

# South Dakota Law Review

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Volume 67 | Issue 1

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2022

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### Recommended Citation

Neil Fulton, *The Merits of Merit: The Tyranny of Merit: What's Become of the Common Good? Book Review*, 67 S.D. L. REV. 39 (2022).

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## BOOK REVIEW

### THE MERITS OF MERIT

THE TYRANNY OF MERIT: WHAT'S BECOME OF THE COMMON GOOD?  
MICHAEL J. SANDEL. ALLEN LANE, 2020. 288 PP.

NEIL FULTON<sup>†</sup>

The idea of merit is hardwired into American consciousness more than almost any concept. It is generally accepted that “the race is to the swift” and that “the cream rises to the top.”<sup>1</sup> This belief that the most talented achieve the most is paired with a widespread belief that anyone can rise to the top with enough effort and ability. The Horatio Alger story, the autobiography of Benjamin Franklin, and other parables of personal advancement are longstanding and well known.<sup>2</sup> Although the potential for personal advancement is a communal belief, it is typically a belief grounded on the vision of a “self-made” individual who achieves through personal talent and industry and not as part of, or through the contributions of, their larger community. These are fundamental tropes of the American story.<sup>3</sup> While ubiquitous in American life, these ideas are especially central to the culture of “elite” professions like academia, law, finance, and medicine, as well as competitive settings like athletics.<sup>4</sup>

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1. There is some irony in phrases like these given that one of the most commonly used adjectival phrases about the elite, “the best and the brightest,” is connected to the profound failure of elite leaders and thinkers in setting and executing policy in the Vietnam War. DAVID HALBERSTAM, *THE BEST AND THE BRIGHTEST* (1992).

2. John Swansburg, *The Self-Made Man*, SLATE (Sept. 23, 2021), [http://www.slate.com/articles/news\\_and\\_politics/history/2014/09/the\\_self\\_made\\_man\\_history\\_of\\_a\\_myth\\_from\\_ben\\_franklin\\_to\\_andrew\\_carnegie.html](http://www.slate.com/articles/news_and_politics/history/2014/09/the_self_made_man_history_of_a_myth_from_ben_franklin_to_andrew_carnegie.html).

3. *Id.*

4. Athletics is commonly portrayed as the pinnacle of meritocracy. Arthur Ogden, *American Sport—the Bastion of Meritocracy*, THE SPORT DIG. (May 29, 2014), <http://thesportdigest.com/2014/05/american-sport-the-bastion-of-meritocracy/>. Commitment to meritocracy in sports is quite strong. *Id.*; Sports Desk, *European Super League: Sport Must be Meritocratic, but UEFA Should Reflect—Conte*, SPORTSMAX (Apr. 21, 2021), <https://www.sportsmax.tv/index.php/football/international/item/80958-european-super-league-sport-must-be-meritocratic-but-uefa-should-reflect-conte>. The perception of sport as pure meritocracy is coming in for significant critique, however. Sports Desk, *supra* note 4; Karen Given, *‘Reimagining’ a More Equitable America—In Sports and Beyond*, WBUR (June 26, 2020), <https://www.wbur.org/onlyagame/2020/06/26/solutions-myth-meritocracy-sports>; Derek Thompson, *Meritocracy is Killing High School Sports*, THE ATLANTIC (Aug. 30, 2019), <https://www.theatlantic.com/ideas/archive/2019/08/meritocracy-killing-high-school-sports/597121/>.

The American ideal of “meritocracy” rests on several fundamental ideas. First, that achievement comes from “merit” rather than other factors.<sup>5</sup> Second, that “merit” is the mixture of innate talent and (more importantly) hard work. Third, that anyone can rise as far and fast as their talent and effort allow. Fourth, that an individual’s position in life reflects their merit. In other words, you get what you earn in life, good or bad. Lastly, merit is an individual achievement; individuals are responsible for their fate, good or bad.

Professor Michael J. Sandel, one of the most prominent public intellectuals and philosophers today, has turned his attention to merit. His latest book, *The Tyranny of Merit*,<sup>6</sup> critiques the American obsession with merit and meritocracy. He is critical of the predominance of merit and the social impacts of that predominance. In lodging this critique, Sandel presents imperative questions about how we live, learn, and work together. Given the ubiquity of merit in American society, it is a work that should interest anyone. Given the centrality of merit in “elite” professions like the law, it is a work that should particularly draw attention from all connected to the practice of law or the legal academy. Sandel issues a timely call to consider the place of merit in American society and whether a different, more communitarian, vision is possible and preferable.<sup>7</sup>

## I. AMERICAN MERITOCRACY

*The Tyranny of Merit* presents three central ideas about merit. First, Americans see the possibility of individual advancement based on merit as a fundamental value and reality.<sup>8</sup> Second, certain forms of education, work, and living are given primacy above others, primarily based on commercial rather than moral values.<sup>9</sup> Third, this commercially prioritized value structure hardens

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5. True meritocracy would specifically reject advancement, or more accurately restricting advancement, based on invidious classifications like race or gender. As experienced in the world, however, the meritocratic worldview often goes beyond this fundamental truth that individuals should be judged on their abilities and achievements to exclude luck, personal connections, timing, or other factors that are not strictly “merit” in assessing any personal accomplishment. Meritocracy in its pure form is seen as the equation “achievement=effort x talent” when additional variables often enter the calculation. Seth Williams, *What Role Does Luck Play in Your Success*, FORBES (Sept. 4, 2018), <https://www.forbes.com/sites/theyec/2018/09/04/what-role-does-luck-play-in-your-success/?sh=1d60e68168c7>; David Roberts, *The radical moral implications of luck in human life*, VOX (Feb. 17, 2020), <https://www.vox.com/science-and-health/2018/8/21/17687402/kylie-jenner-luck-human-life-moral-privilege>.

