

## WHAT TO THE BLACK AMERICAN IS THE MERITOCRACY? Comment on M. Sandel's *The Tyranny of Merit*

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As the host of the November 7, 2020 episode of the popular television sketch comedy show *Saturday Night Live*, comedian Dave Chapelle gave an opening monologue that was by all accounts uneven. Equal parts controversial, humorous, cantankerous, and thought provoking, his closing exhortation was a philosophical coup de grâce. He implored white Americans to engage in “a conspiracy of kindness.” The one caveat: the recipient of the kindness had to be undeserving. As an example, he asked them to find a young Black man selling drugs on a street corner and buy him an ice-cream cone. Chapelle asked white Americans to realize that this Black man would be as undeserving of this ice-cream cone as he was of all the racial injustices he had also experienced in his life. The subtext: American society often seems preoccupied with whether Black people have merited any good that comes to them (the debate over affirmative action is emblematic of this social anxiety), yet glaringly absent is the same concern over whether Black people have merited the racial injustices visited upon them. Hence, the need for the social movement Black Lives Matter. Chappelle’s overarching point: If we, as a society, are so focused on merit, then perhaps American society should be equally concerned about whether Black people have merited grave wrongs, such as police brutality, health disparities, employment discrimination, etc., versus the slight gains (represented by the ice-cream cone) they have made because of affirmative action.

With a cogent display of erudition and carefully laid arguments, Professor Michael Sandel goes further. In his recent book, *The Tyranny of Merit: What’s Become of the Common Good?*, Sandel asks white Americans to consider whether they have merited any of the

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successes they claim as their own doing. This echoes some points from the 2013 book *For Discrimination: Race, Affirmative Action, and the Law*, in which Professor Randall Kennedy notes, “Many Americans misconceive achievement, attributing it entirely to individual effort and talent. In reality, though, achievement stems from many sources: individual effort, to be sure, but also luck (the good fortune to have a healthy body and mind), and social support (family, schools, parks, libraries, laboratories).”<sup>1</sup> Kennedy further notes, “I champion sensibly designed racial affirmative action not because I benefited from it personally—though I have. I support it because, on balance, it is conducive to the public good.”<sup>2</sup>

Sandel’s book, released just ahead of the 2020 presidential election, illuminates the corrosive effects of what he terms the “technocratic meritocracy” on the communal good. Sandel argues that both the “triumph of Brexit in the United Kingdom, [and] the election of Donald Trump in 2016 was an angry verdict on decades of rising inequality and a version of globalization that benefits those at the top but leaves ordinary citizens feeling disempowered.”<sup>3</sup> He adds that these outcomes were “also a rebuke for an technocratic approach to politics that is tone-deaf to the resentments of people who feel that the economy and the culture have left them behind.”<sup>4</sup> Sandel notes: “These days, we view success the way the Puritans viewed salvation—not as a matter of luck or grace, but as something we earn through our own effort and striving. This is the heart of the meritocratic ethic.”<sup>5</sup> The tyranny in this attitude, Sandel argues, is that “the more we view ourselves as self-made and self-sufficient, the less likely we are to care for the fate of those less fortunate than ourselves. If my success is my own doing, their failure must be their fault.”<sup>6</sup> Sandel concludes that “more than a protest against immigrants and outsourcing, the populist complaint is about the tyranny of merit.”<sup>7</sup>

Sandel adroitly traces the rise of the meritocracy as being rooted in Puritan providentialism—encapsulated in the maxim “God helps those who help themselves”<sup>8</sup>—and evolving to the secular “rhetoric of rising”<sup>9</sup> and a final embrace of the exhortation to “personal responsibility”<sup>10</sup> as the anchoring belief for a technocratic meritocracy. This is a meritocracy predicated on a version of economic success in a globalized economy with

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1 RANDALL KENNEDY, *FOR DISCRIMINATION: RACE, AFFIRMATIVE ACTION, AND THE LAW* 10–11 (2013).

2 *Id.* at 11.

3 MICHAEL J. SANDEL, *THE TYRANNY OF MERIT: WHAT’S BECOME OF THE COMMON GOOD?* 17 (2020).

4 *Id.*

5 *Id.* at 59.

6 *Id.*

7 *Id.* at 25.

