

AMERICAN JOURNAL
of LAW and EQUALITY

GETTING TO THE AMERICAN DREAM IN 2021 Comment on M. Sandel's *The Tyranny of Merit*

Patricia A. Cain*

I don't know about you, but my world is somewhat dark right now. Actually, it is really dark. It's like being in a Leonard Cohen dream. You can't want it darker. There are plagues that surround us—plagues of the body and of the soul. Darkness in the streets. In just the last nine months, in my world at least, we have lost the light of four feminist legal giants of the profession—Barbara Babcock, Ruth Bader Ginsburg, Shirley Abrahamson and, more recently, Deborah Rhode. How could it get much darker? January 6, 2021.¹ That dark may be the darkest.

It has been quite the experience reading Michael Sandel's book, *The Tyranny of Merit: What's Become of the Common Good?*,² during this dark period. Chapter 1 begins: "These are dangerous times for democracy."³ How chilling to go back to these words after the events of January 6, 2021. And he is not alone in this thought. My friend and colleague from the University of Iowa, Linda Kerber, said early in her Charles Haskins lecture for the American Council of Learned Societies (ACLS): "We are facing the most serious threat to our democracy."⁴

And, although the Sandel book offers some useful explanations for what is most likely happening in these dark times, the explanation is hardly comforting. I agree with much of

Author: *Patricia A. Cain is Professor of Law at Santa Clara University and is the Aliber Family Chair in Law, Emerita, at the University of Iowa. She is a graduate of Vassar College and received her J.D. from the University of Georgia. Professor Cain is a member of the American Law Institute and a fellow of the American College of Trust and Estate Counsel. She teaches courses in federal taxation, property, wills and trusts, estate planning, torts, and sexuality and the law.

1 This was the date of the siege of the Capitol, the insurrection presumably incited by President Trump.

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

3 *Id.* at 3.

4 ACLS, *2020 A Life of Learning by Linda K. Kerber. The Charles Homer Haskins Prize Lecture*, YOUTUBE (Dec. 22, 2020), <https://www.youtube.com/watch?v=oVVyQg9QHtY&feature=youtu.be>.

what Sandel says, especially his emphasis that our focus on individual merit can result in the creation of apparent winners and losers. To blame the insurrection on the anger of a racist mob is too simple, although surely some of that is true. But these are not the types of racists that tried to keep Mary Means Monk out of their white neighborhood and then bombed her house when that attempt failed.⁵ Nor are they racists like Mrs. Hodge, trying to keep her one block in D.C. purely white and testifying that, even if she had thought a person were white but then learned that the person had a drop of Black blood, she would be overcome with hate.⁶ The anger of the insurrectionists is more complex. The racists to be feared in modern times are the white supremacy terrorists. But they are aided by all the “losers”⁷ that President Trump both loathes and loves.

Sandel tries to explain all of this to his readers, even before it unfolds before our eyes. Although in truth it has been unfolding for years. The premise of his book is quite simple. It is that, by embracing a meritocracy (you can succeed if you just try hard and, oh, by the way, have sufficient talent), we are creating winners and losers. The winners think they deserve what they reap (they have “hubris,” a favorite term of Sandel—one that he uses 56 times throughout the book). And the losers feel bad, are ashamed, and become resentful.⁸

This is not a new idea. As Sandel points out early in his book, it was the thesis of a 1958 book called *The Rise of the Meritocracy* by Michael Young.⁹ Sandel cites to Young throughout his own book. It is also the primary theme of a 2019 book, *The Meritocracy Trap: How America’s Foundational Myth Feeds Inequality, Dismantles the Middle Class, and Devours the Elite*,¹⁰ written by Yale law professor Daniel Markovits. Sandel also cites to this work, although less often than I think he should have.¹¹

5 See *City of Birmingham v. Monk*, 185 F.2d 859 (5th Cir. 1950), *cert. denied*, 341 U.S. 940 (1951). For a vivid photo of the bombed home, see <https://www.al.com/news/birmingham/2016/06/bombings.html>.

6 *Hurd v. Hodge*, 334 U.S. 24 (1948), *discussed in* CLEMENT E. VOSE, *CAUCASIANS ONLY: THE SUPREME COURT, THE NAACP, AND THE RESTRICTIVE COVENANT CASES* 82 (1959).