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

7. Sandel is not the only scholar with a recent consideration of merit. Yale Law School Professor Daniel Markovits has authored his own critique of the role of merit in American society. See generally DANIEL MARKOVITS, *THE MERITOCRACY TRAP: HOW AMERICA’S FOUNDATIONAL MYTH FEEDS INEQUALITY, DISMANTLES THE MIDDLE CLASS, AND DEVOURS THE ELITE* (2019) (cataloguing the multiple causes and effects of and critiquing the meritocracy). Sandel takes a more philosophical approach than Markovits, who attacks the question from a largely economic and sociological perspective. Markovits presents a more data driven work. Those interested in the question are well served to read both books for the different insights on the overarching questions that each provides.

8. SANDEL, *supra* note 6, at 22-23.

9. *Id.* at 29.

societal divisions.<sup>10</sup> Meritocratic sorting is seen as “just deserts,” with achievement (primarily commercial) seen as a reflection of virtue (virtue defined as ability and industry) rather than the product of more holistic causal chains.<sup>11</sup> These ideas can collectively be summarized as a worldview of winners and losers, determined by commercial production, with winning and losing being the just and proper result of the individual’s actions first and foremost.

Each of these ideas deserves deeper exploration.

#### A. THE PRIMACY OF MERIT

The body of Sandel’s book opens with a recounting of the college admissions scandal that came to light in 2019.<sup>12</sup> As a reminder, wealthy and famous parents paid millions to obtain admission to elite institutions for their children.<sup>13</sup> Sandel differentiates the legitimate “front door” of admission based on purely merit from the “back door” of a combination of merit and legitimate (if motivated) parental philanthropy.<sup>14</sup> Different still is what he describes as the illegitimate “side door” of outright bribery to obtain guaranteed admission.<sup>15</sup> While there is a clear legal difference between philanthropy and bribery, Sandel notes that the moral lines are harder to draw and hazier to observe.<sup>16</sup> Wealthy and powerful parents are willing to make the “investments” necessary to get their children “elite” educations regardless of whether those investments are in legitimate, black, or gray markets.<sup>17</sup>

From this troublesome vignette about the foibles of wealthy and famous parents, Sandel draws some conclusions that set off the discussions to follow. First, American society does not much debate the importance or propriety of the

10. *Id.* at 22-24.

11. *Id.* at 34-37. The idea of larger causal chains is worthy of greater discussion than fits here. Sandel considers the fact that otherwise diverse political thinkers like Hayek and Rawls both reject economic outcomes as reflections of just deserts. *Id.* at 126-33. With economic achievement as the centerpiece of the current view of meritocracy, luck cannot be dismissed. What skills society values have a significant component of luck. *Id.* at 134-36. Elite athletes, financiers, actors, and other highly valued professions do not have inherent value necessary to society. Economic achievement thus has a not negligible element of luck and market demand is not per se value to society. *Id.* at 138-39. Accomplishments ascribed to “merit” commonly involve more.

12. *Id.* at 7-15.

13. *Id.* at 7-8.

14. *Id.* at 8-9.

15. *Id.* at 9-10.

16. *Id.*

17. *Id.* This is to say nothing of the educational arms race that begins near birth for many wealthy families. See MARKOVITS, *supra* note 7, at 33-34 (describing the common striving for “elite” education at the elementary school level and earlier). The screening mechanisms to enter “elite” education significantly favor the wealthy. *Id.* at 148-53. Elite education produces elite employment; wealthy parents, recognizing the need for major investments in education to secure future opportunities for their children, make massive investments in their education, which creates an effective but exclusionary cycle. *Id.* While Sandel and Markovits provide similar descriptions of the obsession with obtaining elite education, Sandel’s description and critique is more anecdotal and philosophical while Markovits takes a much more data driven approach. They take different routes to similar conclusions about some of the most deleterious impacts of the current American manifestation of merit.

