

# Merit-Teaching

By YXTA MAYA MURRAY\*

## Table of Contents

I. The Feminist and Critical Race Critique of Standards ..	1076
II. Aristotelian Constructions of Merit, or “Virtue” .....	1081
III. The Stories .....	1091
A. Past Discrimination .....	1091
1. Empathy .....	1095
2. Praxis and Dignity .....	1098
B. The Role Model .....	1100
1. Example .....	1103
2. Skill .....	1103
3. Commitment .....	1104
C. Diversity .....	1104
IV. Conclusion .....	1111

The antiaffirmative action movement has arrived in California. The proposed California Civil Rights Initiative would mandate that the “state not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.”<sup>1</sup> The Initiative was intended by its drafters to combat the “unfairness” caused by “government-forced . . . preferences based upon race and gender,”<sup>2</sup> and to foster an

---

\* Associate Professor of Law, Loyola Law School, Los Angeles. The author wishes to thank Lawrence Solum and David Leonard.

1. Bill Jones, Secretary of State, Proposition 209, in CALIFORNIA BALLOT PAMPHLET, GENERAL ELECTION, NOV. 5, 1996 (forthcoming Sept. 1996) [hereinafter Initiative].

2. Open letter from Pete Wilson, Governor of the State of California available at <http://www.publicaffairsweb.com/ccri/wilson/htm> [hereinafter *Wilson Letter*]. See also Cathleen Decker, *Woman Named to Anti-Affirmative Action Campaign*, L.A. TIMES, Dec. 21, 1995, at A3 (“[The Initiative’s] supporters argue that it would restore fairness to government operations and would curb affirmative action programs that discriminate against non-favored groups.”). Cost is also an important sub-issue within the “fairness” issue. See *Wilson Letter* (“[Because of race and gender preferences] the taxpayers of [one city] paid an extra \$650,000 for a city contract to a ‘minority’ contracting firm, even though another non-minority firm had bid \$650,000 less TO DO THE SAME JOB!”).

“equal opportunity”<sup>3</sup> and “color-blind society,” as opposed to one that is “blind[ly]” race-conscious.<sup>4</sup> The Initiative is the most current example of the anti-affirmative action movement. Underlying the struggle against affirmative action programs is the premise that such programs “sin[fully]”<sup>5</sup> take advantage of “innocent”<sup>6</sup> whites, who are entitled to equal opportunity access to jobs and education, limited only by a neutral value system which measures them based on objective standards of “merit.”<sup>7</sup> The relationship of merit to the Initiative is, even at first glance, a multi-dimensional concept. Since the Initiative covers decisionmaking regarding candidates for public education, public employment, and public contracting, the Initiative’s backers foresee deploying a foundational color-blind, and gender-blind “meritocracy” in such disparate areas as education, construction, and administration.

However, there is an additional complexity to the notion of merit which even this observation does not reflect. Underlying the justification for the Initiative—that “each person deserves to be judged on his

---

3. See Bob Dole, *A California Renewal of Civil Rights' Goal*, L.A. TIMES, Nov. 19, 1995, at M5 (“Promoting equal opportunity does not mean guaranteeing equal results. . . . The objective of a generation of civil rights fighters of all races and colors had been to give every American an equal chance at the starting line—but not a guaranteed outcome at the finish line. . . .”) (citation omitted).

4. See *id.* (“If we truly want to build a color-blind society, then the federal government ought to lay the foundation by adopting policies that are consistent with this goal. . . . [T]he real dividers are the purveyors of preferences themselves, who view every social problem through a racial prism. If we are to break the cycle of racial distrust that now grips America, we must remove the group-think blinders and begin to view one another not as blacks or whites, Asians or Latinos, but as fellow citizens: as Americans.”).

5. Kathleen Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78, 91 (1986) (“[The Supreme Court has] cast[ ] affirmative action as penance for particular sins of discrimination . . . .”); see also ROBERT H. BORK, *THE TEMPTING OF AMERICA* 106 (1990) (“It makes little sense, or justice, to sacrifice a white or a male who did not inflict discrimination to advance the interests of a black or a female who did not suffer discrimination. No old injustice is undone, but a new injustice is inflicted.”).

6. Thomas Ross, *Innocence and Affirmative Action*, 43 VAND. L. REV. 297, 299 (1990) (“A persistent and apparently important part of the affirmative action dialogue, both judicial and academic, is what can be termed the ‘rhetoric of innocence.’ The rhetoric of innocence is used most powerfully by those who seek to deny or severely limit affirmative action . . . .”).

7. Cynthia H. Craf et al., *Political Briefing: Senator Assails Santa Cruz Chancellor Over Angela Davis Honor*, L.A. TIMES, July 21, 1995, at B5. (“So-called affirmative action is morally wrong. . . . It merely continues in a different guise the same race-based discrimination that was wrong in the first place. First-class people come in all colors, and it’s our job to find them based on merit.” (quoting San Fernando Valley congressional candidate Rich Sybert)). See also *Wilson Letter*, *supra* note 2 (“Each person deserves to be judged on his or her merits.”).

or her own merits"<sup>8</sup>—exists a monolithic, if inchoate, conception of what merit is, of what it means to be the “best.” The premise of this Essay is that our current conception of merit—that it is color-blind and gender-blind, numerical, quantifiable, neutral, and transparently fair—has been formed in exclusion. That is, the meaning of merit has been constructed without reference to the virtues and values of people of color, women, and sexual minorities—typical “Outsiders”—who have demonstrated excellence even under conditions of subordination. Some of these forms of merit have deep roots in gender, race, color, class, ethnicity, and sexual orientation. They can be seen in some Outsiders’ empathy for disadvantaged people, their developed skills for interpreting and overcoming subordination, and their unflagging praxis in the face of seeming intractability. They are, in fact, “gendered” and “raced” responses to gender and race discrimination, and they would sadly remain unnoticed under the “blind” approach advocated by the Initiative’s backers.

This Essay skeptically responds to the banner of color blindness raised by the Initiative’s backers because the color-blind ideal itself seems scrutably “gendered” and “raced” when viewed from a perspective which recognizes Outsider merit. Any system which so consistently leaves out these ideas in its definition of “the good” seems to be responding only to an “insider” ideology. In addition, ignoring “gendered” and “raced” forms of merit risks marginalizing some of the richest roads to repair—the insights, empathy, and skills of Outsiders—which are invaluable resources for a state which continually announces its commitment to racial and gender equality. Affirmative action dissolves these risks by increasing the representation of Outsiders in the higher echelons of education and employment, and thus has the potential for what I call “merit-teaching,”—the expansion of our current definition of merit to include the contributions of previously silenced voices.

I will first analyze the notion of merit from the perspective of critical race and feminist legal theorists.<sup>9</sup> These theorists have already paved the road to critiquing the illusory nature of a blind “meritocracy” and have gone far to support their claim that neutral merit standards were designed to promote the interests of a white male “mythic norm.”<sup>10</sup> Second, in order to further explore the unspoken

---

8. See *Wilson Letter*, *supra* note 2.

9. See *infra* notes 17-26 and accompanying text.

10. This is a term coined by Audre Lorde. See Audre Lorde, *Age, Race, Class, and Sex: Women Redefining Difference*, in *SISTER OUTSIDER* 114, 116 (1984).

gender and race investments of a supposedly neutral merit system, I will discuss Aristotelian moral theory—which identifies seemingly universal and neutral virtues—and the philosophical debate over whether there are distinct virtues of the oppressed. I will utilize observations made by Aristotelian moral philosophers as a stepping-off point for my argument that Outsider merit does exist and would be ignored in a blind system. Finally, I will use the storytelling methodology of critical race and feminist legal theorists in order to identify the individual “gendered” and “raced” forms of merit that have been demonstrated by members of my own family—three generations of Mexican-American women who have navigated the boundaries of gender, class, race, and ethnicity in this country since the 1950’s.

### I. The Feminist and Critical Race Critique of Standards

Suppose we have candidate *A* and candidate *B*, each applying for a position in a public law school. “Merit,” as it is configured for law school admissions, could be seen as measured by the applicants’ respective performances on the Law School Admission Test (LSAT), their grades, writing skills, and other, less quantifiable criteria.<sup>11</sup> Candidate *A*, who is a white male, has substantially higher grades and LSAT scores than does Candidate *B*, a Latina.<sup>12</sup> Candidate *A*’s personal statement and work history reveal that he has some experience in telemarketing and accounting and has been a volunteer coach for a little-league softball team in his neighborhood. Candidate *B*, however, demonstrates a high regard for and connection to her ethnic community in her personal statement and work history as a volunteer in a battered women’s shelter. Her personal statement also reveals her intimate understanding of discrimination along both race and gender lines.

Between these two, who should be picked? Using “neutral” standards (that is, “race-less” and “gender-less” valuations of merit), Candidate *A* is the clear winner. Under color-blind ideals of

---

11. See, e.g., LOYOLA LAW SCHOOL LOS ANGELES, BULLETIN AND APPLICATION 27 (1996) (The section on “Admissions Information” states that the school seeks candidates who have undertaken an undergraduate “curriculum of breadth and depth, [and have] grades demonstrating excellence in intellectually challenging course material . . . [as well as strong] writing skills . . . . [Further qualifications include] a high degree of professionalism.”).

12. The comparison between Candidate *A*’s and Candidate *B*’s numerical scores is based on the *Bakke* case, where minorities admitted under the separate admissions process had numerical scores which were “significantly lower” than Bakke’s. See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 277 (1978).

“meritocracy,” race, gender, and ethnicity are somehow divorced from neutral qualifications, leaving the “deracinated” candidate to be evaluated on a now equal playing field.<sup>13</sup> Viewed without regard to gender and ethnicity, both candidates are generous and philanthropic (having both served as volunteers), and one has better number qualifications.

Feminist legal theorists and critical race scholars, however, object to the assumption that the current incarnations of merit standards are neutral and color-blind. “[N]eutral, impersonal and objective criteria,”<sup>14</sup> as they are currently being deployed, are viewed not as universal norms, but as “one-sided,”<sup>15</sup> “structured preferences”<sup>16</sup> which favor the included and overlook, or even negate, the perspectives and potential contributions of white women and people of color. These “norms” contain a particular, privileged, exclusive referent which only appears “transparent.”<sup>17</sup>

---

13. See RICHARD POSNER, *THE ECONOMICS OF JUSTICE* 366-67 (1981) (objecting to the use of “racial or ethnic criteria . . . [in] determin[ing] the distribution of government benefits and burdens” although qualifying this principle to accommodate segregation in prison race-riots); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273-74 (1986) (“Any preference based on racial or ethnic criteria must necessarily receive a most searching examination.”) (emphasis added); Derrick Bell, *The Final Report*, 87 MICH. L. REV. 2382, 2403-04 (1989) (“‘Answer me this, Derrick, have you ever heard of merit? That means achieving something by yourself without having it handed to you for doing nothing. Harvard should recruit the brightest and most promising students in the nation based on past record, not granting positions based on race.’”) (quoting from an anti-affirmative action letter he received).

14. Gary Peller, *Race-Consciousness*, 1990 DUKE L.J. 758, 777 (1990).

15. See *id.* at 772 (“Neutrality is universality according to the integrationist ethic but [critical race theorists] understand neutrality to contain within it an invisible form of race prejudice. And we also consider ‘universality’ to be a one-sided concept, an exclusionary one which vests itself in privilege by purporting to speak for everyone.”).

16. See PATRICIA WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 103 (1991) (“Standards are nothing more than structured preferences . . . . [T]he whole historical object of equal opportunity is to structure preferences for rather than against the participation of black people.”).