7 Core Trump supporters are often described as persons who are not college educated and have lost their jobs (or fear losing them). In general, they are said to feel they deserve more and have been shortchanged by the elites who are in power. At the same time, studies show that the median income of a Trump supporter is higher than that of the average American. See Nate Silver, *The Mythology of Trump’s “Working Class” Support*, FIVETHIRTYEIGHT (May 3, 2016), <https://fivethirtyeight.com/features/the-mythology-of-trumps-working-class-support/>.

8 To be clear, when I refer to “losers” who are created by the meritocracy, I am not including the “Oath Keepers,” who clearly played a role in the recent insurrection, or other seditionists like them. I am worried about the more general underclass, those who feel rejected by the promise of this country, many of whom also appear to have participated in the insurrection.

9 MICHAEL YOUNG, *THE RISE OF THE MERITOCRACY* (1958).

10 DANIEL MARKOVITS, *THE MERITOCRACY TRAP: HOW AMERICA’S FOUNDATIONAL MYTH FEEDS INEQUALITY, DISMANTLES THE MIDDLE CLASS, AND DEVOURS THE ELITE* (2019).

11 For an excellent excerpt relaying principles from his book, see Daniel Markovits, *How Life Became an Endless, Terrible Competition*, ATLANTIC (Sept. 2019), <https://www.theatlantic.com/magazine/archive/2019/09/meritocracys-miserable-winners/594760/>.

Sandel then builds his case on these earlier writings. In fact, he builds his case, and then he builds it again and again. He asserts that the notions that equal opportunity is enough and that one's ability to "rise to the top" is what is most important in this country are just plain wrong. For those who doubt his thesis, you are Sandel's intended audience and you should read this book.

But Sandel also adds some interesting context, especially for those of us who have lived through these times leading to the triumph of the rhetoric of the possibility of "rising," which in turn leads to the concept that there are some losers who deserve their fate and others who lose "through no fault of their own." Ronald Reagan is credited by Sandel as the first president to contribute to the rhetoric of rising and the concept of the deservedly poor. But these concepts were similarly embraced by more recent Presidents, such as Bill Clinton and Barack Obama.¹² Republicans and Democrats alike have contributed to the current structure of the meritocracy, creating winners and losers—those who deserve their fates and the handful who do not and, therefore, may be justifiably aided by the state.

Sandel and I are in agreement about the problems created by an overarching meritocracy. And, personally, I needed no convincing on the matter. I think it is abhorrent for any of us to think that we made it to the top because we deserve it. The song that actually kept going through my head as I read this book was not Leonard Cohen's darkness song. Rather it was "There but for Fortune," by Phil Ochs:

Show me the prison, show me the jail.
 Show me the prisoner whose life has gone stale.
 And I'll show you a young man with so many reasons why.
 There but for fortune go you or I.¹³

And it does occur to me that one's experience of success and how one views the role of luck in that success may be gendered. Noted historian Linda Kerber, the 2020 Haskins lecturer selected by the ACLS, began her talk with the following notation: "The late historian Mary Maples Dunn often repeated the findings of a survey of new PhDs: Men ascribe success to their own brilliance. Women ascribe success to luck."¹⁴

I think the Ochs lyrics pretty much sum up Sandel's point. Luck, not merit, is the great decider: luck of family, luck of natural-born talent, luck at each precipice on the journey of life. Speaking personally, I had the great luck to have been born white and to have been born into a respected and valued family. But I had the bad luck to have been born in Columbus, Georgia, which is a small city in the South. It was a place that, in the 1950s

12 See SANDEL, *supra* note 2, at 22–23.

13 PHIL OCHS, "There but for Fortune," as sung by Joan Baez (Vanguard 1964).

14 ACLS, *supra* note 4.

and 1960s, did not value women except as wives of powerful men, which my grandmother was (luck!). But there was no way it could have allowed me to be who I was as a lesbian (bad luck regarding time and place). One day in a high school class, my plane geometry teacher wanted to congratulate the star of the school play. Very dramatically, he said “She is a fine . . .” (and then he went over to pick up a dictionary and pretended to thumb through it) “. . . thespian,” he concluded. “You have to be very careful about saying the right word here.” And the whole class giggled. I was 16. I felt very awkward and I certainly felt like I didn’t belong.