current conception of “merit,” only how to achieve it.<sup>18</sup> Debates about the mechanisms to achieve and “rise” in society are very different than debates about the propriety of those goals or their measurement. Sandel raises the more fundamental, less frequently considered, question of whether the current view of “merit” is truly good.<sup>19</sup> The admissions scandal demonstrates in concrete terms that a focus on merit can produce perverse and destructive incentives. Second, with the definition of merit and value of “rising” within society assumed, obtaining certain shared markers of merit such as attendance at elite educational institutions is vital.<sup>20</sup> Given the perceived importance of these badges of honor, the incentive is high to do or pay what it takes to achieve them.<sup>21</sup> The wealthy have an advantage given how much money can do to achieve many of them.<sup>22</sup> Even with these advantages, those winning the race for merit pay a heavy psychic cost in doing so.<sup>23</sup> Finally, Sandel notes at the opening that this intense focus on achievements rooted in merit is approached hyper-individually.<sup>24</sup> He sees enormous costs to community relationships and personal virtue from the vision of the “self-made” individual who is responsible for and deserving of all they achieve.<sup>25</sup>

Sandel sees the pursuit of merit, under a certain definition, as the primary motivating value in American society. That primacy places certain incentives, largely economic, above others. That, in turn, leads to a certain type of society.

## B. THE VIRTUE OF MERIT

This general acceptance of merit as the primary social value must have some reason. Merit must reflect some significant social value to hold the social influence that it does. Sandel sees two primary values that drive the primacy of merit: opportunity and virtue.<sup>26</sup> This rests on a foundational belief that all have

18. SANDEL, *supra* note 6, at 11.

19. *Id.* at 14.

20. *Id.* Markovits again goes further to demonstrate that the economic and social divergence among those who obtain these “elite” indicia and those who do not is enormous. MARKOVITS, *supra* note 7, at 4-6. The division between the “rich and the rest,” as Markovits describes it, produces a division across nearly all aspects of life. *Id.* at 201-02. Winners within the American meritocracy live lives foreign and disconnected from the losers. *Id.*

21. SANDEL, *supra* note 6, at 13.

22. *Id.*

23. *Id.* at 183. Markovits provides a more extensive and detailed critique of the costs of meritocracy. MARKOVITS, *supra* note 7, at 41-45. He describes how elite education is commodified as the entering requirement of elite labor which, while highly compensated, leaves little room for self-expression and leisure. *Id.* at 36-39. Entrenched meritocracy in the labor market also hollows out the middle class and diminishes opportunity for all but the elite. *Id.* at 24-27. For the elites who “win” the meritocratic race, the psychic costs are staggering. *Id.* at 44-45.

24. SANDEL, *supra* note 6, at 14-15.

25. *Id.* The dark flip side of this vision is that those who do not achieve at high levels in the race for merit somehow lack virtue or worth. *Id.* at 42-44. This too has a potentially corrosive impact on how citizens view each other and engage with each other. Or don’t engage with each other, more accurately, as a result of meritocratic sorting. MARKOVITS, *supra* note 7, at 223-28. It also ignores the relative contributions of luck. *Supra* note 11.

26. SANDEL, *supra* note 6, at 34-35, 68, 73.

the opportunity to succeed as much as their talents and efforts allow.<sup>27</sup> It is supported by the “rhetoric of responsibility,” which promises that outcomes are entirely the result of merit—those who thrive “earned it,” and those who struggle are morally culpable.<sup>28</sup> Sandel explores the roots and implications of these values.

Sandel identifies support for the belief that merit reflects virtue in American religiosity and commercialism. The former provides a moral justification,<sup>29</sup> the latter a practical justification and metric<sup>30</sup> for meritocracy.

Sandel notes that a society that heavily rewards merit can be powerfully fair and efficient, but alternatively can take a darkly moralistic turn.<sup>31</sup> The belief that those who succeed are talented and industrious is connected to the belief that those who prosper and those who suffer do so based on the absence or presence of sin.<sup>32</sup> This is a worldview of divine providence.<sup>33</sup> Sandel sees the religious ideas of providence and predestination as having evolved into the secular ideas of merit and just deserts where outcomes reflect virtue.<sup>34</sup> Predestination and providential thinking can manifest in a surrender to fortune (what happens, happens) or a claim of mastery (the individual decides their fate).<sup>35</sup> The providential mindset also has subsets of hubristic and punitive thinking.<sup>36</sup> This theological root of meritocracy unites with the second support, primacy of commercial activity, in the so-called “prosperity gospel” currently popular in some circles.<sup>37</sup> The “prosperity gospel” proclaims economic prosperity to be a divinely sponsored reward for righteousness while poverty is divine punishment for sin.<sup>38</sup> It is a highly meritocratic outlook, with no room for luck or other influences and no morally neutral outcomes.<sup>39</sup>

27. *Id.* at 67-68.

28. *Id.* at 64-66.

29. *Id.* at 34-45.

30. *Id.* at 62-63, 134-37.

31. *Id.* at 34.

32. *Id.* at 35.

33. *Id.* at 36-38.

34. *Id.* at 42-43.

35. *Id.* at 43.

36. *Id.* at 44-45. Hubristic thinking manifests in the belief of “the chosen” that their actions are divinely inspired and supported, thus destined for success. *Id.* This mindset can be deployed to justify even rash actions and dramatic disparity of outcomes. *Id.* Punitive thinking can suggest that people get what they deserve so bad outcomes and even disasters are deserved. *Id.* As a concrete example of this thinking, Sandel cites evangelical Christian leaders who suggest that natural disasters and the attacks of 9/11 are divine retribution for a variety of social sins. *Id.* Providential thinking can become dangerous in its dismissal of responsibility for injustice or human suffering and its diminution of other human beings as unworthy in the eyes of God.