17. See Barbara Flagg, *I Was Blind, But Now I See: White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 957 (1993) (Flagg identifies a “transparency phenomenon,” which is the “tendency of whites not to think about whiteness, or about norms, behaviors, experiences, or perspectives that are white-specific.”); see also Kimberle Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1379-80 (1988) (“[T]he white norm . . . [is] a statement of the positive social norm, legitimating the continuing domination of those who do not meet it.”); Martha Minow, *The Supreme Court, 1986 Term—Forward: Justice Engendered*, 101 HARV. L. REV. 10, 32, 68 (1987) (“The unstated point of comparison is not neutral, not particular, and not inevitable, but only seemingly so when left unstated. . . . [P]ower is at its peak when it is least visible, when it shapes preferences, arranges agendas, and excludes serious challenges from discussion or even imagination.”); Alex Johnson, *The New Voice of Color*, 100 YALE L. J. 2007, 2030 (1991) (examining “inte-

Feminists and critical race theorists challenge the foundation upon which these “neutral” concepts of merit rest. They ask: “How were these standards developed?” “How can a system be truly neutral and noncontextual in the first place?”<sup>18</sup> “How could it be universal if it was forged from exclusion?” In other words, can the majority’s concept of neutral fairness *be* fair if those who framed the original concept of merit did so in the absence of white women and people of color?<sup>19</sup> Indeed, they may have developed their definitions by using “others” as the signpost for what it means to be devoid of merit.<sup>20</sup> Inherent in this critique of merit is a challenge to the “blindness” principle—the theory upon which antiaffirmative action advocates depend. Again, instead of promoting neutrality and fairness, a gender, race, and ethnicity blindness is believed by critical race and feminist scholars to foster continued subordination by focusing on formal equality. This only scratches the surface of the race and gender inequality in our country<sup>21</sup> and does not provide the tools for ferreting

---

gration as domination through the imposition of white values and norms—universalist meritocratic standards, for example, that privilege whites and maintain the subordination of blacks and other people of color”). Cf. Martha Minow, *Feminist Reason: Getting It and Losing It*, 38 J. OF LEGAL EDUC. 47 (1988) (“Feminists have shown how . . . assertions of neutrality hide from view the use of a male norm for measuring claims of discrimination.”).

18. See Duncan Kennedy, *Frontier of Legal Thought III: A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L.J. 705, 733 (1990) (“Judgments of merit are inevitably culturally and ideologically contingent because they are inevitably paradigm-dependent.”).

19. See Richard Delgado, *Affirmative Action as a Majoritarian Device: Or, Do You Really Want to be a Role Model?*, 89 MICH. L. REV. 1222, 1224 (1991) (“Our acquiescence in treating [the issue of minority representation] as a ‘question of standards’ is absurd and self-defeating when you consider that we took no part in creating those standards and their fairness is one of the very things we want to call into question.”). Cf. JOYCE A. LADNER, TOMORROW’S TOMORROW 414 (1971) (Ladner discusses how social methodology replicates subordination: “The relationship between the (objective) researchers and his subjects resembles that of the oppressor and the oppressed, because it is the *oppressor who defines the problem*, the nature of the research, and to some extent the quality of the interaction between him and his subjects.”) (emphasis added).

20. Diana M. Poole, *On Merit*, 1 LAW & INEQ. J. 155, 157 (1983) (“Merit is defined by white men to reward what white men become. Merit, as we know it, explicitly values particular experiences and abilities—the ones developed by white upper class men—and therefore implicitly devalues others. . . . [M]eritocracy calls those who conform to these standards ‘equal.’ Those who are different, it calls ‘unqualified.’”).

21. Neil Gotanda describes the technique of nonrecognition of difference:

Nonrecognition [of difference] is a technique, not a principle of traditional substantive common law or constitutional interpretation. It addresses the question of setting forth an analytical methodology. This technical approach permits a court to describe, to accommodate, and then to ignore issues of subordination. This deflection from the substantive to the methodological is significant. Because the technique appears purely procedural, its normative, substantive impact is hidden. Color blind application of the technique is important because it suggests a seem-

out deep-seated bias.<sup>22</sup> The battle over affirmative action is one facet of this debate. The call to blind ourselves to difference and to back off from questioning the nature and context of the development of the current status of our “meritocracy” in the name of fairness, would only promote maintenance of the status quo.<sup>23</sup>

Critical race theorists have come under attack as advocating a wholesale abdication of “merit-ideals”.<sup>24</sup> However, this may be more of a simplification of the critical race position than an accurate depiction of its prescriptions. Scholars of color do not necessarily reject the first principle of equality—the “concept” of merit—but rather may question the “conception” of merit—the approach of color-blind “meritocratists” who consistently devalue contributions made by these scholars.<sup>25</sup> Advancing a monolithic characterization of critical race

---

ingly neutral and objective method of decisionmaking that avoids any consideration of race.

Neil Gotanda, *The Colorblind Constitution*, 44 STAN. L. REV. 1, 17 (1990). Cf. Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, in FEMINIST LEGAL THEORY 383, 387 (D. Kelly Weisberg ed., 1993) (Crenshaw criticizes the feminist and anti-racist conceptualization of discrimination: “Despite the narrow scope of [the] dominant conception of discrimination and its tendency to marginalize those whose experiences cannot be described within its tightly-drawn parameters, this approach has been regarded as an appropriate framework for addressing a range of problems.”).

22. One important development in the use of race-consciousness to extract racial “meaning” from what appear to be otherwise neutral processes is Charles Lawrence’s investigation into unconscious racism. See Charles Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 323 (1987).

23. See Cass Sunstein, *Neutrality in Constitutional Law*, 92 COLUM. L. REV. 1, 8 (1992):

[T]he attack on affirmative action takes . . . as uncontroversial[,] existing distributions of benefits and burdens between blacks and whites. The attack rips the notion of discrimination out of the context that gave the word its social meaning and made it a term of opprobrium. The attack treats attention to context and history as unprincipled. . . . [T]he prevailing conception of neutrality defines the presence of government action by reference to existing distributions.

*Id.*

24. See Daniel Farber & Suzanna Sherry, *Is the Radical Critique of Merit Anti-Semitic?*, 83 CAL. L. REV. 853, 862 n.47 (1995) (“[W]e feel justified in describing Critical Race Theory as a whole as endorsing the more radical position of rejecting merit entirely.”).

25. RONALD DWORKIN, *LAW’S EMPIRE* 71 (1986). Ronald Dworkin sets out the concept/conception distinction:

The contrast between concept and conception is . . . a contrast between levels of abstraction at which the interpretation of the practice can be studied. At the first level agreement collects around discrete ideas that are uncontroversially employed in all interpretations; at the second the controversy latent in this abstraction is identified and taken up. Exposing this structure may help to sharpen argument and will in any case improve the community’s understanding of its intellectual environment.

*Id.* See also RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 134-36 (1978).

and feminist scholars' "merit-philosophies" for any end, however, would be inaccurate. Some of these theorists may in fact believe that a neutral "meritocratic" ideal cannot exist, while others may believe that neutral "meritocracy" is a valid ideal but that merit's current incarnation is non-neutral. Still other theorists may argue that existing ideals may have neutral elements, but are applied in biased ways.<sup>26</sup>

This Essay maintains that Outsiders may possess a "good," that is, a form of merit which is valuable, not only for Outsiders themselves, but for the state as well. Consequently, the assertion of this "good" rests on an assumption that Outsider merit can be positively measured by some form of universal gauge—"it's good for me as well as you"—and that the problem with the existing system is that it simply does not recognize and value these virtues because of the biased political structure. For example, returning to the law school admissions hypothetical,<sup>27</sup> if I support Candidate *B* (the Latina with particular experience with discrimination, a demonstrated connection with her ethnic community, and with lower numbers than Candidate *A*), I am not abdicating merit ideals any more than the Supreme Court did in *Regents of University of California v. Bakke*.<sup>28</sup> In that case, the Court presumed that based on number criteria alone, the reverse-discrimination plaintiff was qualified enough to fairly deserve admittance to medical school.<sup>29</sup> I am simply asserting Candidate *B*'s proper inclusion into the realm of the "good." Instead of retreating to a smooth surfaced number preference, one which glides over bumpy individualism and avoids attending to the concrete details of lived experiences, I am recognizing the value of particular experience with discrimination and the ability to challenge that discrimination with productive action.

At hand is an attempt to transform the meritocratic ideal by including what has been up to now excluded—the valuable, concrete

---

26. Lawrence Solum, Professor of Law, illuminated this point for me.

27. *Supra* notes 14, 15 and accompanying text.

28. 438 U.S. 265, 276-77 (1978).

29. *Id.* In analyzing the Court's holding, Cheryl I. Harris found that:

The majority of the [*Bakke*] Court was willing to validate Bakke's expectation because the special admissions plan violated neutrality, when 'neutrality' was a colorblind decision process based on 'objective merit.' . . . [H]owever, the Court's discussion about relative performance, measured by 'neutral' merit criteria, masks its assumptions about the [number-centered] definitions of merit. . . . [R]onald Dworkin has argued that Bakke's claim that his rejection violated merit-based standards was unsubstantiated because . . . [m]erit could in fact mean something quite different, such as a probability that the individual would make a contribution to the profession.

Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1771 (1993) (citations omitted).



lived experiences of oppressed peoples.<sup>30</sup> However, this project will require an examination of first, the original, non-neutral, and politicized values against which white women and minorities are being measured, and second, the alchemization of excluded voices and those values. Embarking on this project, I will travel back in time to observe some initial articulations on merit, value, and virtue, and then speed up closer to the present day to reflect on excluded constructions of those ideals.

## II. Aristotelian Constructions of Merit, or “Virtue”

Aristotle wrote that the notion of distributing power according to merit was uncontroversial, although the definition of merit was contested: “[T]hat what is just in distribution must be according to merit in some sense, though they do not all specify the same sort of merit, but democrats identify it with the status of freemen, supporters of oligarchy with wealth (or with noble birth) and supporters of aristocracy with excellence.”<sup>31</sup> Aristotle, an aristocratist, aligns merit with virtue,<sup>32</sup> and provides a detailed account of their forms.

In his *Nicomachean Ethics*, Aristotle posited that the good citizen and the good person (who were one and the same) should be characterized by a unity of moral and intellectual virtues. Two examples of the moral virtues are courage and temperance,<sup>33</sup> those things that create the “good” or “happy” life.<sup>34</sup> The moral virtues operate within the

---

30. This is within the critical race theory and feminist legal theory traditions. See, e.g., Yxta Maya Murray, *The Cultural Meaning of Judicial Selection*, 79 CORNELL L. REV. 374, 384-391 (1994) (examining how certain scholars reviewed Justice Clarence Thomas’ merit, ideology, and judicial fitness through a lens which attended to the concrete details of the black experience).

31. ARISTOTLE, *NICOMACHEAN ETHICS* bk. V, ch. 3, p. 1131, col. a, ll. 26-29, reprinted in *THE BASIC WORKS OF ARISTOTLE* 1006 (Richard McKeon ed., 1941).

32. This may be a contestable point since the conclusion that Aristotle equates merit with virtue and excellence is never explicitly made in his *ETHICS*. But see David Keyt, *Aristotle’s Theory of Distributive Justice*, in *A COMPANION TO ARISTOTLE’S POLITICS* 259, 259 (David Keyt & Fred D. Miller, Jr. eds., 1991) (“[T]he standard of worth that Aristotle ultimately endorses is ‘virtue fully furnished with external means’ (*arete kechoregemene*)”] (citing ARISTOTLE, *POLITICS* bk. IV, ch. 1, p. 1289, col. a, ll. 31-33, reprinted in *THE BASIC WORKS OF ARISTOTLE*, *supra* note 31, at 1206-07).

33. See ARISTOTLE, *NICOMACHEAN ETHICS* bk. II, ch.6, p. 1107, col. b, ll. 1-8, reprinted in *THE BASIC WORKS OF ARISTOTLE*, *supra* note 31, at 959-60; Lawrence Solum, *Virtues and Vices of a Judge: An Aristotelian Guide to Judicial Selection*, 61 S. CAL. L. REV. 1735, 1739 (1988) [hereinafter Solum, *Virtues and Vices*].

34. See Ronald Beiner, *The Liberal Regime*, 66 CHI.-KENT L. REV. 73, 75 (1990) (“The central thought of Aristotelian ethical theory is that human activities, for all their unquestioned diversity, are nonetheless governed from within; there is a center to human action; there are patterns of coherence in human existence. The proper unit of moral analysis is

realm of emotions and are held to be a “mean” between contrasting emotive vices, such as courage’s mediation between timidity and recklessness.<sup>35</sup> The virtues are also developed out of habitual experience.<sup>36</sup> Aristotle further identified the intellectual virtues of theoretical and practical wisdom. Theoretical wisdom “operates in the realm of abstract thinking, science and theory.”<sup>37</sup> Practical wisdom, known as *phronesis*, is “excellence in deliberation,” “operates in the realm of praxis, action in particular situations,”<sup>38</sup> and is forged out of practical experience.<sup>39</sup> *Phronesis* is the intellect’s ability to guide an individual to act appropriately, out of an understanding of the “salient features of a complex situation;” this understanding grows out of “the long process of living and choosing.”<sup>40</sup> Finally, Aristotle holds

---

the happy life.”); see also IRIS MURDOCH, *THE SOVEREIGNTY OF GOOD* 18 (1971) (discussing the roles of love and justice in the moral judgment); Heidi Li Feldman, *Codes and Virtues: Can Good Lawyers Be Good Ethical Deliberators?*, 69 S. CAL. L. REV. 885, 910 (1996) (discussing the “classical Aristotelian virtues such as liberality, courage and magnanimity”); PHILIPPA FOOT, *VIRTUES AND VICES* 8 (1978) (analyzing the virtues of courage and temperance and contrasting them to justice); G.E.M. Anscombe, *Modern Moral Philosophy*, in *ETHICS* (Judith J. Thomson & Gerald Dworkin, eds., 1968).