I had a friend who showed me the way to escape from Columbus, Georgia. She had gone to Vassar and told me that I should do the same (luck!). I got in (luck!). But Vassar turned out to be a less-than-ideal escape. I loved the campus when I first visited it as a junior in high school (1962). What clinched my choice, though, was that the Vassar Experimental Theater was doing a production of Lillian Hellman’s *The Children’s Hour* that weekend. The fact that Vassar was willing to produce a play about hidden lesbian love made a huge impression on me. Of course, the two leading parts in that play were for women, which probably made it attractive to the Drama Department at an all-women’s college. And, as I learned later, although Vassar tolerated lesbians when they were on stage in a play, the reality was that lesbians were not welcome in the student body. If they were discovered, they were expelled. Consequently, I learned early on the value of the closet. (This was disappointing, but probably “good luck” at the time.) Again, I was being told that I didn’t belong.

Not belonging is a sadness. And although my own experience is perhaps minor compared to that of others, it is real. If you have ever experienced “not belonging,” you can begin to understand the sadness—a sadness that can sometimes turn to resentment. Again, I was lucky. For years, I didn’t belong in my family. For a time, I was not even sure about old friends. But, in the end, I was able to reconnect with all these people (luck).

Ever since college, at every corner, every turn in my life, and even though I was striving hard at times, I have seen my successes as involving a great deal of luck. For example, my Vassar A.B. helped me immensely in acquiring my first law school teaching job at the University of Texas, which occurred shortly after I graduated from the University of Georgia School of Law. I think the Vassar credential more or less upped the value of graduating at the top of the class at a state law school. I am a firm believer in the value of state schools, like the University of Georgia, and I feel that luck again intervened to place me there, in Athens, Georgia.¹⁵

15 Strange luck, in my view, because in 1960, I had been visiting a friend on the campus (I was a sophomore in high school) at the time that Charlayne Hunter and Hamilton Holmes were desegregating the campus. The *Red and Black*, the school newspaper, had some fairly offensive letters and an awful cartoon. I swore at the time that I would never set foot on that campus again. But times change—and change brings hope.

What Sandel wants us to realize is that even if we work hard, even if we are smart, it is luck more than “just deserts” that got us to where we are. And that means that the “losers” are the luckless ones. “There but for fortune . . .” The “winners” have no right to look down on the “losers.” The luckless ones are not worthless; they are not to be despised. They need not only our support but also our admiration for both their survival skills and for their contributions. They don’t need our handouts. “They” should not even be thought of as “other than us.” As much as I believe we need a stronger safety net for all of us, the one thing Sandel convinced me of was that a safety net is not enough. We need to find a way to make everyone feel proud of what he or she is contributing to the common good.

Now, for me, this is a problem with respect to many of the “losers” who stormed the Capitol on January 6, 2021. I cannot forgive most of them for their actions. But I must try to understand the plight of those who have been downtrodden by the meritocracy and by this economy that is not working for them. And we all need to work together to make their lives better so that this never happens again. Those who feel left out and are angry need to feel like they belong.

Sandel’s final chapters offer two possible suggestions for improving the current state of affairs. One suggestion centers on education. It is always the solution, right? We need more equal access to education. Poppycock! We have been trying for decades to make access to education be more equitable. But the problem is that we have been using the myth of meritocracy as our means. And it is a myth. Rely on the SAT rather than your family connections? Great idea! But have you ever noticed how skewed the SAT results are toward the families with connections?¹⁶ We in the education industry know this best. Good families beget good standardized tests, which beget admissions to good institutions, which beget good jobs.

One of Sandel’s proposed solutions to the educational admissions problem is to throw all application files into the air, once, of course, you have narrowed them to a universe of potentially able students. Personally, I can’t see how this helps. And even if it could, it comes too late. I fear that the credentialing necessary to get into the universe of files to be thrown into the air will cut out most of the “losers.” Furthermore, in his proposal, Sandel focuses too heavily on the prestigious institutions. Many folks can get ahead in the world without attending prestigious institutions (even in these days that overemphasize the importance of a four-year college education). Sandel too often seems to conflate prestigious institutions with all four-year colleges.