37. *Id.* at 46-47.

38. *Id.* The reasoning behind the prosperity gospel can be used to justify economic success, inequality, disparate health care outcomes and costs, and any host of social outcomes. *Id.* at 47-49. Because outcomes are presented to be justified by good works, no outcome can be realistically criticized. Likewise, there is little need for charity because those with less are in that position because of their own sin. *Id.* As such, the prosperity gospel is powerful justification for social and economic status quo and inequality. Although well beyond the scope of this review, how this “gospel” reconciles with actual gospel commands for love of neighbor (*Matthew* 22:34-40) and to be poor in spirit and merciful (*Matthew* 5:3-10) seems a significant question.

39. *Id.* at 49-50.

The prominence of “prosperity gospel” is perhaps unsurprising given that Sandel also sees American meritocracy to be grounded on the prominence and preference of commercial activity.<sup>40</sup> Merit, and the attendant achievement, is commonly measured through income and other commercial metrics.<sup>41</sup> Sandel notes that merit, and the notion that “you can make it if you try,” may not bear out as much as many would like to think.<sup>42</sup> In fact, a focus on commercial merit can be highly exclusionary.<sup>43</sup> It is also incredibly confining, tying those possessed of “merit” to certain careers and settings that justify their investment in elite credentials and are accepted as the “proper” path.<sup>44</sup> Those who make it through the meritocratic filter obtain economic success far beyond that imaginable for those who do not.<sup>45</sup> In America, merit pays—big time. But only if you play ball.

The commercially focused meritocracy is subject to several powerful critiques. First, it prioritizes commercial activity over other ideas of the common good like solidarity and citizenship.<sup>46</sup> Second, meritocracy creates nearly unbridgeable gaps in income, education, socialization, and political engagement.<sup>47</sup> A world of division and inequitable outcomes based on merit threatens social and political rupture and is likely unsustainable.<sup>48</sup> Third, the meritocracy tends to recognize only “elite” work grounded in “merit” as worthy work.<sup>49</sup> This has the result of denigrating the value of work generally outside elite settings<sup>50</sup> while

40. *Id.* at 29.

41. *Id.* at 73-75.

42. *Id.*

43. *Id.* Markovits explores this phenomenon more fully, noting that those already in elite positions can pass advantage to their children educationally and economically to such an extent that it is near miraculous for those outside the meritocratic elite to break through. MARKOVITS, *supra* note 7, at 133-37.

44. SANDEL, *supra* note 6, at 89-92.

45. *Id.* at 22-24. College education, particularly from elite institutions or when paired with graduate education, provides a multi-million payoff compared to those without. MARKOVITS, *supra* note 7, at 182-85. The income imbalance that exists currently in favor of the elite is like “not a slope but a cliff.” *Id.* at 188; see also James Lardner, *Inequality Has Soared During the Pandemic—And So Has C.E.O. Compensation*, THE NEW YORKER (July 30, 2021), <https://www.newyorker.com/news/daily-comment/inequality-has-soared-during-the-pandemic-and-so-has-ceo-compensation?> (illustrating how the enormous advantage comes at the enormous cost of incessant labor); MARKOVITS, *supra* note 7, at 190-92 (same). Currently, the commercial meritocracy rewards the expenditure of human capital and elite labor so that the “elite” have nothing of value to rely on beyond their intellect and labor. *Id.* at 193-94. If the elite stop working, they stop earning and stop being elite. *Id.* Hence the “trap” of Markovits’s title.

46. SANDEL, *supra* note 6, at 28-29. Sandel explicitly notes a disconnect between moral judgment and “merit” as it is currently envisioned. *Id.* Whoever produces the most has the most merit and is thus the most virtuous. Sandel has written elsewhere about the predominance of commercial and market-based values over other measures of virtue. See generally MICHAEL J. SANDEL, WHAT MONEY CAN’T BUY: THE MORAL LIMITS OF MARKETS (2012) [hereinafter WHAT MONEY CAN’T BUY] (analyzing America’s market-based values).

47. MARKOVITS, *supra* note 7, at 201, 204, 217, 229.

48. *Id.* at 66-71.

49. SANDEL, *supra* note 6, at 197-99.

50. *Id.* This denigration, often fueled by elite condescension, is nothing new. *Id.* at 202-03. It has intensified political division in recent years. *Id.* Sandel notes also that it erodes a definition of the common good that encompasses any value beyond raw economic production. *Id.* at 205. Work could instead be viewed as the opportunity to advance the common good through deliberation and living a thoughtful, fulfilled life. *Id.* at 208-09. Sandel describes this as a vision of “contributive justice.” *Id.* at 211-13.

trapping the elite in certain jobs with enormous demands and no meaningful connection to values beyond the commercial.<sup>51</sup>

One central point Sandel makes is that there can and should be something more to civic engagement and human activity than the current meritocratic structure readily offers.<sup>52</sup> He contends that moving beyond a vision of merit as solely the intellectual tools that facilitate economic advancement would produce a more sustainable and vibrant society.<sup>53</sup> A world driven by more than the current vision of merit is possible and preferable.