35. Solum, *supra* note 33 at 1739 (citing ARISTOTLE, *NICOMACHEAN ETHICS*, bk. III, ch. 5, p. 115, col. a, ll. 7, reprinted in *THE BASIC WORKS OF ARISTOTLE*, *supra* note 31, at 974) (Aristotle states that courage “is a mean with regard to feelings of fear and confidence.”).

36. See *id.* (Aristotle holds that moral virtue comes about as a result of habit.).

37. See Lawrence Solum, *Virtues and Voices*, 66 CHI-KENT L. REV. 111, 116-117 (1992) [hereinafter Solum, *Virtues and Voices*]; Solum, *supra* note 33, at 1739; HARDIE, *ARISTOTLE’S ETHICAL THEORY* 116 (1980).

38. ARISTOTLE, *NICOMACHEAN ETHICS* bk. VI, ch. 5, p. 1140, col. a, ll. 25-27, reprinted in *THE BASIC WORKS OF ARISTOTLE*, *supra* note 31, at 1026 (“[T]he mark of a man of practical wisdom [is] to be able to deliberate well about what is good and expedient for himself.”); Solum, *Virtues and Voices*, *supra* note 37 at 116-17.

39. ARISTOTLE, *NICOMACHEAN ETHICS* bk VI, ch. 8, p. 1142, col. a, l. 23, reprinted in *THE BASIC WORKS OF ARISTOTLE*, *supra* note 31, at 1030 (“[Practical wisdom] is the analogue of theoretical insight.”) (quoted in MARTHA NUSSBAUM, *LOVE’S KNOWLEDGE* 74 (1990): “The content of rational choice must be supplied by nothing less messy than experience and stories of experience.”); Solum, *supra* note 37, at 116-17 (“The intellectual virtues are initially developed by teaching and mature through experience.”).

As a further illumination of Aristotelian virtues, Steven Munzer defines Aristotle’s configuration of the virtues as one which targets characteristics that dispose individuals to behave and think in ways that are beneficial for herself and for others. See MUNZER, *infra* note 69 and accompanying text.

40. NUSSBAUM, *supra* note 39, at 75; see also NANCY SHERMAN, *THE FABRIC OF CHARACTER* 15 (1989) (“[T]he impersonality of reason does not fix law as external or rigid, but rather establishes it as an expression of ongoing and active reason. What is final is not the deliverances of written law, but rather the ‘best judgments’ of those who, guided by experience and the law, can improve upon it.”); Lawrence Solum, *Equity and the Rule of Law*, in *THE RULE OF LAW* 135-36 (Ian Shapiro ed., 1994), (“*Phronesis* is the intellectual component of the disposition to respond appropriately to particular situations.”).

that the virtues must be possessed in unity—that an individual possesses either all of the virtues, or none at all.<sup>41</sup>

These virtues seem ineluctably neutral since they initially appear as broad and abstract categories which are potentially all-inclusive. They also seem to be irrefutably positive and productive characteristics, upon which we would be eager to judge either a person or a society.<sup>42</sup> However, even these foundational values are not devoid of ideological content. Aristotle, famously, constructed his paradigm of virtues from the premise that they could only be attained by a privy few. First, women and natural slaves could not possess the virtues “in perfection.”<sup>43</sup> Further, the virtues could only be acquired by those who had sufficient leisure time, namely, the upper class.<sup>44</sup>

Interestingly, upon examination of some of Aristotle’s listed virtues, we see that they can evoke images similar to those evoked by the language used in modern day delineations of merit such as the following: intellectual “rigo[r],” “industr[y],” and “balanced dispositions.”<sup>45</sup> Other definitions look to “dependability,” the quality of being “hard working,” and the manifestation of fidelity.<sup>46</sup> In addition, there exist

---

41. See HARDIE, *supra* note 37, at 116-17 (“The fact that Aristotle describes each virtue separately must not be taken to imply that he thinks that a man can have one virtue without having others as well. On the contrary he tells us . . . that, while a man may have the natural endowment which fits him for one virtue but not for another, virtue in the proper sense is a unity.”).

42. Solum, *VIRTUES AND VOICES*, *supra* note 37, at 117 (“The person who possesses the virtues of temperance, courage, and wisdom will likely flourish, and a society composed of such persons will also flourish.”).

43. ARISTOTLE, *POLITICS* bk. I, ch. 13, p. 1260, col. a, ll. 12-20, *reprinted in* THE BASIC WORKS OF ARISTOTLE, *supra* note 31, at 1144.

[T]he slave has no deliberative faculty at all; the woman has, but it is without authority . . . [S]o it must necessarily be supposed to be with the moral virtues also; all should partake of them, but only in such manner and degree as is required by each for the fulfillment of his duty. Hence the ruler ought to have moral virtue in perfection. . . . [T]he subjects, on the other hand, require only that measure of virtue which is proper to each of them.

*Id.* See also Solum, *Virtues and Voices*, *supra* note 37, at 127; Miriam Galston, *Taking Aristotle Seriously: Republican-Oriented Legal Theory and the Moral Foundation of Deliberative Democracy*, 82 CAL. L. REV. 329, 396 (1994) (“Aristotle’s proposals for an ideal or best regime were highly exclusionary. Women and natural slaves were to be excluded from participation in political life.”).

44. Galston, *supra* note 43, at 396 (“Men who lacked a certain level of property and a certain type of education and experience [were also to be excluded] . . . [because] they need leisure for acquiring virtue and engaging in political activity.”).

45. See, e.g., Carl Tobias, *Rethinking Federal Judicial Selection*, 1993 B.Y.U. L. REV. 1257, 1274-75 (1993).

46. See IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 204 (1990) (“One study of performance evaluation practices finds that evaluators of professional or managerial performance commonly rely on assessment of broadly defined traits such as

modern examples of the ideological content of these measures. Aristotle's assertion that only the privileged few can access virtue bears an uncomfortable resemblance to current day conservative thinkers' pronouncements that poor, single mothers (of color) are devoid of moral and work ethic "virtue," and that their lack of this kind of merit is so powerful that they signify "this nation's most dangerous time bomb."<sup>47</sup> By focusing the issue of minority and female need through a moral lens and by using these reductions to justify a severing of critically needed welfare benefits that women and minorities need to maintain participation in public life,<sup>48</sup> these modern day thinkers come close to imitating Aristotle's most racist and sexist reflections on the distance "others" keep from the virtues needed to become a citizen.

I see Aristotle's delineation of the virtues necessary to attain the good or happy life as being strongly connected to the modern debate over affirmative action and the meaning of merit. There is a construction of value in both Aristotelian moral theory and the antiaffirmative action stance which initially appears to be neutral, productive, and

---

leadership, initiative, cooperation, judgment, creativity and dependability."). Other definitions of merit can seem more inchoate, often referring obliquely to "excellence," but many articulations of merit seem to refer back to industry and devotion. *See, e.g.* Richard H. Fallon Jr., *To Each According to His Ability, From None According to His Race: The Concept of Merit in the Law of Antidiscrimination*, 60 B.U. L. REV. 815, 815 n.1 (1980) ("[Merit means] any quality or achievement, typically regarded as an indication of excellence, that makes fitting the bestowal of some desired benefit or reward."); Randall Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745, 1806 (1989) ("[M]erit is an honorific term that identifies a quality of accomplishment that has been achieved; it does not refer to inherited characteristics such as race or gender."); Sanford Levison and J.M. Balkin, *Law, Music, and Other Performing Arts*, 139 U. PA. L. REV. 1597, 1614 n.64 (1991) (emphasizing "faithful[ness]" in a brief essay comparing merit in art and legal scholarship); John E. Morrison, *Colorblindness, Individuality, and Merit*, 79 IOWA L. REV. 313, 330 (1994) ("The concept of merit is just as ambiguous as the concepts of both race and social relationships, . . . [but some define it as] [h]ard work and good results.").

For the connection between Aristotelian moral theory and the meaning of merit, *see* Fallon, at 815 n.1 ("Aristotle, who argued forcefully for the equation of merit with excellence or virtue, also noted the contestable and contested meaning of the term—the ultimate source of many . . . issues and confusion.").

47. *See Wilson Makes Renewed Call for Moral Values*, L.A. TIMES, Jan. 9, 1996, at A1, A13 ("All the problems tearing apart the fabric of our society have deep roots in this exploding epidemic of out-of-wedlock births. . . . [Conservative thinkers have] identifi[ed] out-of-wedlock births as the nation's most dangerous time bomb."). *Cf.* Regina Austin, *Sapphire Bound! in FEMINIST JURISPRUDENCE* 575 (Patricia Smith ed., 1993) ("[T]he condemnation of black unwed motherhood is so deeply embedded in mainstream thought that its invocation in connection with teenage pregnancy may be considered uncontroversial.").

48. *See Wilson Makes Renewed Call for Moral Values*, *supra* note 47, at 13 ("Wilson proposed to discourage unwed mothers with a plan to stop additional welfare benefits for women who have babies while they are receiving public assistance.").

positive. For example, Aristotle identifies courage, temperance, and justice as three important virtues. Similarly, the modern terms used to define merit focus on broad, noncontextual features such as faithfulness or industry.<sup>49</sup> In fact, even the professions which seem most amenable to merit quantification loosely define some seemingly neutral qualities that are considered desirable, such as the ability to contribute to the profession,<sup>50</sup> moral character,<sup>51</sup> or “interpersonal skills.”<sup>52</sup>

However, on closer examination, the validity of these standards is questionable. What are the particular definitions of courage, justice, temperance, and *phronesis*, as they have been defined in the absence of other voices? Are these definitions wholly accurate and fairly applied to others? For example, Aristotle’s particular conception of courage reveals the danger of defining virtues in exclusion: “[T]he courage . . . of a man and of a woman, are not . . . the same; the courage of a man is shown in commanding, of a woman in obeying.”<sup>53</sup> Similar challenges might be made to antiaffirmative action theorists, who depend on what sometimes appears to be the monolithic justification of color-blind merit. Armed with a gender and race consciousness, modern critical race and feminist scholars may ask: How has the definition of merit been exclusively constructed, and is it also fairly applied to others?

These questions move back towards the entrenched assumptions about what it means to be “good,” pulling strenuously at long held truths regarding what is “valuable.” However, these sorts of voyages are not without their perils; they need methods. But, anchors do exist as critical race theorists and feminist theorists have developed some tools for analyzing our modern definition of merit. One of the most important contributions of these bodies of scholarship is their attempts to peel back the layers of foundational “truth,” bringing to light underlying assumptions which are, inevitably, “white-centered”

---

49. See, *supra* notes 33, 40, 45, and 46.

50. Harris, *supra* note 29, at 1771 (discussing medical school admission in *Bakke*).

51. See *Aiken v. City of Memphis*, 37 F.3d 1155, 1165-66 n.7 (6th Cir. 1994) (citing a regulation which specifies the qualifications for the position of patrol officer, one of which is that the applicant “have a good moral character”); *Drayton v. City of St. Petersburg*, 477 F. Supp. 846, 851 (M.D. Fla. 1979) (good moral character requirement for police officers and firefighters).

52. See Blum, *infra* note 120.

53. ARISTOTLE, *NICOMACHEAN ETHICS* bk. I, ch. 13, p. 1260, col.a, ll. 22-24, reprinted in *THE BASIC WORKS OF ARISTOTLE*, *supra* note 31, at 1144.

and “male-centered.”<sup>54</sup> One of the main tools so developed has been storytelling, which “Outsider,” or “from the bottom”<sup>55</sup> jurisprudence use in order to “subvert . . . in group reality [and] destroy[] mindset.”<sup>56</sup>

The task I have in mind is to use storytelling—in particular, biographical stories about my Mexican-American grandmother, my mother, and myself—in order to examine whether the concept of merit, or, in Aristotle’s terms, “virtue,” may be reconfigured by the inclusion of previously silenced voices, whose stories may contain concrete, particular details illuminating modes of value which largely have been ignored.<sup>57</sup> This project is consistent with the commitment of critical race and feminist scholars, and is also in line with the struc-

---

54. See, e.g., Kimberle Crenshaw, *Foreword: Toward a Race-Conscious Pedagogy in Legal Education*, 11 NAT’L BLACK L.J. 1, 2 (1989) (examining the law school culture and positing that it embodies a false assumption of perspectivelessness); see also *supra* note 17.