8 *Id.* at 40.

9 *Id.* at 59.

10 *Id.* at 131.

an elite college education as both threshold and sorting machine, separating the winners from the losers. Sandel argues that “our technocratic version of meritocracy severs the link between merit and moral judgment. . . . [T]he value of people’s contributions consists in the market value of the goods and services they sell [and] in the domain of government, it assumes that merit means technocratic expertise.”<sup>11</sup>

In recent years, affirmative action for college admissions has been posited as the arch enemy of the meritocratic ideal. As Sandel notes, “Meritocratic intuitions reach across the political spectrum. They emerge with special intensity in discussions of affirmative action in college admissions.”<sup>12</sup> Kennedy tells us exactly why this is so: “The intense interest in the affirmative action controversy at the top public and private colleges and universities, where seats are scarce and competition savage, stems from their positions as key gateways to opportunity, socialization, and certification. Selective institutions of higher education are far-reaching training grounds for the power elite.”<sup>13</sup> In short, in a zero-sum scenario, in which great inequality is accepted as a matter of merit, an elite college education has become ritualized as the dividing line between the haves and the have nots.

Yet, when it comes to who merits admission to selective colleges, the meritocratic ideal fails to live up to its own standards. First, Sandel parses the difficulties of disentangling merit from the boost of hereditary or unearned economic advantage. He notes, for example, that “standardized tests such as the SAT purport to measure merit,” but that in reality, “SAT scores closely track family income,” thus reflecting the economic reality that wealthy parents can afford to “enroll their children in SAT prep courses,”<sup>14</sup> which help raise their scores. Those who walk in through the “front door” based on their SAT scores, grades, and resume of activities feel they have merited their place. But if those metrics have been bolstered by the wealth of their parents who can afford SAT prep courses, private tutors, subsidies for unpaid internships, etc., are those students any more meritorious than the students who gained admission through the “back door” because their parents’ wealth allowed for a large donation to the school? And what about those who enter through the “side door,” because their parents pay so-called consultants to rig admissions tests or falsify athletic records to raise their candidate profiles? Although entering through the side door is certainly illegal, is it morally worse than the action of entering through the back door when parents take the chance of donating money directly to the school?<sup>15</sup>

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11 *Id.* at 28.

12 *Id.* at 60.

13 KENNEDY, *supra* note 1, at 14.

14 SANDEL, *supra* note 3, at 10.

15 *Id.* at 9–11.

Sandel, argues, however, that it would be facile to conclude that the problem is merely a failure to live up to the meritocratic ideal. The problem, he maintains, is the meritocratic ideal itself. For Sandel, the tyranny of merit is the amalgamation of attitudes associated with the meritocracy itself, which erodes solidarity by insisting that the winners and losers deserve their fate; the “credentialist prejudice” that reifies a college degree and “undermines the dignity of work”; and the elitist attitude that “social and political problems are best solved by highly educated, value neutral experts.”<sup>16</sup> All these, Sandel insists, combine to corrode the common good.

What is the answer then for the tyranny of meritocracy? If we are to overthrow this system, what should take its place? Sandel parses two prominent alternatives to the meritocratic ideal and rejects them in turn. First, he notes that free-market liberalism, which views “economic rewards as merely reflecting economic value currently placed on certain work or talent,” is “a way to resist demands for redistribution,” as it frees society from “over-moralizing economic rewards as reflecting merit” and, in turn, relieves society of the responsibility of addressing inequality.<sup>17</sup> Thus, underlying inequality goes unchecked and could become untenable.

Second, Sandel observes that egalitarian liberalism or welfare state liberalism contends that “income inequalities due to natural talents are no more just than inequalities that arise from class differences.”<sup>18</sup> However, rather than handicap the talented, as Michael Young parodies in the *Rise of the Meritocracy*, the legal philosopher John Rawls suggests “the winners share their winnings with those less fortunate than themselves.”<sup>19</sup> For Rawls, “the difference principle” is an agreement “to regard the distribution of natural talents as a common asset and to share in the benefits of this distribution.”<sup>20</sup> However, Sandel concludes that egalitarian liberalism falls short, because it “does not challenge the self-satisfaction of elites after all.”<sup>21</sup> Sandel argues that Rawls’s “entitlement to legitimate expectations may be as potent a source of meritocratic hubris and working-class resentment as claims based on merit, virtue, or desert.”<sup>22</sup> Here, Sandel points to a statement from the liberal egalitarian philosopher Thomas Nagel, which Sandel sees as troubling proof of this “meritocratic hubris.” According to Nagel, “when racial and sexual injustice have been reduced, we shall still be left with the great injustice of the smart or the dumb, who are so differently rewarded for comparable effort.”<sup>23</sup>

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16 *Id.* at 73.