### C. THE DIVISIONS OF MERIT

Sandel observes early on in *The Tyranny of Merit* that American society is deeply divided.<sup>54</sup> He observes that, to the degree American unity currently exists, it is now largely based on a hollow perception that everyone faces similar challenges to their advancement rather than a communal view of mutual obligation and shared sacrifice.<sup>55</sup> Given Sandel's communitarian approach,<sup>56</sup> it is not surprising that one of his initial observations is how American society prefers individual goods over communal ones. His book catalogues several ways in which meritocracy creates and hardens social divisions.

Despite the widespread rhetoric of rising in American society, the reality is much less hopeful or equitable.<sup>57</sup> Current circumstances provide real opportunities to rise for some but much more limited prospects for others.<sup>58</sup> Despite the ubiquity of belief in rising by merit and equal opportunity, real prospects of rising have become hereditary like the wealth of the landed aristocracy once was.<sup>59</sup> Placing economic success above other measures of worth

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51. MARKOVITS, *supra* note 7, at 192-94. "Elite" workers, while hugely compensated unlike the middle class and below, have work that is stripped of human elements or integration into the person's full life. *Id.* The idea of "vocation" is gone. *Id.* So too is much in the way of leisure. *Id.* at 79-85, 190-91. By stripping the intellectually elite of leisure time, they are vastly diminished spiritually. JOSEF PIEPER, LEISURE THE BASIS OF CULTURE 58 (2009). A world of total work is devoid of true leisure, which is time given over to ends other than the purely utilitarian. *Id.* at 66-67. Time of true leisure allows real human integration and spiritual centering. *Id.* at 46. It is necessary for real understanding of transcendent knowledge and virtue. *Id.* at 74. Meritocracy makes the leisure that facilitates real contemplation unavailable to many who might be most suited to it, however.

52. SANDEL, *supra* note 6, at 15.

53. *Id.* at 224-27.

54. *Id.* at 4.

55. *Id.* at 4-5.

56. See Daniel Bell, *Communitarianism*, STAN. ENCYC. OF PHIL. (May 15, 2020), <https://plato.stanford.edu/entries/communitarianism/> (discussing the common, but debatable, description of Sandel as a communitarian in orientation); Robert B. Thigpen & Lyle A. Downing, *Liberalism and the Communitarian Critique*, 31 AM. J. POL. SCI. 637, 637-38 (1987) (discussing the challenge communitarianism presents to liberalism).

57. SANDEL, *supra* note 6, at 22-23.

58. *Id.* at 24-25. Sandel cites economic data demonstrating that the United States currently lives with considerably more economic inequality and less economic mobility than many other nations. *Id.* at 76-77.

59. *Id.* The value of inheritance within many elite families in the form of investments in education can approximate \$10 million. MARKOVITS, *supra* note 7, at 146-47. Investments in higher education, and

in society and attributing its achievement entirely to perceived virtue rather than a more complicated aggregation of causes has instilled a not entirely justified hubris in the winners of the meritocratic arms race.<sup>60</sup> This is a powerfully divisive force in society as those on the short side of meritocracy's divide are viewed as unworthy and those on the winning side are viewed with hostility.<sup>61</sup> The wealthy, typically beneficiaries of the spoils of meritocracy, are separated from the rest socially, vocationally, politically, and in almost all respects.<sup>62</sup> Little of this arrangement supports a connected and coherent society.

In addition to conditions on the ground being divided, a philosophical divide exists about merit. Sandel acknowledges that meritocracy can significantly advance freedom and opportunity.<sup>63</sup> Unfortunately, meritocracy can also create a divided world with no communal vision or purpose.<sup>64</sup> Obsession with "personal responsibility" readily produces an atomistic society where individuals have only self-reliance available to them, with all negative consequences assigned to personal failure.<sup>65</sup> Paired with a factional, market-driven world focused on productivity and just desert theorizing, meritocracy philosophically divides more than it unites presently.<sup>66</sup>

Sandel observes that higher education, although portrayed as a democratic instrument of climbing, often accelerates inequality.<sup>67</sup> Academic credentials are commonly weaponized.<sup>68</sup> Educational achievement is critical to success within the meritocracy.<sup>69</sup> Focus on credentials promotes meritocratic hubris at least as much as it advances equality.<sup>70</sup>

Sandel, coming from an elite university himself, notes the gatekeeping role of higher education.<sup>71</sup> Barriers to entry like high SAT scores are highly correlated with wealth and class, simply locking in existing inequities.<sup>72</sup> The phenomenon is worse at elite institutions.<sup>73</sup> The "college premium" in education (the difference in earnings between those with and without college degrees) exacerbates existing

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the superordinate careers that elite higher education support, represents a new form of generational wealth transfer but prevents the opportunity for all that true meritocracy would offer. *Id.*

60. SANDEL, *supra* note 6, at 24-25.

61. *Id.*

62. MARKOVITS, *supra* note 7, at 201-02.

63. SANDEL, *supra* note 6, at 59.

64. *Id.*

65. *Id.* at 66.