55. See Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987).

56. See Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2413 (1988) (“Stories, parables, chronicles, and narratives are powerful means for destroying mindset—the bundle of presuppositions, received wisdoms, and shared understandings against a background of which legal and political discourse takes place.”).

Narrative scholarship, particularly that coming from critical race and feminist legal scholars, strives to dismantle the notion that the law operates from an objective standpoint, one that “envisions scholars [and lawyers] achieving an unbiased and universal perspective by distancing themselves from the social reality they seek to describe.” Charles Lawrence, *The Word and the River: Pedagogy as Scholarship as Struggle*, 65 S. CAL. L. REV. 2231, 2252 (1992); see also Williams, *supra* note 16, at 6 (“I am trying to challenge the usual limits of commercial discourse by using an intentionally double-voiced and relational, rather than a traditionally legal black-letter, vocabulary.”). West notes that:

[S]ome legal thought confuse[s] . . . male experience with ‘human’ experience . . . because women have not made clear that our day-to-day, lived experience . . . is incommensurable with men’s [posits that] [w]e need to flood the market with our own stories until we get one simple point across: men’s narrative story and phenomenological description of law is not women’s story and phenomenology of law. We need to dislodge legal theorists’ confidence that they speak for women, and we need to fill the gap that will develop when we succeed in doing so.

Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 65 (1988).

57. Feminist jurisprudence and critical race theory value attentions to the concrete details of everyday life. See, e.g., Margaret Jane Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699, 1706 (1990) (“Pragmatism and feminism largely share, I think, the commitment to finding knowledge in the particulars of experience. It is a commitment against abstract idealism, transcendence, foundationalism, and nontemporal universality and in favor of imminence, historicity, concreteness, situatedness, contextuality, embeddedness, [and] narrativity of meaning.”); John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129, 2146 (1992) (discussing “critical race theory’s experiential grounding”).

ture of Aristotelian method. First, critical race theory and feminist theories have unabashedly announced their commitment to disturbing foundational assumptions. In addition, Aristotelian moral theory, which itself has provided one of the foundations for an exclusive definition of merit, is also open to this kind of method. Although this Essay critiques the gender and race hierarchy that underlying Aristotelian moral theory, it also uses Aristotle's identification of the virtues as a theoretical framework for delineating the distinctive merits of Outsiders. For example, Aristotle placed significant emphasis on the value of *phronesis*—practical experience in the development of “wisdom” and “understanding,”<sup>58</sup>—which can be a valuable tool for uncovering valuable Outsider wisdom stemming from personal experience with subordination.<sup>59</sup> Further, as interpreted by Martha Nussbaum, using biographical stories in order to flesh out the virtues has been considered consistent with Aristotle's moral philosophy: “[T]he content of rational choice must be supplied by nothing less messy than experience and stories of experience. Among stories of conduct, the most true and informative will be works of literature, biography, and history . . . .”<sup>60</sup>

Using “from the bottom” storytelling in order to illuminate a new configuration of merit, however, is not uncontroversial in Aristotelian moral theory. In the first place, the concept of Outsider merit directly conflicts with Aristotle's assertion that Outsiders could *not* possess virtue. In addition, an attempt to discern particular virtues may contradict Aristotle's conception of the unity of the virtues. Since some Outsiders may possess certain virtues but not others due to their excluded status (good temper, for example), the resultant notion of distinct virtues challenges Aristotle's rule of unity.<sup>61</sup>

A debate between Nussbaum and my colleague, Lawrence Solum, reveals the tensions that arise when Outsiders attempt to recast the Aristotelian model. Outsiders presumptively do not have access to the qualities, or experiences, that could be considered virtuous—“virtuous” in the abstract (the broad categories of “courage,” “tem-

---

58. NUSSBAUM, *supra* note 39, 74-75 (“[Aristotle] stresses the importance of experience in giving content to practical wisdom, developing a contrast between practical insight and scientific or mathematical understanding . . . . [P]ractical perception . . . is gained only through a long process of living and choosing that develops the agent's resourcefulness and responsiveness . . . .”). See also Linda R. Hirshman, *The Book of “A”*, 70 TEX. L. REV. 971 (1992) (noting parallels between feminism and Aristotelian moral theory).

59. See *infra* note 118, and accompanying text.

60. NUSSBAUM, *supra* note 39, at 74.

61. See Solum, *Virtues and Voices*, *supra* note 37, at 133-34; see also *supra* note 41.

perance,” “justice,” or “industry and devotion,” as the virtues have been recently cast in the merit debate)<sup>62</sup> or “virtuous” in the particular (those qualities in context). Solum, in his article *Virtues and Voices*,<sup>63</sup> wonders whether

the experiences of oppression and exclusion may lead to the development of states of character that lead to moral action, to the right sort of choosing. Those who are privileged (the included and unoppressed) may not develop these virtues merely by being informed of the propositional content of the distinctive knowledge of the oppressed. Experiences of oppression may not be necessary for the recognition of injustice, but it seems plausible that those who actually experience oppression will have ethical perceptions that are different from those who recognize injustice in other ways, e.g. through theoretical discourse about justice.<sup>64</sup>

Nussbaum, however, prefers to think of Outsiders as having access only to special “knowledge” which is relevant to good deliberation.

I am rather nervous, about the idea that the excluded have virtues of their own just because of the excluded and oppressed way of life they have led . . . [Outsiders] can lose, [Aristotle] claims, many of the major virtues, because they become incapable of trust or hope. This, to me, is more persuasive than the idea that exclusion generates new virtues.<sup>65</sup>

Although Nussbaum’s articulation of the Aristotelian position as being incapable of trust or hope may be striking, it is not without a modern day analogue.<sup>66</sup> This is, to *me*, one of the reasons why revision or merit-teaching must occur, since standards which presumptively find Outsiders lacking point more to the insufficiency of the standards than to our own merit. This is not to say, however, that all standards of merit must be abolished. Revolution is better asserted in increments,<sup>67</sup> and abdicating all standards may only leave the majority

62. *See id.*

63. *See id.*

64. *Id.* at 137.

65. Martha Nussbaum, *Comments*, 66 CHI.-KENT L. REV. 213, 228 (1990).

66. Posner notes the antiaffirmative action position:

[S]uppose[s] that a particular racial or ethnic identity is correlated with characteristics that are widely disliked for reasons not patently exploitative, noncompetitive, or irrational. A substantial proportion of the members of the group may be loud, poor, hostile, irresponsible, poorly educated, dangerously irascible, or ill mannered, and have different tastes, values, and work habits from our own, or speak an unintelligible patois.

Posner, *supra* note 13, at 367-68.

67. *Cf.* Radin, *supra* note 57, at 1700-01 (positing that feminism should not abdicate “the new epistemology” because it had been developed by men, but finding that “it is



with the conclusion that Outsiders are simply incapable of meeting any standards whatsoever.<sup>68</sup>

An additional objection to the identification of Outsiders' distinct virtues is the requirement that there be a unity of the "virtues." However, this may not *wholly* preclude, within the Aristotelian model, an articulation of the particular virtues of the oppressed. To the extent that Outsiders respond to their excluded status through self-destructiveness, bad temper, et cetera, Aristotle's theory would refuse to recognize them as virtuous, despite their manifestations of other forms of virtue. However, the project of identifying distinct virtues does not itself necessarily break Aristotelian unity.

For example, Stephen Munzer, in his book *A Theory of Property*,<sup>69</sup> writes that general virtues can be "variably instantiated" and displayed in different ways depending on the society.<sup>70</sup> He also asserts that there are "localized virtues," that are "virtues only in some societies,"<sup>71</sup> and "differentiated virtues," that are "virtues for persons who occupy certain roles or positions but need not be virtues for persons who occupy different roles or positions."<sup>72</sup> This does not mean that the different "virtues" do not conform to a unified program, but rather are simply the articulation of broad categories of virtue in context.<sup>73</sup> Biographical narrative is a helpful tool in the excavation of these contextual virtues as it can unearth concrete illustrations of actual, "every day," lived experiences with inequities, thus uncovering valuable responses and perceptions that may otherwise be overlooked.<sup>74</sup>

---

pragmatically better" for excluded voices to be affirmed, and consequently enabled, (in pragmatism's case) to articulate the problem of "bad coherence").

68. See Farber & Sherry, *supra* note 24.

69. STEPHEN R. MUNZER, *A THEORY OF PROPERTY* (1990).

70. *Id.* at 123 ("For example," Munzer writes, "consider two societies that have different conceptions of kindness toward the elderly when they become terminally and painfully ill. One society performs euthanasia . . . and the other allows their lives to run a natural course while treating them gently and respectfully.").

71. *Id.* (differentiating between the need for "industry" in a society where resources are readily obtainable and in a society with scarce resources).

72. *Id.* at 124 ("Some might contend that in a feudal society, obedience and docility are virtues for serfs and not for nobles, whereas boldness is a virtue for nobles but not for serfs.").

73. *Id.* at 121, 124 (All the different "virtues" must qualify as "virtue," that is, a characteristic which benefits its owner and others, and enhances positive features or corrects shortcomings.).

74. Cf. Austin Sarat & Thomas R. Kearns, *Editorial Introduction* to *LAW IN EVERYDAY LIFE* 2, 10 (Austin Sarat & Thomas R. Kearns eds. 1993) (noting "the contingency and specificity of the relationship of law and everyday life" and observing that "[our] understandings, conventions, and assumptions are themselves produced and shaped by legal

These objections aside, the use of the biographical narrative of Mexican-American immigrants to investigate different meanings of merit fits in well with this project, since narrative and storytelling are firmly rooted in the Chicano tradition.<sup>75</sup> That I am using biographical narratives of Mexican-Americans in this Essay is not incidental to my project. Although my exploration of merit and virtue is intended to supplement the debate on affirmative action—broadly construed to mean not only affirmation for Chicanos but also other Outsiders—an examination of the meaning of merit in the Chicano life is of particular importance as the status of the Chicano is in need of increased jurisprudential attention.

The Chicano experience has largely been included in the civil rights movement and critical race theory, but without sufficient explanation of what discrimination, oppression, or “outsider-ness” means in that experience. Chicano claims of oppression and exclusion have been fit into the same framework as race claims,<sup>76</sup> poverty claims,<sup>77</sup> ethnicity claims,<sup>78</sup> and gender claims.<sup>79</sup> However, a more incisive examination of Chicanos would reveal that the discrimination against

---

rules and practices”); Hendrik Hartog, *Abigail Bailey's Coverture: Law in a Married Woman's Consciousness*, *supra* at 65 (reflecting on “the role of legal values and legal institutions in the shaping of ordinary social identities” by “attend[ing] to” the 1815 autobiography of Abigail Bailey). Cf. RAMON SALDIVAR, *CHICANO NARRATIVE* 154-155 (1990) (“[A]utobiography can be used to advance a critical attitude toward social institutions, turning what seems an inherently private form of discourse onto the public social world. . . . ‘Autobiography certainly has a great historical value in that it shows life in action and not just as written laws or dominant moral principles say it should be.’”).

75. See SALDIVAR, *supra* note 74, at 32 (“Because the corrido is ‘*narrative, reflexive, and propositional in semantic intent and poetic in technique*,’ it lends itself readily to use as an instrument of ideological analysis.”) (citation omitted).

76. See *Hernandez v. New York*, 500 U.S. 352, 356 (1991) (The Supreme Court used both the terms “race” and “ethnicity” in an equal protection claim regarding jury selection involving Latinos.); see also Deborah Ramirez, *The Mixed Jury and the Ancient Custom of Trial by Jury De Medietate Linguae: A History and a Proposal for Change*, 74 B.U. L. REV. 777, 818 (1994) (“Within ‘race’ I include Latinos, African-Americans, Asians, and Native Americans.”).

77. See *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973).

78. See *Hernandez v. Texas*, 347 U.S. 475, 482 (1954) (In an equal protection challenge to jury exclusion, the Court asserted that its decision to strike down the exclusion of Mexican-Americans in jury selection did not mean that it was “reviv[ing] the rejected contention that the Fourteenth Amendment requires proportional representation of all the component ethnic groups of the community on every jury.”); see also *Hernandez v. New York*, 500 U.S. at 356.

79. See Catherine A. MacKinnon, *Reflection on Sex Equality Under Law*, 100 YALE L.J. 1281, 1301 (1991) (considering the forced sterilization of Latinas when discussing how reproductive policy serves male interests); Kathryn Abrams, *Title VII and the Complex Female Subject*, 92 MICH. L. REV. 2479, 2521-22 (1994) (considering discrimination against Latinas and the ‘sex-plus’ doctrine under Title VII).

them cannot be so easily described, and the reasons for their exclusion may vary greatly from case to case. Chicanos are not simply Outsiders because of their race, ethnicity, skin color, class, or language; each of these factors blends together with gender in different ways for different Chicanos.