17 *Id.* at 187.

18 *Id.* at 129.

19 *Id.* (quoting John Rawls) (citation omitted).

20 *Id.* (quoting JOHN RAWLS, A THEORY OF JUSTICE 101 (1971)).

21 *Id.* at 143.

22 *Id.* at 144.

23 *Id.* at 146 (quoting THOMAS NAGEL, MORTAL QUESTIONS 104 (1979)).

I did not necessarily find this convincing as evidence of the downside of egalitarian liberalism. Rather, it is when Sandel writes about an iteration of egalitarian liberalism, the “luck egalitarian” philosophy of the 1980s and 1990s, that the picture emerges clearly. Luck egalitarian philosophy replaces solidarity or compassion as the sole reason to help the needy with an emphasis on determining how they came to be needy in the first place.<sup>24</sup> This is the notion of “the undeserving poor,” the plight of welfare recipients memorialized by Professor Michael Katz in his 1990 book.<sup>25</sup> Thus, luck egalitarianism resurfaces an emphasis on personal responsibility and on whether certain poor people merit help more than others.

After rejecting these two alternatives, Sandel settles on “a lottery of the qualified” as one reform for higher education as the sorting machine. He notes that “[t]his proposal does not ignore merit altogether; only those qualified are admitted. But it treats merit as a threshold qualification, not an ideal to be maximized.”<sup>26</sup> This is all well and good, but does it actually touch the underlying problem of existing inequality? There is a presumption here that there is some sort of level playing field for becoming qualified. But the history and present story of the United States belies this notion.

Sandel’s intention in writing this book is primarily to diagnose the root causes of the rise of populist politics, and he does handily succeed in presenting compelling arguments for his diagnoses. I read the book also as reflecting the debates around affirmative action and as offering an indirect explanation for our societal acquiescence to continued racial inequality in the United States. If, as Sandel argues, it is the resentment of white Americans who find themselves shut out of the technocracy that has fueled the rise of populism, should we dare ask Black Americans how they feel?

In his speech *The Meaning of July Fourth for the Negro*, Frederick Douglass rhetorically asked and answered: “What, to the American slave, is your 4th of July? I answer; a day that reveals to him, more than all other days in the year, the gross injustice and cruelty to which he is the constant victim.”<sup>27</sup> Sandel’s book prompts a similar question: What to the Black American is the tyranny of meritocracy?

Regarding personal responsibility, Black Americans are subjected to lectures about doing their part to combat obesity via healthful eating, while many find themselves stranded in food deserts.<sup>28</sup> This is the same obesity that was blamed for the higher death rate of Black Americans from the coronavirus,<sup>29</sup> albeit that studies reveal racial bias in

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24 *Id.* at 147.

25 See generally MICHAEL KATZ, *THE UNDESERVING POOR: FROM THE WAR ON POVERTY TO THE WAR ON WELFARE* (1989).

26 SANDEL, *supra* note 3, at 185.

27 Frederick Douglass, Speech, *The Meaning of July Fourth for the Negro* (July 5, 1852), <https://www.pbs.org/wgbh/aia/part4/4h2927t.html>.

28 Kelly Brooks, *Research Shows Food Deserts More Abundant in Minority Neighborhoods*, *JOHNS HOPKINS MAG.* (Spring 2014), <https://hub.jhu.edu/magazine/2014/spring/racial-food-deserts/>.

29 Timothy Huzar, *High BMI Linked to COVID-19 Severity in African Americans*, *MED. NEWS TODAY* (Aug. 7, 2020), <https://www.medicalnewstoday.com/articles/high-bmi-linked-to-covid-19-severity-in-african-americans>.

medical decision-making<sup>30</sup> and that standard treatment protocols are premised on racist notions that disadvantage Black patients.<sup>31</sup> Regarding higher education, in a society in which elementary school funding is based on property tax, and schools in low-resource, minority neighborhoods lack even the basics, such as textbooks, how then could those students ever have a chance at becoming eligible for Sandel’s lottery of the qualified for college?