66. *Id.* at 62-63.

67. *Id.* at 155-56; MARKOVITS, *supra* note 7, at 26-27.

68. SANDEL, *supra* note 6, at 82-84.

69. *Id.* at 85-88.

70. *Id.* at 87-89, 155.

71. *Id.* at 155-56. Sandel notes that far more students meet the criteria for entry to elite institutions than can ever receive admission. *Id.* at 184-86. This creates a "lottery of the qualified," which substantially undercuts the validity of the credentialing function. *Id.* As with many outcomes, luck and other causes have a greater impact on elite academic careers than the victors would care to admit or than merit alone. *Id.* at 124-25; *supra* note 11.

72. SANDEL, *supra* note 6, at 164-65.

73. *Id.* at 166-67.

inequalities more than resolves them.<sup>74</sup> As a result, obtaining credentials overshadows the educational function in many institutions.<sup>75</sup> Sandel's personal observation is that higher education rarely succeeds, if it even tries, to teach practical wisdom and virtue to students.<sup>76</sup> This leaves many students without avenues to develop good judgment and virtue.<sup>77</sup> Higher education becomes highly commodified as a gateway to commercial success and little more.

Division within the delivery of higher education then gives way to division within the workforce. Meritocracy has a distressing tendency to divide workers into those doing the "important" work of the elite and everyone else.<sup>78</sup> Sandel observes many who rhetorically divide society into "makers" (possessed of merit and virtue) and "takers" (those who lack both and drag society down).<sup>79</sup> It is not clear that the "makers" always advance society, however. Sandel cites the example of the elite financial community. The brilliance of those doing this work, and the financial incentives they face, can result in financial innovation and transactions largely for their own sake<sup>80</sup> or produce negative results.<sup>81</sup> The influence of the so-called "makers" has resulted in political structures that exacerbate inequality.<sup>82</sup>

The social division that modern work imposes is bad, to say nothing of the enormous costs it imposes on the "elite" workers who seem to "win" the contest

74. *Id.* at 197.

75. *Id.* at 182. Many students remain obsessed with jumping through hoops of selectivity throughout their time on campus. *Id.* at 181-83. Time at elite institutions has become dominated by collecting badges of achievement more than engaging in real learning. *Id.* Markovits notes that this impulse continues into the working world as superordinate workers advertise their unending work schedules as badges of virtue. MARKOVITS, *supra* note 7, at 96-99. This culture of incessant labor deepens social divisions, as many superordinate workers look at those who work less with disdain. *Id.* at 108-10. It is hard to have a shared society when groups lack a shared reality to the degree that elite workers and others do at this point.

76. SANDEL, *supra* note 6, at 99.

77. *Id.* at 90.

78. Meritocracy can again ignore the impact of good fortune. Those who have realized commercial success by virtue of their merit also do so by virtue of the good fortune of being possessed of skills that society highly values. *Id.* at 122-23. The financier, lawyer, actor, or professional achieves success through innate ability and effort to be sure, but the financial rewards they obtain owe at least as much to living in a society with enough affluence and interest to reward their unique abilities to the degree they are. *Id.*; *supra* note 11.

79. SANDEL, *supra* note 6, at 220-21.

80. *Id.* at 216-17.

81. John V. Duca, *Subprime Mortgage Crisis*, FED. RESRV. HIST. (Nov. 22, 2013), <https://www.federalreservehistory.org/essays/subprime-mortgage-crisis> (describing bundling of subprime mortgages for resale); Justin Pritchard, *What Caused the Mortgage Crisis?*, THE BALANCE (Aug. 28, 2020), <https://www.thebalance.com/mortgage-crisis-overview-315684#>.

82. SANDEL, *supra* note 6, at 221-22. Sandel sees a disconnection from other humans in the world of modern work and commerce. *Id.* He describes the challenge of recognizing the fundamental dignity of other humans when the dignity of their life's labor is rejected. *Id.* Sandel forcefully calls for a resumed recognition of the value and dignity of all work to heal this division among society. *Id.* at 208-11, 221-22. In order to do so, it is necessary to shift from viewing commerce as simply a means to satisfy consumer preferences unthinkingly to critically evaluating social preferences and prioritizing those which advance the common good. *Id.* at 208-09. As Sandel has noted elsewhere, the market need not be all to all. *See generally* WHAT MONEY CAN'T BUY, *supra* note 46 (analyzing America's focus on the market and its meaning in American society).

of modern meritocracy.<sup>83</sup> At the other end of the spectrum, real opportunity continues to decrease.<sup>84</sup> Sandel observes powerful ways in which work is dividing rather than unifying society.<sup>85</sup>

Merit has also forced its way into governance in ways that promote division. Engaging in “smart” governance has become a watchword.<sup>86</sup> It is a watchword to describe not only policies but people in government.<sup>87</sup> As a result, elitism and condescension creep into governance.<sup>88</sup> The discussion of “smart” solutions promotes a highly technocratic government.<sup>89</sup> Sandel argues that government should be more focused on advancing moral activity.<sup>90</sup> The technocratic governance that a meritocratic focus perpetuates may inhibit this higher purpose.

