By ignoring this fact, we continue to embrace a status quo that devalues members of "minority" groups in the name of celebrating individual agency. The politics of recognition is in fact about recovering individual agency for members of subordinated and devalued groups by recognizing the historical and current reality of race relations in this country and acknowledging that the dominant narrative is a narrative of devaluation and misrecognition and that this narrative is group-oriented.

The argument that race-conscious inclusive policies violate an important political principle of liberalism—the principle of individual agency—exists in tension with the actual political practice and political tradition in this country with respect to African Americans. Members of the majority routinely invoke the principles of individual agency and individual autonomy to resist affirmative steps to include African Americans but consistently violate those very principles in their daily encounters with and treatment of African Americans. When an African American applies for a loan, applies

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Amendment are, by its terms, guaranteed to the individual . . . ." (quoting *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948)); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 281 n.8 (1986) ("The Constitution does not allocate constitutional rights to be distributed like bloc grants within discrete racial groups . . . ."); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 299 (1978) ("If it is the individual who is entitled to judicial protection against classifications based upon his racial or ethnic background because such distinctions impinge upon personal rights, rather than the individual only because of his membership in a particular group, then constitutional standards may be applied consistently.").

for a job, seeks to buy a house in a predominantly white neighborhood, or encounters a law enforcement official, he or she is often treated not as an individual citizen or as a consumer but as a "type" or a signifier of a group.

As to the issue of assimilation and loss of cultural integrity,<sup>251</sup> those who are viewed as role models for purposes of the politics of recognition supposedly perform well, or are capable of performing well, in certain roles. It is also the case that most of these roles are defined by the status quo, both in terms of their content and the manner in which they are performed. So, when individuals from a marginal group are held up as role models based on their performance in certain roles conventionally defined by the status quo, role modeling constitutes an assimilative process; however, it would be a mistake to reject the concept on this ground. Despite this supposedly assimilative dimension, it does not follow, as critics allege, that the concept of role model necessarily undermines the cultural integrity of the group to which the role model belongs. Even though roles are generally initially defined by conventions, quite often they are refined and redefined by those who occupy them. The role model does not simply occupy a rigid and eternally defined role; he or she develops that role and how it should be performed. That being the case, role models from marginal groups have the potential and the power to transform the roles they occupy, including the very conception of those roles, especially if the members of the group represent a critical mass in the particular enterprise. They are not simply passive and mechanical role occupants, but rather individuals who can actively redefine their positions using the very cultural resources and horizons of significance that have been excluded from the process of role-constitution.

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<sup>251</sup> Some might argue that the issue here is not assimilation, but rather the limitation of possibilities. The argument might go this way: The concept of role model is restrictive. It restricts people's creative and imaginative potential in so far as it represents the exhaustion of the good and proper life as defined by the role model's life. The idea that role models constrain the otherwise imaginative and creative potential of individuals is, however, unconvincing. People do not simply imagine and create out of the blue. Creativity and imagination arise partly out of their experiences, out of their encounters with others, and the cultural landscape. Sometimes they directly appropriate other people's experiences, which we might refer to as direct modeling. Other times, they follow the experiences of others by analogy or use them as stepping stones to define a seemingly new role or a new field. The point is that people necessarily learn and draw from other people in their communities to gather creativity and imagination.

In addition, the suspicion of destructive assimilation is, in my view, premised on a false dichotomy between the principled resistor, who puts himself or herself outside the conventional structure, and the role model insider, whose very status as a role model supposedly robs him or her of the capacity both to understand and represent the cultural and social needs of his or her fellow social outsiders. This distinction does not reflect reality. The role model insider might, in fact, wage a transformative battle by reinscribing and redefining the role that he or she supposedly occupies and represents to others, while the principled outside resistor might simply continue to wage a defensive battle of survival against the narrative of nonrecognition, one that ironically transforms his or her desire for recognition as an agent into the pathological behavior of self-devaluation and self-destruction. Furthermore, the concept of role model as a version of the politics of recognition is not about assimilation in the sense of the group losing its agency, culturally or otherwise, but rather it is about providing marginal groups with the vocabulary, the voice, and the imagination to provide an effective counternarrative to the dominant narrative of exclusion and devaluation.

#### CONCLUSION

Two purposes have animated and organized this Article. First, my aim was to develop and defend one version of the rhetoric of role model—what I have referred to as role model as a version of the politics of recognition—that I believe has not been systematically developed and defended. But this is part of a larger, and second, purpose, namely, to sort out the various meanings that the rhetoric of role model has been required to carry in popular and academic discourse as well as in judicial decisions and to suggest which meanings are empirically informed, logically sound, and normatively defensible. That the concept of role model is widely invoked in various circumstances is not in dispute. Athletes are often designated by the media and the courts as role models, the underrepresentation of some minority groups in positions of political and social influence is at times explained in terms of the lack of role models for members of those groups, teachers are regarded by the courts as well as in popular discourse as role models for their students, even companies are regarded as role models for other companies, and television characters are viewed as role models for their viewing audience. The popularity of the concept has been

inversely related to its clarity. There has not been any systematic and sustained inquiry into the concept of role model. Indeed, quite often the rhetoric of role model is invoked, in both popular and legal discourse, as if it carried its own meaning and needed no explanation. This Article has attempted to start a dialogue to correct this oversight. It concludes that there are three senses in which the concept of role model could legitimately be invoked—what I have referred to as the role imitation view, the comprehensive view, and the role model as a version of the politics of recognition—and that invoking the term outside these specific circumstances is likely to be logically unsound and normatively suspect.