Accordingly, this Essay seeks to begin to illustrate some aspects of the complex nature of discrimination against Chicanos through biographical storytelling, and to draw out the distinct merit that exists in these Latinas' responses to their difficult circumstances. By analyzing these stories under the rubric of past discrimination, role modeling, and diversity, I will focus in on the ways in which such "colored" merit is developed, and how it can be deployed. In the first narrative, I will analyze my grandmother's life in an effort to identify instances of merit that are forged out of experiences of past discrimination. In so doing I will not only be performing the radical act of defining productive responses to subordination as "meritorious," but I will also posit how this merit, which has been understood only in the private realm, also has potential public uses. In the second two narratives, which focus on my mother's story and my own, I will examine how Outsider merit can be deployed through role modeling and diversity concepts.<sup>80</sup>

### III. The Stories

#### A. Past Discrimination

We recognize the need for careful judicial evaluation to assure that any . . . program that employs racial or ethnic criteria to accomplish the objective of remedying the present effects of past discrimination is narrowly tailored to the achievement of that goal.<sup>81</sup>

The Court in *Fullilove* had nothing so ethereal in mind as storytelling and the investigation of Outsider virtues or merit when it held that affirmative action plans (there, a ten-percent set-aside for minority-owned businesses) had to be narrowly tailored to the goal of remedying past discrimination. But past discrimination is a useful lens through which to examine Outsiders' abilities to contribute to society.

---

80. An important caveat, however, does need to be made. This Essay does not purport to define all Outsider merit. It does not even attempt to further a claim of Latino or Latina virtue. Rather, it is an individual examination of the incidents of merit in a particular family—mine—which would likely be ignored under a color- or gender-blind analysis. By examining specific Latina lives I hope to unearth merit which is directly informed by race and gender.

81. *Fullilove v. Klutznik*, 448 U.S. 448, 480 (1983).

As noted, Aristotle placed heavy emphasis on the centrality of actual, lived experience in the development of virtue.<sup>82</sup> Similarly, some modern scholars emphasize practical experience in their definitions of merit.<sup>83</sup> Outsiders' experiences with discrimination and subordination can give them a richer perspective and highly sophisticated coping tools that the majority simply has not acquired. Take, for example, my grandmother, Maria Aldrete Adastik. She was born in 1924, in Coahuila, Mexico, in the small city of La Villita which bordered on Texas. "The town was named after my Grandfather, Villareal," she tells me, proudly adding, "he owned the whole place."<sup>84</sup>

My grandmother is a small woman, like I am, who talks with her hands, making swift, geometric shapes in the air. She can laugh herself to tears at her own jokes and memories. She has brown eyes and medium skin, "Spanish skin," with barely a trace of *mestizo*. She dyes her dark hair red, lightening it as many Mexican women do, and her voice is a thick, accented music. We are sitting on the couch in my living room; my grandfather is quiet and unseen in the study reading the paper. With a tape deck on the table and me asking pointed questions, this is a different kind of conversation from any we have had before. We are discussing how she grew up in Mexico, married and had her only child there, and how she met the man I call my grandfather, Walter Adastik, who brought her over the border: the person who, by marrying her, helped her become an American citizen.

In my family it has become customary to speak of some great status and wealth once enjoyed by our blood line in small, dusty towns; that we were wealthy, high class, and owned acres of property and cattle; that we had haciendas and maids. These mythic things did not last very long. They ended with my great-grandfather's death at the age of thirty (he was Paco Aldrete, a stern looking, dark-haired man whom I know only from old, sepia-toned photographs), which left my great-grandmother, Otila, my grandmother, Maria, and her six

---

82. See *supra* notes 39-41 and accompanying text.

83. A reference to the concept of judicial "merit" is helpful here. See Tobias, *supra* note 45, at 1274; STEPHEN L. CARTER, *THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS* 152 (1994) (asserting that an examination of a judicial nominee's day-to-day experience with minorities reveals something important about that candidate's moral character, an important element of judicial merit); Murray, *supra* note 30, at 382 (positing that some objections to then-Supreme Court Justice nominee Judge Clarence Thomas focused on his youth and inexperience).

84. Interview with Maria Aldrete Adastik in Pasadena, Cal. (June 27, 1995). Quotations attributed to "my grandmother" or "Maria" throughout the remainder of this Essay refer to this interview, but, at the request of the author, will not be individually cited in an attempt to preserve the narrative flow of these sections.

sisters alone and in debt, forced to sell off the ranches and the cattle and to try to find work.

Two years later, when my grandmother was sixteen, she married a family friend. After several months, Maria became pregnant. "It was normal then to have the babies when we were that age," she says, comfortably. "In those years, marriage at sixteen or seventeen was normal. Even Shirley Temple married at seventeen. See, so even the movie stars was married earlier."

When Maria discovered that her new husband was having affairs with other women, she decided to separate from him, even though she was only sixteen and two months pregnant. She had her baby, my mother, Thelma Diaz, and moved to Nueva Rosita, a different state in Mexico, to be with her mother and sisters, all of whom lived in the same apartment. Maria found work as an orderly in a hospital.

Maria's life choices—the decision to try and divorce her husband, to have a child out of wedlock, to work—meant that she was to spend the next six years confined to very stringent rules, imposed by both Mexican society and by her estranged husband:

They were very, very strict society. Very strict. I couldn't go out anywhere because I was not divorced. I was separated. He didn't want to divorce me, he was hoping that I would go back to him. And he would not support Thelma, either. And he said that if he see me in any parties, or dancing, or in company of another man, he will take Thelma away from me.

"Would he be able to do that?" I ask her. I cannot imagine what would have happened to our family's history if this man had carried out his threats.

"He will. Yes, legally," she answers, "because he have the money to pay lawyers, for those things like that. Even if he steal her. I was afraid. So I spend five or six years going nowhere."

Eventually her first husband divorced her, and Maria and her family moved to Monterrey. After working for seven years, as a supervisor in Monterrey's Social Security department Maria became involved in a "pen-pal" program designed to connect Anglo men with willing Latinas. She soon began writing letters to my grandfather, Walter Adastik. He was a quiet man from Michigan. A mechanic. Bilingual. They arranged a meeting in Mexico. It was 1955, and Eisenhower was the President of the United States.

Walter came to Monterrey for one week, renting out a hotel room and taking Maria out to dinners, lunches, and for ice cream cones. The young couple was always chaperoned by watchful, protective Otila, although Maria was thirty years old and herself a mother. At

the end of the week Maria agreed to marry Walter and move to the United States, even though that same week she had been offered a promotion at her job.

“Wasn’t that awfully quick?” I ask, astonished that their forty year marriage could have been premised on a one week courtship. “Didn’t you want to take the promotion?”

“No. There was no other answer. When my mother saw Walter,” Maria explains, speaking of my great-grandmother,

[S]he told me “You are going to be a fool if you let him go out without marry.” She thought he was a good man, honest, and nice; he is the best person I met. I thought the same thing. Even if I didn’t know him. I had a feeling.

“Were you happy that he was an American?” I ask.

To this my grandmother responds with a very organized answer, lucid and rational, demonstrating the cost-benefit analysis in which she has been engaging all of her life.

There are two big reasons—the first one, more important. In Mexico, if you are alone, especially divorced (because they forgive you if you are widow) if you are divorced, you are at fault. If you are a woman. A man, they’re saints, okay? They don’t do anything wrong. Whatever they do is okay. If you are divorced, you have to be very careful what you do, what you say, how you dress, everything. Take care of your surroundings. Taking care of what the people think. Because whatever you do is wrong. For another, I have Thelma. And usually . . . a divorced woman has that bad reputation, no matter what. You are dead. So you are like that, no one is gonna marry your daughters with a good intentions. Even if she start dating, the first thing they going to try is to take her to bed because the mother is divorced. “So let’s try the girl.” Never fails. Unless you are a multimillionaire. So the best thing is to marry an American.

It was arranged that Maria would meet Walter in Tijuana, so that he could bring her over the border, and they would be married in Los Angeles. She flew down to Tijuana—a city she had never seen before—and it was exotic, filled with merchants, strangers, and buildings. Maria had come alone, planning to send for Thelma after she was married and had settled into her new life.

But Walter was late to the airport. Seven hours late, leaving Maria waiting at the terminal for two hours and then sitting for five hours in a hotel lobby, a meeting spot they had previously discussed. After waiting so many hours she thought that Walter had decided against the marriage, that he had changed his mind, and was not coming after all.

My grandmother tells me the thoughts that were running through her mind that night while she waited in the lobby, glancing about for any sign of Walter. "He doesn't want to marry me," she thought. She is crying as she remembers this:

What to *do*. That means I have to go back to Monterrey with empty hands, and I was feeling so bad. What I'm going to tell my friends? What I'm going to tell my family? I felt so bad that I said I'm not going back. I am not going back, so I'm going to stay here. I will send for Thelma.

Walter eventually arrived at the hotel, explaining that traffic was the reason for his late arrival. "The plane arrived at four-thirty; at *four-thirty* he was at Culver City, working," she says, remembering how her new fiance had miscalculated transportation time. Forty years later, she is still aggravated at the thought. The next day they made what is considered in our family a historic trip over the border. "I feel good. I feel very happy," she says, remembering the crossing-over. This was the beginning of my maternal Mexican-American lineage. Maria and Walter married, brought Thelma across, and began life together in a tract house in Lakewood, a small, unassuming California suburb about an hour away from Los Angeles.

Maria's story, at first glance, may simply seem like an ambiguously sad tale: Should she have taken the promotion? Did she pick the right man? However, within her story I see strains of virtuous, empathetic moral reasoning, and the ability to take tough, productive action in the face of a seemingly intractable situation. I also see the profound ability to adapt while maintaining personal integrity. These characteristics as expressed in Maria's story are consistent with the ideals of Aristotelian virtue, which Stephen Munzer defines as a "character trait that disposes a person to think or act in ways that are generally beneficial both for the person having the trait and for others, and that either enhances some positive feature or corrects or modifies some shortcoming[s] of human beings."<sup>85</sup> Further, the characteristics I have noted are also consistent with the broad, modern definition of merit, which focuses on fidelity, dedication, and tenacity.<sup>86</sup>

### 1. *Empathy*

First, my grandmother's response to her oppressive circumstances in Mexico—rejecting a promotion at a job she enjoyed and by which

---

85. MUNZER, *supra* note 69, at 121.

86. *See supra* notes 37.

she felt affirmed, and pragmatically marrying a suitable American—is traced to her empathetic sense of responsibility to her own daughter. Maria was trapped; she knew that. She was precluded from living the sort of social life which seemed necessary for a young woman's healthy development, yet it was concern for her daughter's future which guided her decisionmaking. From her experiences as a divorced, and consequently ostracized, woman in an insular society, Maria knew the costs of being labeled a deviant. She also knew how those same costs—seclusion, isolation, objectification (“Let’s get the girl”)—would come to bear on own her daughter by virtue of their shared blood. It was because of this empathetic responsibility that Maria made her sacrifices.

This empathy, forged out of personal experiences with subjugation, is a form of merit currently unrecognized by the majority of society. However, if our society is concerned with eliminating bias and discrimination, as it should be,<sup>87</sup> then we should reconfigure our definition of merit to include the ability to perceptively and productively recognize and respond to discrimination. As Robin West writes:

The ability to sympathetically understand (and respond to) anothe[r] . . . implies . . . the ability to interpersonally compare subjective utilities, as well as the ability to act on them. . . . [K]nowledge of the other's subjectivity can then become the basis of our comparison of the intensity of the pain felt by that human being with that of another, or of ourselves. . . . Further, it is the comparison . . . which determines my final moral commitment . . . to resist the suffering inflicted upon this woman, or upon . . . [this man because I know] their pain is greater or weightier than the suffering of others.<sup>88</sup>

Personal experience with oppression is central to the formation of this empathetic capacity. The person who experiences subjugation has more than an abstract or theoretical knowledge about the plight of Outsiders. Instead, he or she will have felt the burden of oppres-

---

87. Most political leaders from both ends of the political spectrum do seem to assert this goal. See *Wilson Filed Affirmative Action Suit*, UPI, Aug. 10, 1995, available in LEXIS, Nexis Library, UPI File (The article quotes Governor Wilson's statement that “[w]e should have the same system of fairness for all Californians; one that does not play favorites, one that does not legislate outcomes, but one that allows every hard-working citizen to be recognized and rewarded on individual merit and individual achievement without regard to race or ethnicity.”); Bill Clinton, *The Results of a White House Review of Federal Affirmative Action Programs* (July 19, 1995) (transcript available through Federal Document Clearing House, Inc.) (“The purpose of affirmative action is to give our nation a way to finally address the systemic exclusion of individuals of talent on the basis of their gender or race from opportunities to develop, perform, achieve and contribute.”).