Additionally, elite workers are able to disproportionately drive public policy through the engagement of lobbyists and political contributions.<sup>91</sup> That is met by forces of nativism, populism, rejection of expertise, and governing structures.<sup>92</sup> Government, rather than being a means of collective actions to advance the common good, becomes a force of division and personal advantage.

Meritocracy is presented as providing equal opportunity to thrive based on ability and effort. As it has been realized in the United States, meritocracy has promoted division as much as unity.

#### D. TOXIC MERITOCRACY?

Sandel’s portrait of the state of meritocracy in the United States is grim. He sees a society divided and diminished. Winners in the system suffer significantly. Losers are left with little opportunity or hope. Society is left with an unclear path forward. Meritocracy, in Sandel’s assessment, is toxic as it is currently realized.

If this were all it offered, Sandel’s book would be hard to take. But as a moral philosopher, Sandel asks important questions. Is there another way? Can we rebuild a world of common good? Can this world provide room for all to

83. SANDEL, *supra* note 6, at 183-84. The demands of time, health, and freedom of elite workers are extreme. MARKOVITS, *supra* note 7, at 189-92. The requirement to do more and more work to achieve ever greater financial rewards alienates and exhausts those at the top of the meritocratic pyramid. *Id.* at 194.

84. SANDEL, *supra* note 6, at 197. These workers too face significant despair and the attendant health impacts. *Id.* at 199-201.

85. *Id.* at 221-22. Resentment runs both ways across the divide created in the workforce by meritocracy. *Id.* at 201-03, 220-21. That resentment expresses itself politically, reinforcing divisions through resultant public policy choices. *Id.* at 203-05; MARKOVITS, *supra* note 7, at 63-65.

86. SANDEL, *supra* note 6, at 93-94.

87. *Id.*

88. *Id.* at 95-96. Those with lower levels of educational attainment are less common in government service. *Id.* at 97-98. Such imbalance can provoke populist backlash. MARKOVITS, *supra* note 7, at 62-65.

89. SANDEL, *supra* note 6, at 104-08.

90. *Id.* at 108-10.

91. MARKOVITS, *supra* note 7, at 52-53.

92. SANDEL, *supra* note 6, at 64-65.

genuinely thrive? These important questions take up the balance of *The Tyranny of Merit*.

## II. MEANING OVER MERIT

Sandel does not simply critique merit. Instead, he pairs critique with proposals to revamp meritocracy to ameliorate its excesses. In this respect, *The Tyranny of Merit* is more normative and aspirational than merely descriptive. Three of his suggestions stand out.

### A. RETHINKING SOCIAL VALUES

Sandel's most fundamental suggestion is to rethink social values.<sup>93</sup> Sandel sees meritocracy in the United States as emphasizing "rising" through commercial activity over other values.<sup>94</sup> Even if this vision of rising provides equal opportunity, Sandel argues that it is the wrong focus.<sup>95</sup> His most emphatic and radical suggestion is that society reorient its focus to emphasize helping all citizens develop their abilities to the greatest extent, recognizing the dignity of all without mandating equality of outcome, and to reinvigorate habits of public deliberation and engagement.<sup>96</sup> To do this, Sandel calls for a fundamental shift toward a civic, not commercial and consumerist, vision of the collective good.<sup>97</sup> This is not, strictly speaking, a rejection of meritocracy. Instead, it is a repurposing toward a more inclusive and communally focused vision of what constitutes "merit."

Sandel points out that making this shift will require a shift in what society values. Rather than simply asking how much can be produced and consumed, society should look at how effectively citizens can engage each other through community and public deliberation.<sup>98</sup> He argues that this shift can produce real connections through shared values rather than simply aggregated economic preferences.<sup>99</sup>

This initial suggestion is no small proposal. It is a call for a wholesale restructuring of the American psyche. Sandel has noted elsewhere the American obsession with commerce and markets as the cure for most ills.<sup>100</sup> Shifting the purpose that animates a focus on merit is a dramatic but invaluable shift to eliminating the currently detrimental manifestations of American meritocracy.

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93. *Id.* at 222.

94. *Id.* at 224.

95. *Id.*

96. *Id.* at 224-26.

97. *Id.* at 226-27.

98. *Id.*

99. *Id.* at 227.

100. See generally WHAT MONEY CAN'T BUY, *supra* note 46 (noting America's focus on the market).

## B. HIGHER HOPES FOR HIGHER EDUCATION

Sandel next makes concrete proposals to change higher education. His focus is on dismantling the sorting function within higher education and deemphasizing the elite credentialing that gives sorting such importance.<sup>101</sup> He makes two recommendations to achieve these goals.