We have allowed the rhetoric around affirmative action to be corrupted—rather than the remedial measure that Sandel identifies it as, we have come to see affirmative action described as repaying a no longer or never owed debt, thus implying it is now a gift and not a moral obligation. Worse yet, affirmative action has come to be characterized as an *unmerited* boon to certain racial minorities. But even the term “remedial measure” fails. This is because “remedial” implies redress for past actions. Characterizing affirmative action as remedial is incorrect, because it implies that racial inequality is a relic of the past, whereas the reality, as reflected by current statistics,<sup>32</sup> is that racism is present action. A better characterization of affirmative action, and one that does not suffer from the tyranny of merit, is that it is a necessary bulwark against the rising tide of racial inequality. In the face of ongoing racism, affirmative action ensures that we do not slip back into being a society that is both separate and unequal.

What to the Black American then is the meritocracy? In his book *For Discrimination*, Professor Kennedy points to a quote from President Lyndon Johnson:

You do not take a person, who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say “you are free to compete

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30 Heidi Ledford, *Millions of Black People Affected by Racial Bias in Health-Care Algorithms*, NATURE (Oct. 26, 2019), <https://www.nature.com/articles/d41586-019-03228-6>.

31 Darshali A. Vyas, Leo G. Eisenstein & David S. Jones, *Hidden in Plain Sight—Reconsidering the Use of Race Correction in Clinical Algorithms*, 383 NEW ENG. J. MED. 874, 874–82 (2020).

32 Black Americans continue to be disproportionately represented in deaths due to the use of lethal force by law enforcement, although they are more likely to be unarmed than any other racial group. See Sarah DeGue, Katherine A. Fowler & Cynthia Calkins, *Deaths Due to Use of Lethal Force by Law Enforcement: Findings from the National Violent Death Reporting System, 17 U.S. States, 2009–2012*, 51 AM. J. PREVENTATIVE MED. S173–S187 (Nov. 2016). In 1968, a typical middle-class Black household had \$6,674 in wealth compared with \$70,786 for the typical middle-class white household. In 2016, the typical middle-class Black household had \$13,024 in wealth versus \$149,703 for the median white household. See Heather Long, *The Black–White Economic Divide Is as Wide as It Was in 1968*, WASH. POST (June 4, 2020), <https://www.washingtonpost.com/business/2020/06/04/economic-divide-black-households/>. Between 1972 and 2019, the Black unemployment rate was consistently at or above twice the white unemployment rate. See Olugbenga Ajilore, *On the Persistence of the Black–White Unemployment Gap*, CTR. FOR AM. PROGRESS (Feb. 24, 2020), <https://www.americanprogress.org/issues/economy/reports/2020/02/24/480743/persistence-black-white-unemployment-gap/>.

with all of the others” and still justly believe that you have been completely fair. Thus, it is not enough just to open the gates of opportunity.<sup>33</sup>

But this is exactly what the tyranny of meritocracy now demands.

I note, however, that Sandel’s cure for the tyranny of meritocracy is incomplete. It is, at best, a palliative. For one, he admits that his proposed solution of a lottery still relies on merit. It is a lottery of the “qualified.” This leaves many unanswered questions regarding the definition of “qualified” and who gets to decide. Also, in what position does this place many Black Americans who, first as a matter of law, and then as a matter of continued systemic racism, have generationally been impeded from reaching those qualifications? Second, his solution, which is poised at the college level, focuses on an end point rather than a starting point. Any true curative for inequality must start at the root.

If we are to escape the tyranny of the meritocracy, we must start with childhood interventions. We must address environmental racism that pollutes the air and water of the children of racial minorities and the economically underprivileged. We must ensure access to early childhood education and to affordable childcare that could allow families to escape generations of poverty. The college admission process is merely the tip of the iceberg.

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33 KENNEDY, *supra* note 1, at 34 (quoting President Lyndon Johnson, Howard University Commencement Address (June 4, 1965)).