88. Robin West, *Taking Preferences Seriously*, 64 TUL. L. REV. 659, 681-682 (1990).



sion—what Toni Morrison calls “the adult pain that rested somewhere under the eyelids, somewhere under th[e] head rags and soft felt hats, somewhere in the palm of the hand, somewhere behind the frayed lapels, somewhere in the sinew’s curve.”<sup>89</sup> The experience of this deep, almost physically felt, emotion makes it possible for an Outsider to get “inside the skin” or to “step into the shoes” of another Outsider.

For example, Maria understood that in her community, marital separation could mean great danger for a woman’s well-being, not only because estranged husbands could respond violently, but also because estranged wives and their daughters were devalued by the larger society. “Whatever you do is wrong” and “you are dead,” are the words she used to describe the divorced woman’s status. Her empathetic perception of a woman’s vulnerability after divorce—a perception which includes the understanding that men could “legally” take away children from their ex-wives because they “have the money to pay lawyers, for those things like that”—is a valuable resource in a society where women are disadvantaged by divorce.<sup>90</sup> Maria understands not only the immediate, external inequities of marital separation, but also its less visible forms of oppression—alienation and fear caused by change in status and increased vulnerability—which may not always be taken into account by privileged policymakers who have never been exposed to these conditions.<sup>91</sup>

---

89. TONI MORRISON, *SULA* 4 (1973).

90. Scholars and other commentators have observed how divorce reforms do not accurately reflect or compensate for the lived inequities faced by divorced women.

Marital-property laws rest on the premise that husband and wife are equal partners in marriage. . . . Without entering the equal treatment versus equal results debate, one can recognize that compensating for the disparate positions of husband and wife at divorce by presuming that they do not exist begs the question.

Bea Ann Smith, *The Partnership Theory of Marriage: A Borrowed Solution Fails*, 68 TEX. L. REV. 689, 732 (1990) (citations omitted); Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 838 (1989) (Although not advocating a maternal presumption, Williams notes that “[s]cholars have found that the abolition of the maternal presumption in child-custody decisions has had . . . deleterious impacts on women. . . . [I]n the 90 percent of the cases where mothers received custody, mothers often find themselves bargaining away financial claims in exchange for custody of the children.”).

91. See *supra* note 90. This reflection regarding the public-policy value of Maria’s learned wisdom also appears to be related to the Aristotelian position that wisdom and excellence of character go hand in hand: “Without wisdom, excellence of character would be like a man groping in the dark and not knowing where to go; without the desires of an excellent character, wisdom would have nothing to do.” J.O. URMSON, *ARISTOTLE’S ETHICS* 84 (1988).

Maria’s experiences with hardship are worth valuing because they can serve as a beacon for policymakers and lawmakers. Inclusion of Outsiders’ experiences can guard against the current “groping in the dark” which is evidenced by short-sighted welfare and

Maria is also able to empathize with the plights of Outsiders, especially those who suffer subjugation from a combination of “intersectional” factors,<sup>92</sup> such as race, ethnicity, language barriers, and gender. The need for welfare, education, and access to a forum are deprivations that Maria has experienced as a single mother, a new immigrant, and a non-English speaking “mail-order bride” of sorts. These experiences permit Maria to transcend the stereotyped images of welfare queens and thieving “illegals” competing against the story of the economically disadvantaged white man so often espoused by the majority’s one-dimensional rhetoric of “rights.”<sup>93</sup> My grandmother consistently demonstrates this empathy through her responses to the plights of others in need: myself, my mother, the neighbor, the woman on the street, the alien crossing the border. “They don’t get what they need,” she once said to me, when we were talking about the condition of undocumented workers after the passage of Proposition 187. “Peoples don’t care about them. All their doors are closed. They need at least *one* door open.”

## 2. *Praxis and Dignity*

My grandmother’s story also reveals her ability to take productive action while retaining her sense of self, qualities which may not always be recognized as a form of merit. Within the debate of the existence of the “virtues of the oppressed” lies a division over whether Outsiders merely have special “knowledge,” or indeed may possess their own, unappreciated forms of merit.<sup>94</sup> After relating this part of my grandmother’s story, I am convinced that she offers more than mere “knowledge.” Maria’s understanding of her own situation and her commitment to a better life, both for herself and for her daughter, motivated the demonstration of her ability to take productive, adaptive, resistant action in the face of intractability.<sup>95</sup> Although Maria’s response to her oppression may not be immediately recognizable as

---

divorce policies that fail to take into account the lack of equality between married men and women and the sacrifices that some women will make in order to retain custody of their children. *See supra* note 90.

92. *See* Crenshaw, *supra* note 14.

93. *See supra* notes 3-6.

94. *See* NUSSBAUM, *supra* note 39; *see* Solum, *Virtues and Vices*, *supra* note 33.

95. Robin West describes this form of merit, which is beyond mere knowledge, as sympathetic judgment.

[T]he sympathetic judgment is not information; it is not simply a judgment about the suffering of others. It presupposes, as well as facilitates, a commitment to oppose the cause of the other’s subjective suffering, as well as an understanding of it. When we sympathize with the suffering of another, we understand what she’s going through, but we do not just understand it, we are also moved to lessen it.

transcendent—after all, she ran into the arms of a man whom she barely knew and turned down employment opportunities<sup>96</sup>—her acts of moving to a different town and marrying an American simultaneously reveal her capacity to resist the worst forms of subjugation through pragmatic decisionmaking, and her powerful, empathetic sense of moral responsibility for the welfare of her daughter. Furthermore, Maria kept her personal integrity in sight. For Maria, this meant committing herself to her original plan of escaping her ex-husband's threats and making a new life for herself, with or without a man to support her.

Maria's story illustrates her fidelity, praxis, and empathy, and has something to offer our estimation of what it is to be "meritorious" and "deserving" in this society. We need a society of people who are able to overcome obstacles in productive ways; we should seek out individuals who exhibit firm moral commitments to others. Maria's merit, however, is not simply a "good" in the private realm of my family. Instead, it has the potential to extend into the public sphere, since her personal experience with oppression and learned methods of moral coping bodes well for her ability to empathize with the situations and decisions of other oppressed people. It is also a model of productive action combined with self-respect. However, as I will discuss in the next two sections, a simple recognition of Outsider virtue is not sufficient. Instead, mechanisms for deploying these lessons are also required to achieve an enlightened societal understanding of merit.

---

When we sympathize, we share in the pain and commit ourselves to resist its source.

West, *supra* note 88, at 686-87.

96. Not only may my grandmother's formidable praxis be unrecognized by a majoritarian conception of merit, it may also fail to be recognized by feminist theory.

Feminist theory at present, especially feminist legal theory, tends to focus on women as passive victims. . . . This story of woman as victim is meant to encourage solidarity by emphasizing shared oppression. . . . [But] black women have had to learn to construct themselves in a society that denied them full selves. . . . [and an inclusive feminist theory should insist] on the importance of will and creativity.

Angela P. Harris, *Race and Essentialism*, in *Feminist Legal Theory*, in *FEMINIST LEGAL THEORY* 348-355 (D. Kelly Weisberg ed., 1993). See also Martha R. Mahoney, *Whiteness and Women*, in *Practice and Theory: A Reply to Catharine MacKinnon*, 5 *YALE J.L. & FEMINISM* 217, 220 (1993) ("[D]efining gender by what is done to women, and centering the definition of what is done to us around sexual exploitation—tend to ignore creativity and struggle in women's experience[s] that have been particularly emphasized as important to women of color.").

## B. The Role Model

Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy. The role model theory . . . typif[ies] this indefiniteness. There are numerous explanations for a disparity between the percentage of minority students and the percentage of minority faculty, many of them completely unrelated to discrimination of any kind.<sup>97</sup>

Reflecting upon my grandmother's story prompts me to wonder what she would have accomplished if the kind of opportunities that I have had through affirmative action had been available to her.<sup>98</sup> The virtues, or merit, of praxis and empathy which I find my grandmother forged out of her oppressive circumstances do not end the discussion over what merit should mean in the affirmative action context. My grandmother had profound, hard-won merit. However, she did not have the opportunity to utilize her skills in the public sphere. Thus my grandmother's teaching occurred in the home where she instilled in me a rigorous work ethic and sensitized me to the vagaries of discrimination.

Outside of the private realm, no one gave Maria the tools to communicate her perceptions and experiences to others in public policy debate; no one seemed that interested at all. Indeed, Maria had been so consistently devalued that she did not even feel as though she had the right "face" with which to communicate her ideas. For example, even now when she recalls becoming a naturalized American citizen, Maria reveals her perception that to "really become" an American, she would have had to become something else.

"Did you feel any different [when you became an American citizen]?" I asked her once. She looked down at her hands and half-smiled.

"Well," she told me, "I felt very American. I felt blonde, I felt my eyes blue. I felt better. . . . I am an American now."

The potential of affirmative action to increase the presence of such Outsiders in higher level positions is important for merit-teaching—that is, the reconfiguration of the definition of merit through the inclusion of previously silenced voices—because it guards against this lack of self-esteem by providing positive, successful models for Outsiders, consequently strengthening the tenor of these excluded voices.

---

97. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986).

98. For I do believe that I am a product of affirmative action, or what Stephen Carter calls an "Affirmative Action Baby." STEPHEN L. CARTER, *REFLECTION OF AN AFFIRMATIVE ACTION BABY* (1990).

Moreover, affirmative action provides Outsiders with opportunities to reach beyond the places where people listen and learn from them. Evaluated in this light, the concept of the "role model" is a critical merit-teaching tool, since role models occupy positions of high status. Role modeling, however, is not in vogue right now. "Do you really want to be a role model?" Richard Delgado asks, rhetorically identifying the baggage and pitfalls assigned to minorities who take on such a burden.<sup>99</sup> Regina Austin also provides an incisive critique of role modeling, identifying how it can restrict the lives of real women of color in favor of idealistic "model" images.<sup>100</sup>

Nevertheless, I think that role modeling—a basis for affirmative action which the Supreme Court rejects<sup>101</sup>—operates in the notion of merit in two ways. First, role modeling facilitates the reconfiguration of the definition of merit since placing Outsiders in higher status positions communicates the message that their voices, skills, and virtues are valuable and meritorious in this society.<sup>102</sup> Outsider role model mentors also possess certain skills that enable other Outsiders to find their own voices, an empowering tool that goes beyond symbolism. Consequently, this strengthens Outsiders' self-esteem and ability to participate in public rhetoric, a necessary prerequisite to merit-teaching. Second, role modeling itself reveals Outsider merit in action. It is difficult, keen work to be a role model. It is empathy in action.

My own mother's story reflects some of these themes. My mother, Thelma Diaz Quinn, came to California in 1955. She was fourteen. My mother realized early on that she wanted to become an educator and thus pursued a teaching credential at a nearby state college. She became a Spanish teacher in the Los Angeles School District.

When I asked my mother about the presence of role models in her own education, she responded that she did not have any profes-

---

99. See Delgado, *supra* note 19.

100. Austin, *supra* note 47, at 580 (Austin discusses the firing of Crystal Chambers, a single woman who worked as an arts and crafts instructor for the Girl's Club—where "approximately 90 percent of the program participants were black"—and was fired when she became pregnant, thus violating the "negative role model rule": "Role models are not an adequate response to material conditions that limit the choices of young black women, both those who get pregnant and those who do not. 'Pride,' and 'positive identities' are not substitutes for 'prosperity' or 'power.'").

101. See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986).

102. See Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327, 1329 (1986) ("[Affirmative action] expand[s] . . . [the] professional class able to pass . . . elevated aspirations to subsequent generations . . . [and] teach[es] whites that blacks, too, are capable of handling responsibility. . . .").

sional role models, but did have a dearth of Latina colleagues (who could also be viewed as a type of role model):

Well, I really didn't have, I can't think of role models in my life—in education, that is. Grandma was a big force when I was growing up. Although not academically, no. I always had to feel very strong myself. I remember very clearly only fifteen percent of the student population of the colleges and universities were women. I was one of those fifteen. And I was a Mexican-American which made me even more unique.<sup>103</sup>

When my mother became an educator, however, she wholeheartedly embraced the part of role model mentor for her Latino students. Her students were often recent immigrants, did not speak much English, and were profoundly intimidated by both their new classmates and American society.

I asked my mother what she could give to those students that non-Latino professors could not. She explained how she feels that her mission is not simply to impart abstract knowledge, but also to help develop the students' self-esteem and confidence. My mother believes that she is particularly well-suited for this task, because she not only has a unique commitment to her Latino students' welfare, but also shares some common life experiences with them and consequently understands particular obstacles to success they may encounter.