If we want to solve this current problem through the route of higher education, I do not think our energies should be spent on trying to get “losers” into Yale or Harvard or

16 On average, children whose parents make more than \$200,000 a year score about 250 points higher on the SAT than children whose parents make \$40,000 to \$60,000. See MARKOVITS, *supra* note 10.

Stanford. We should, of course, continue to break down the barriers to entry into these elite schools. But what we need to do, if indeed a college education is necessary to success, is to increase the funding of state universities and community colleges.¹⁷ And we need to start the equalization process at about age 4, by means of publicly funded preschools.¹⁸ We may even need to reimagine the entire educational process. Sandel doesn't rule this out. He just doesn't talk about it much.

Sandel's final chapter offers his other solution: the value of work. All of us, the lucky and the unlucky, need to feel useful. We need to feel that we are contributing to the common good. We need to be connected to the things that make this country great.

Too often, Sandel's choice of words in this section of the book focuses on paid work. The paycheck that you bring home is evidence that you are part of the production class and not just a consumer. You are contributing to the common good, or more specifically, to the GDP. But if you are underpaid, then you appear to be undervalued as a producer. If the pandemic has taught us nothing else, surely it has taught us the value of those underpaid workers—the trash collectors, the grocery store clerks, the home healthcare workers, and especially the EMT personnel and the ambulance drivers. Why in the world should they be paid so much less than I am being paid? They are the ones who make my life possible.¹⁹

Sandel seems a bit too ready to accept this fact of underpayment, of undervaluation. That is because what he really cares about is how each of us, regardless of how we are participating in this world, understands our own value. The evil meritocracy, by branding some of us as “losers,” prevents many of us from feeling like we are essential contributors to the “common good.” And that is a bad way for us to structure our society. And although Sandel's discussion of how to improve education and to value work are useful, I don't think any of his proposals will accomplish the goal that he has in mind.

17 According to the Center for American Progress, there is a \$78 billion gap between funds to support four-year colleges and funds to support two-year community colleges. The total gap is due to many factors in addition to underfunding by state legislatures. The problem of underfunding is extremely serious as to community colleges, whose students tend to come from lower-income and lower-wealth families and, therefore, need more support. See Victoria Yuen, *The \$78 Billion Community College Funding Shortfall*, CTR. AM. PROGRESS (Oct. 7, 2020), <https://www.americanprogress.org/issues/education-postsecondary/reports/2020/10/07/491242/78-billion-community-college-funding-shortfall/>.

18 There is a drastic undersupply of affordable childcare and early education in this country, despite the widespread demonstration of the benefits that such early intervention would produce both for the child and for society. For a recent report on the state of this undersupply, see Steven Jessen-Howard & Simon Workman, *Early Learning in the United States: 2019*, CTR. AM. PROGRESS (Sept. 16, 2019), <https://www.americanprogress.org/issues/early-childhood/reports/2019/09/16/474487/early-learning-united-states-2019/>.

19 See “*The World's Scariest Economist*” on *Coronavirus, Innovation, and Purpose*, VOX CONVERSATIONS (May 18, 2020), <https://podcasts.apple.com/us/podcast/worlds-scariest-economist-on-coronavirus-innovation/id1081584611?i=1000474928034>.

If the “losers” could only feel connected, if they could only feel like they were “active participants” in the American project, then perhaps we could all be “one”: “one” with differences of opinions (that is good), “one” with the ability to debate our differences (that is good), “one” in a world where there is no class of winners or losers. Then we could all aspire to live in a world where we are sometimes led in one direction and sometimes in another direction, based on equal debate and participation. That is the true American Dream. The possibility of “rising” is a good thing. Equal educational opportunity and meaningful work opportunities are also good. But even more importantly, we need to find a way for all Americans to attain a sense of personal worth and belonging. To use a phrase that was coined by a president who served before we developed the rhetoric of “rising” based on equal opportunity, what we need is a theory that “will make all boats rise.” That phrase is attributed to President John F. Kennedy, who is said to have used it first in a 1963 speech in which he said “a rising tide lifts all boats.”²⁰ In my view, that phrase remains an excellent beacon to help guide us toward a world in which we all feel that we belong.

20 The phrase did not arise with Kennedy, according to his speechwriter, Ted Sorensen. But Kennedy embraced it and used it numerous times. See TED SORENSEN, *COUNSELOR: A LIFE AT THE EDGE OF HISTORY* (2008).