[My other colleagues,] they go there to teach history, to teach math, whatever. But I believe in teaching the whole kid, everything that he needs to know [to] become aware of the world. It has nothing to do with Spanish. No one else seems to take an interest. [For example,] when the opportunity was given to the entire school to get the extra bilingual credential, I was the only one who took that opportunity in my school.

No, I would not just teach Spanish or just teach English. I would teach about life also. I would give lectures about self-esteem, I would teach them about the importance of setting goals in their life. [In] the Hispanic community, [much] of the old thinking is still there. It's that only God knows what's going to happen in the future. I would tell them, "no," you will know what you will be doing with your life. Don't leave it up to God. You have to set goals. And you must believe that you will reach them, because the moment that you say "no, I don't have the money, I'm not intelligent enough, I'm not this, I'm not that,"

---

103. Telephone Interview with Thelma Diaz Quinn (January 23, 1995). Quotations attributed to "my mother" or "Thelma" throughout the remainder of this Essay refer to this interview, but, at the request of the author, will not be cited in an attempt to preserve the narrative flow of these sections.

you just said “no.” No matter what else is handed to you it will not happen because you said to yourself “no.”

In this version of role modeling, my mother, who herself had felt the exclusion of being without role models—“I always had to feel very strong myself”—clearly demonstrates “different” merit in action. My mother expands the definition of what “merit” is by example, skill, and commitment.

### 1. *Example*

First, the contributions of Outsiders at higher levels affirms the value both of people of color and white women, and refutes the underlying presumption that these groups cannot “get the job done.” Outsiders, such as my mother, who are willing to take the opportunity to become role models, are capable of translating their moral commitments and their different knowledge into productive, visible action. While supporting and inspiring other Outsiders to succeed, they challenge a “race-less,” “gender-less” vision of merit through their actions, thus advancing the concept of merit-teaching. Some disagree with this assessment of the effects of affirmative action,<sup>104</sup> but in my own experience, seeing Outsiders in positions of authority has always affirmed my sense of Outsiders’ value. Witnessing role models has verified my sense of our complex intersectional fidelity, empathy, tenacity, praxis, and justice. It also affirms my conception of self-worth.

### 2. *Skill*

Second, my mother possesses skills that other teachers may not possess. From her experiences my mother has developed an empathy for Latino students which translates into a moral commitment to foster their welfare and equality which her non-Latino colleagues have not demonstrated. In addition, her particular knowledge and skills for coping with the burdens suffered by Latinos are a great advantage in her profession. She understands, for example, the paralyzing intimidation that Latinos can feel in this country, and their learned response to rely on religion to assuage disappointments. In response, my mother teaches productive action in the face of adversity; “never say ‘no,’” “set goals,” and “believe in yourself” are her themes.

Role models’ particular knowledge of oppression enables them to communicate the nature of that oppression to other Outsiders (as well as to the majority), and to articulate methods for challenging it. Thus

---

104. See Carter, *supra* note 98. Stephen L. Carter, for example, believes that affirmative action stigmatizes people of color.

“role modeling” can be broadly construed. It can come either in the form of a teacher who, knowing the obstacles her students of color face, gives them tools to overcome those obstacles; or a doctor who focuses on the particular needs of his community,<sup>105</sup> or an architect who tries to “leave [his] city better than [he] found it.”<sup>106</sup> All of these individuals incorporate into the definition of merit “raced” and “gendered” attributes because their formidable contributions have “cultural meaning.” That is, role models’ accomplishments are located around the axis of their “different” identities; their accomplishments are directed and shaped by their goals of aiding, being a voice for, and inspiring other Outsiders.

### 3. *Commitment*

Finally, a role model potentially embodies the greatest, most valuable form of merit of all. When I asked my mother why she works so hard at being a role model (beyond teaching her students “life lessons,” she also drives high school graduates to the city college to register for classes, and gives free English lessons out of her home) she answered: “Because I love them. I don’t know why, I just do. They drive me crazy sometimes, but you know, I still love them. And I think, at least I hope so, that they can sense that.”<sup>107</sup>

### C. *Diversity*

Just as a “diverse student body” contributing to a “robust exchange of ideas” is a “constitutionally permissible goal” on

---

105. See Nicholas Lamann, *Taking Affirmative Action Apart*, N.Y. TIMES, June 11, 1995, at 36 (Lamann portrays Patrick Chavis, a 43-year-old obstetrician-gynecologist who was admitted into the U.C. Davis Medical school under the special-admit program. Chavis says:

[H]e worke[d] harder than [his white medical-school classmate[s] [did] and in tougher conditions. He and his four black classmates set up a primary-care clinic when they were at Davis and worked there as volunteers, but they couldn’t get any of the white students to join them. . . . He ticks off what the black doctors admitted under Davis’s special minorities-only program . . . are doing now: almost all are in primary care in underserved areas.

*Id.*

106. See Tinah Saunders, *Architect’s Tribute Has Been Building For Years*, THE ATLANTA J. AND CONST., May 4, 1995, at D4 (profiling architect Joseph W. Robinson who benefitted from an early affirmative action contract-program, designed homes for African-Americans whose homes were being destroyed by an advancing expressway system, won awards for his designs, and mentored high school students).

107. Needless to say, this form of fidelity requires time, dedication, and hard, hard work. See Delgado, *supra* note 19, at 1226-27 (“Being a role model is a tough job, with long hours and much heavy lifting. You are expected to uplift your entire people. Talk about hard, sweaty work!”) (citations omitted).



which a race-conscious university admissions program may be predicated, the diversity of views and information on the airwaves serves important First Amendment values. The benefits of such diversity are not limited to the members of minority groups who gain access to the broadcasting industry by virtue of the ownership policies; rather, the benefits redound to all members of the viewing and listening audience. . . . “[T]he American public will benefit by having access to a wider diversity of information sources.”<sup>108</sup>

Diversity, which has not yet been eliminated by the Supreme Court as a valid, constitutional justification for affirmative action,<sup>109</sup> presents another opportunity for merit-teaching. In addition, “being” diverse can be a meritorious act in and of itself.

In *Bakke*, the Supreme Court posited that diversifying a medical school’s student body through the admission of students with “particular background[s]—whether it be ethnic, geographic, culturally advantaged or disadvantaged”—would benefit the medical profession since the introduction of these students’ “outlooks[ ] and ideas” would “enrich . . . training” and “better equip . . . graduates to render with understanding their vital service to humanity.”<sup>110</sup> Further, in *Metro Broadcasting, Inc. v. F.C.C.*,<sup>111</sup> the Supreme Court somewhat opaquely referred to the advantage (in broadcasting) of increasing the robust exchange of ideas through diversity.

Racial and gender diversity is critical in education and in the workplace beyond promoting the realization that people of color and white women can “do the job.” Diverse workplaces and educational facilities are also crucial as means to increase the majority’s exposure to the “idea” of the type of Outsider merit that is well illustrated by my grandmother’s and my mother’s stories—the empathies, skills, and fidelities that they have formed directly as a consequence of their Outsider status. Diversity provides an otherwise unrealized opportunity for validating Outsider perspectives and approaches to problem-solving through rhetorical exchange among “different” colleagues. I hope this opportunity will ultimately lead to an enriched expansion of the definition of merit.<sup>112</sup>

---

108. *Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547, 568 (1990) (citations omitted).

109. See *Adarand Constructors, Inc. v. Peña*, 115 S.Ct. 2097, 2127 (1995) (“The proposition that fostering diversity may provide a sufficient interest to justify such a program is not inconsistent with the Court’s holding [requiring that all benign racial classifications be analyzed under strict scrutiny].”).

110. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 314 (1978).

111. 497 U.S. at 547.

112. For a related view, compare Rogovin’s conclusion regarding the incorporation of minority perspectives:

My own experiences as a law student might help to illuminate this point. I am an American-born, mixed ethnicity Latina. I grew up in the suburbs of Long Beach and was educated in public schools until I attended Stanford Law School. Upon arriving at Stanford, I experienced something of a revelation. I had spent the last four years at UCLA studying literature and working as a tutor in a program that serviced minority students. Stanford, to me, was full of rich people with fancy backgrounds. Some of my classmates were, after all, the sons and daughters of investment bankers, lawyers, doctors, and captains of industry. And one of the main distinctions I perceived between "them" and me was that they had grown up having dinner table conversations about public policy, legal doctrine, and international relations, while I had grown up in a single-mother household, discussing feelings and personal histories. Nevertheless, I snapped to my legal education task quickly enough and overcompensated by studying at all hours. After the initial hysteria wore off and my pangs of self-doubt began to subside, I started to suspect that my analytical positions were sometimes different than some of my (more privileged) classmates—in particular, those of my male classmates and male professors. Yet my perspectives did not necessarily seem weaker. Indeed, sometimes I perceived important aspects of the doctrine we were studying that others did not.

It was the second semester of my first year of law school, and I was taking a constitutional law class with a well-renowned scholar. We were studying *Craig v. Boren*,<sup>113</sup> the case where the Supreme Court announced the intermediate scrutiny standard of review for gender classifications. *Craig* addressed an Oklahoma statute which prohibited the sale of 3.2% beer to males under the age of 21, and to females under the age of 18. The majority, in an opinion by Justice Brennan, held that the classification was a denial of equal protection to males from 18-20 years of age because the statistical evidence offered by the State had not provided sufficiently strong evidence of

---

[E]xposing the majority culture to . . . diverse minority viewpoints will alter the majority's focus and decrease both its inclination to automatically reject, or the likelihood of its misunderstanding, new and seemingly strange ideas. Instead, minority perspectives will be incorporated into the very values and judgments that inform the majority culture's taste.

Wendy M. Rogovin, *The Regulation of Television in the Public Interest: On Creating a Parallel Universe in Which Minorities Speak and Are Heard*, 42 CATH. U. L. REV. 51, 68 (1992).

113. 429 U.S. 190 (1976).

young men's greater propensity to drink and drive;<sup>114</sup> because there was no particular evidence of the dangerousness of 3.2% beer as opposed to alcohol generally; and because the statute did not prohibit young men's consumption of the beer, only its purchase.<sup>115</sup> Our class focused on Justice Rehnquist's dissent, where he wrote that the statute should be upheld because "there is no suggestion . . . that males in this age group are in any way peculiarly disadvantaged, subject to systematic discriminatory treatment, or otherwise in need of special solicitude from the courts," and furthermore because "there [is] no plausible argument that [this statute constitutes] discrimination against females."<sup>116</sup>

This passage caused me to reflect on my college and high school days, when I had encountered negative experiences with young men and alcohol, and had plenty of exposure to the image of the hard-drinking "'reckless' young m[an]"<sup>117</sup> that was woven into both the majority and dissenting opinions. I sensed that there was something more in the *Craig* opinion than simply a lack of sufficient "fit" between a governmental goal of reducing drunk driving incidents and the statistical frequency of young men's propensity to drink and drive. While my professor continued lecturing, I rifled through my past experiences with these matters. I uncomfortably recalled being sexually assaulted in college by a large, drunk sophomore, and being unfavorably contrasted to supposedly manly, hard-drinking, *machos* in social and professional settings.

As I emerged from my memories, my professor was saying something to the effect of: "And so, Rehnquist's position did not win the day because even though the statute did not discriminate against women, it did not survive this new, higher standard of review the Court had just announced for gender classifications."

I raised my hand. "Maybe," I started. Weakly. "Maybe the law was bad for women, though." My professor stared at me blankly, and I felt the room cool down a notch.

---

114. *Id.* at 201-02 ("[T]he statistics broadly establish that .18% of females and 2% of males in that age group were arrested for [drunk driving]. While such a disparity is not trivial in a statistical sense, it can hardly form the basis for employment of a gender line as a classifying device. Certainly if maleness is to serve as a proxy for drinking and driving, a correlation of 2% must be considered an unduly tenuous 'fit.'").

115. *Id.* at 203-04.

116. *Id.* at 219-20 (Rehnquist, J., dissenting).

117. *Id.* at 203, n.14.

I continued. "Maybe the law is bad because it furthers the image of men being these reckless, drinking types. Maybe *that's* not good for women."

"You think that a law that lets women drink before men discriminates against women?" my professor asked me, incredulously. Perhaps it was something about the tone of his voice, or the apparent strangeness of my position, but many of my classmates began laughing. My professor gave me a conciliatory wink and continued on with his lecture.

This was not an affirming experience. First, I was quite invested in winning the respect of my classmates, and the laughter indicated a lack thereof. Second, I felt like my opinions had not been accorded sufficient weight. Yet, after class several students approached me.

"That wasn't all wrong," one man told me. "I hadn't seen that before, you know." Women talked to me about it too. Beyond spurring an inelegant griping session about institutionalized hegemony ("forget this, I should've gone to film school"), my comment had struck a nerve for them, and they agreed that women's particular experiences with drunk men should be considered in the construction of laws which regulate men.

This narrative is not intended to highlight my ultra-sensitive perspicacity of constitutional analysis, as there were many experiences where other classmates provided even more incisive commentary based on their own perspectives. Rather, it is designed to illustrate one instance of how Outsiders' presence in the higher echelons of education and employment can slowly, but I think surely, expand the definition of merit. For example, in the legal profession, the ability to think abstractly, argue by analogy, and speak organizationally are highly valued skills. However, Outsiders' experiences and different resulting approaches can potentially help them track new roads to "justice." That is, their experiences may give them insight to previously ignored injuries and problematic assumptions—such as the injury that might occur when assumptions about male recklessness are reiterated in statutes, or the ways in which certain analytical approaches "immunize[ ] the law from serious criticism."<sup>118</sup>

---

118. See, e.g. Kimberle W. Crenshaw, *Foreword: Toward a Race-Conscious Pedagogy in Legal Education*, 11 NAT'L BLACK L.J. 1, 4 (1993) (noting the ability of Outsiders to "explode . . . abstraction[s] by stepping outside . . . doctrinal bounds . . . [and reveal how legal frameworks] perpetuate[ ] the devaluation of African-American perspectives" as well as the attendant costs to exercising that ability).

Moving back to Aristotelian moral theory, this assessment of Outsiders' potential contributions to legal reasoning focuses on their *phronesis*—their practical wisdom—and the perception which grows out of that experience: “[F]or because experience has given them an eye they see aright.”<sup>119</sup> Outsiders may have a different and valuable form of this *phronesis* and concomitant perception, since the “practical experience” which informs their “eye” is subordination.<sup>120</sup> Experiencing and overcoming subordination may clear the air for some Outsiders, allowing them to discern what is morally relevant about a set of facts, a statute, or a ruling, which remains unseen by the majority. “Relevance” here refers to the oppression that may exist in some set of facts, or to potential of a legal instrument to contribute to or dismantle existing oppressive structures. This “relevance” can be grounded in my own narrative, for example, as my experiences with sexual subordination permitted me to tease out the strands of gender hierarchy from a statute which my constitutional law professor believed to be uncontroversially in favor of women.<sup>121</sup>

---

119. See ARISTOTLE, *NICOMACHEAN ETHICS* bk VI, ch. 11, p. 1143, col. b, l. 14, reprinted in *THE BASIC WORKS OF ARISTOTLE*, *supra* note 31, at 1033; NUSSBAUM, *supra* note 39, at 74 (“Practical insight is like perceiving in the sense that it is noninferential, nondeductive; it is an ability to recognize the salient features of a complex situation.”); Solum, *Virtues and Voices*, *supra* note 37, at 136 (discussing the *phronimos* who “is able to discern what is morally relevant about the situation”).

120. See Lawrence Blum, *Moral Perception and Particularity*, 101 *ETHICS* 701, 715 (1991) (“[T]he perception of particularities is often a sensitivity to particular sorts of moral features—injustice, racism, physical pain, discomfort—and general things can be said about what promotes those sensitivities, about the obstacles to such sensitivities, and about how such sensitivities develop.”).

121. At this juncture, it is appropriate to point out how the narrative account of particular Outsider virtue, interestingly, appears in keeping with the theoretical framework of Daniel Farber and Suzanna Sherry who wrote a detailed critique of the uses of narrative in critical race and feminist theory. See Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narrative*, 45 *STAN. L. REV.* 807 (1993). These scholars do see some benefits in narrative, particularly its ability to provide a “source of empathetic understanding about members of outsider groups.” *Id.* at 830. However, they also posit that legal scholars’ narrative may, among other flaws, not be tied to legal analysis, and may not contribute to knowledge. *Id.* at 847, 849. Nevertheless, the preceding narratives and the concurrent analysis may satisfy some of their objections. For example, the use of narrative to uncover some “raced” and “gendered” forms of *phronesis* fits into Farber’s emphasis on practical reason as an alternative form of legal analysis. See *id.* at 820; see also Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 *MINN. L. REV.* 1331, 1341 (1988) (“The heart of pragmatist thought is the view that the ultimate test is always experience.”) (citations omitted). It may be said that the narrative unearthing of “raced” or “gendered” *phronesis* is tied to legal analysis. That is, it is instructive as to the definition of “merit” which exists at the heart of the constitutional affirmative action issue. Further, the narratives are also tied to Sherry’s focus on the notions of Aristotelian virtue. See Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 *VA. L. REV.* 543, 609-610 (1986) (examining Justice O’Connor’s punishment jurisprudence, which is in-

Outsiders' experiences and accompanying perceptions can also communicate their ability to contribute to professions which often call for intangible qualities, such as "unique experience, skills in communications, negotiation,"<sup>122</sup> or "interpersonal skills."<sup>123</sup> However, Outsiders' "intangible" qualities, such as their ability to solve problems or manage subordinates, in special, valuable ways are often shaped by personal characteristics of race, gender, ethnicity, and sexual orientation. Accordingly, diversity—the introduction of significant numbers of white women and people of color into education and the workforce—is important for merit-teaching since the "symbolic" presence of Outsiders in the higher echelons cannot alone expand the meaning of merit. For this reason, our conception of affirmative action cannot be limited to furthering role-modeling. Furthermore, Outsider role models' presence in the higher echelons can be risky as their different approach to a problem, if observed only in isolation, can appear eccentric, or even unworthy.<sup>124</sup> Although, with enough exposure, the majority may ultimately come to value these different approaches—as did the man who found my insight on *Craig v. Boren* illuminating.

Finally, "being" diverse itself sometimes requires its own form of fidelity. There is a cost to pushing the envelope.<sup>125</sup> Much in the way that the role model strives, or the sufferer of past discrimination toils to better her own life, so does the "diverse" employee or student. Forging new paths requires tenacity, dedication, and vigilance. Thus,

---

formed by the "virtue of mercy or compassion" and focuses on "the responsibility and virtue of the decisionmaker . . ."). Scrutinizing merit through Aristotle's lens of virtues illustrates how these narratives may contribute to "knowledge" by challenging foundational assumptions of the moral theory and expanding our notion of "merit" in the affirmative action debate.

122. *Cherry v. AT&T*, 47 F.3d 225, 230 (7th Cir. 1995) (holding that a gender discrimination suit, where plaintiff was attempting to prove her eligibility to a salary increase under a salary plan, failed since she did not qualify as a "lobbyist").

123. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 234-35 (1989) (holding that an employer shown to have considered gender in making an employment decision must prove by a preponderance of the evidence that the decision would have been the same without gender considerations).

124. *See, e.g. id.* (where a female plaintiff's aggressive methods of communicating—which could be seen as a productive attribute formed by gender relations—were held against her, even though she had successfully utilized her aggressiveness in negotiation situations).

125. *See Crenshaw, supra* note 118, at 4 (Crenshaw details the costs of an African-American student's choice to "explode . . . abstraction[s] . . . [in the law school classroom]: she would risk being regarded as an emotional—perhaps even an hysterical—Black person railing against the law in an obviously biased, unlawyerlike manner.").

diversity is not a passive status nor is inclusion a free handout. It can be (at best?) active, hard work.

#### IV. Conclusion

Merit is usually considered a stumbling block for advocates of affirmative action. The primary complaint is that white women and people of color ubiquitously maneuver around our neutrally-formed "meritocracy" in order to grab a bag full of goodies. However, our modern conception of merit is not a monolithic, hard-edged, one-dimensional "Truth" which was formed in apolitical abstraction. Rather, it has excluded certain manifestations of merit from the calculus. There may be varied conceptions of the meaning of merit, such as the qualities of perceptiveness and tenacity which are hard-won by experiencing and overcoming oppression. Accordingly, this Essay does not seek to discredit "merit-ideals," but rather, it aims to include Outsiders within its parameters.

The current debate over the meaning of merit in affirmative action can be viewed through the lens of Aristotelian moral theory. Aristotle's identification of the virtues of temperance, justice, and courage seem at least somewhat related to modern articulations of what merit means, namely fidelity and dedication. Similarly, Aristotle's biased conceptions of the meaning of merit<sup>126</sup> mirror the exclusive and myopic terms in which we configure merit today. Merit, as apparently expressed by the antiaffirmative action thinkers, is something you earn. It exists, on a chart, with correlating numbers; it can be gauged to ascertain who is the best.

Yet what merit means in the workplace or in education is not so easily quantified, even by the majority's own delineation. For example, in *Bakke*, it was unclear how subjective criteria contributed to a candidate's "benchmark score," which was the summation of an interview, grades, MCAT, letters of recommendation, and other biographical data.<sup>127</sup> Furthermore, many fields look for some form of intangible excellence in their applicants.<sup>128</sup> Nevertheless, some forms of merit—the lessons learned from the wages of oppression, and the modes of praxis used to combat it—may not have been recognized by

---

126. See *supra* notes 25, 31.

127. See Philip Fetzner, *Reverse Discrimination: The Political Use of Language*, 12 NAT'L BLACK L.J. 212, 223 (1993) ("The *Bakke* opinion does not reveal what percentage of the benchmark score was derived from personal interviews, extra-curricular activities, or 'overcoming disadvantage' as opposed to the clearly quantitative factors.").

128. See *supra* notes 50-52 and accompanying text.

the majority in its definition of that “excellence,” simply *because* we have developed our sense of the “good” in the workplace and schools in exclusion of diverse points of view.

Further, the color-blind approach advocated by the Initiative seeks to truly blind us to those different types of virtue; the mother whose tenacity and sympathy is the consequence of subjugation by her ex-husband, the teacher whose empathy and skill has been shaped by her experiences as a recent immigrant, and the lawyer whose enriched understanding of a statute stems from her personal, “gendered” confrontations. The “gendered” and “raced” nature of the formation of these types of merit would be perilously ignored by the color-blind approach insisted on by the Initiative—an approach which seeks to divorce the “good” from race, gender and ethnicity. This ignorance seems particularly piercing as the state continually reiterates its goal of equality in the same breath in which it rejects the tenets of affirmative action.<sup>129</sup> The failure to continue placing white women and people of color in the higher echelons of work and education, as role models and diversity models, will only hasten the retreat from the merit-teaching that affirmative action is now making possible.

This returns us to the law school admissions hypothetical posed earlier.<sup>130</sup> Viewing Candidate *B*'s skills in terms of gender and race, her ethnic background, and professional and charitable activities seem valuable as they evidence empathy and praxis which is particularly geared toward the elimination of Outsiders' subjugation—laudable attributes for a lawyer. Although Candidate *A* also evidences charitable impulses, and a greater facility for test-taking, his selection should not necessarily be a foregone conclusion in a society where Outsiders are so desperately in need of advocates with special skill in addressing their concerns. Thus, my preference for Candidate *B* is not simply a knee-jerk, hands-out reaction. Instead, it is a recognition of Candidate *B*'s actual virtue; a virtue or merit which is contextualized, “racialized,” and “gendered,” and which would be missed under a color-blind approach.

One final caveat must be added. Obviously, there are dangers in celebrating Outsider merit, especially when that celebration specifically configures merit in terms of oppression. Taken to a logical ex-

---

129. See *City of Richmond v. J.A. Croson*, 488 U.S. 469, 493 (1989) (“To whatever racial group these citizens belong, their ‘personal rights’ to be treated with equal dignity and respect are implicated by a rigid rule erecting race as the sole criterion in an aspect of public decisionmaking.”).

130. *Supra* notes 11-12 and accompanying text.



treme, the approach may suggest that Outsiders are only best qualified to fulfill social welfare positions (although the “social welfare” category could be quite expansive). However, I do not think that Outsiders only possess virtue forged from the wages of oppression, as to say so would denigrate the skills they exhibit which are not necessarily learned through subordination. For example, it took intense hard work to learn the analytical lessons of law school—an education for which I had not been primed at the dinner table, in contrast to some of my more privileged classmates. Furthermore, this Essay does not suggest that the experience or legacy of subordination is so fabulous that Outsiders are made “better” by their lower status. This suggestion would seem inconsistent with the position that Outsiders need to be included, and their status needs to be raised.

Instead, I am searching for a more expansive meaning of merit. I find that merit exists in forms that are not presently accounted for, and would possibly never be brought to light under a color-blind or gender-blind approach. Through the stories of my grandmother, my mother, and even myself, some of merit’s different (“gendered” and “raced”) forms can be unearthed—the recognition of which may some day forge the road toward a greater wealth of merit-teaching.