First, he proposes that elite institutions of higher education eliminate admission preferences for legacies, children of donors, and athletes.<sup>102</sup> He notes that there are more highly qualified candidates than seats within elite universities.<sup>103</sup> He proposes to instead conduct an admissions lottery following an initial screen for minimum qualifications.<sup>104</sup> Sandel argues that this would reduce the pressure on high school students and reduce the incentive in college to continue a frenzied resume building in favor of real educational engagement.<sup>105</sup>

Second, Sandel suggests reinvigorating public investment in all postsecondary education.<sup>106</sup> This includes community colleges, technical and vocational education, and job training, as well as four-year universities.<sup>107</sup> Such widespread investment in education would demonstrate a social commitment to all education as having value.<sup>108</sup> Sandel argues that this can, by extension, reduce the extreme imbalance that educational sorting imposes, especially elite higher education.<sup>109</sup>

Sandel makes a final suggestion, which connects his proposals for higher education with his overarching suggestion to reassess communal values. He suggests that “educating citizens for democracy” be conceptualized as interjecting that education into all institutions, not only elite universities.<sup>110</sup> All citizens would

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101. SANDEL, *supra* note 6, at 188-89.

102. *Id.* at 184.

103. *Id.* at 184-85.

104. *Id.* at 185-86.

105. *Id.* at 188. Full of positive aspiration to reduce student pressure as this proposal may be, the screening to determine lottery eligibility itself imposes significant pressure. Inevitably some students will be on the “wrong” side of any line. Many students will be clearly qualified, others clearly not. However, those students who are close to the cutoff will continue to feel enormous pressure to do what it takes to be in the lottery. Additionally, this proposal addresses one negative manifestation of meritocracy in higher education, not all. For example, he suggests that this will reduce the hubris associated with higher education from elite institutions. *Id.* at 183-84. But a lottery that deemphasizes the marking factor of elite credentials at certain institutions alone cannot remove the sorting factor present within education. Some academic records and institutions will be considered better than others. That is arguably a very good thing. *See, e.g.,* George Will, *Rejecting meritocracy clashes with America’s basic premises*, WASH. POST (Aug. 6, 2021), <https://www.washingtonpost.com/opinions/2021/08/06/rejecting-meritocracy-clashes-with-americas-basic-premises/> (arguing that rejecting the talent screening aspect of meritocracy would be counterproductive and contrary to central American values). Sandel addresses several hypothesized objections to his proposal. SANDEL, *supra* note 6, at 186-87. The fact that it is an underinclusive solution is not one of them.

106. SANDEL, *supra* note 6, at 188-89.

107. *Id.*

108. *Id.*

109. *Id.* at 190-91.

110. *Id.* at 192-93.

benefit from education involving these values and talents.<sup>111</sup> Elite institutions, while commonly purporting to be the home of this type of education, often fail to provide effective instruction on moral or civic virtues in favor of technocratic skills.<sup>112</sup> Sandel posits that this type of education “can flourish in community colleges, job training sites, and union halls as well as on ivy-strewn campuses.”<sup>113</sup> He, therefore, calls for civic engagement to be a unifying principle across all educational platforms.

Sandel presents concrete steps to remake education in American society. These proposals offer the potential to reconceive how citizens enter the educational system and what they learn upon arrival. By extension, it can retool how merit is defined and utilized to provide a space for all to develop their individual abilities to the greatest degree and for society to rebuild community and thrive in a more holistic fashion.

### C. WORK

Sandel also calls for a reassessment of how merit is defined and used within the world of work. He begins by noting that the “college premium” for wages has more than doubled in recent years.<sup>114</sup> Contemporaneously, many working class and working poor citizens suffer “deaths of despair.”<sup>115</sup> The profound division among workers promotes division and resentment in political and social engagement.<sup>116</sup> Sandel suggests that one fundamental step to attack these problems is to emphasize the dignity of work, all work, within society and public policy.<sup>117</sup>

Sandel’s work proposal is more of a shift in mindset than an enactment of certain policies. He suggests shifting from a consumerist view of the public good to a civic conception.<sup>118</sup> This mindset shift rejects production and consumption as the markers of human flourishing to an Aristotelian vision of cultivating and exercising individual abilities to the greatest degree.<sup>119</sup> Sandel argues that this would promote “contributive justice” wherein all are seen to have value in the manner in which they contribute to the collective human good.<sup>120</sup> This is distinct from distributive justice that just asks if all get their “fair share” of production and consumption.<sup>121</sup> Instead, Sandel emphasizes promoting the dignity of all work

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111. *Id.* at 193.

112. *Id.* at 192.

113. *Id.* at 193.

114. *Id.* at 197-99.

115. *Id.* at 199-201.

116. *Id.* at 202-04. Or non-engagement may be a more accurate way to put it. As Markovits notes, those on differing sides of the accomplishment gap that the current approach to meritocracy imposes live entirely different and separate lives for the most part. MARKOVITS, *supra* note 7, at 20.

117. SANDEL, *supra* note 6, at 205.

118. *Id.* at 208-09.

119. *Id.* at 209.

120. *Id.* at 212.

121. *Id.*

and its value in society.<sup>122</sup> He sees expressive values in work that reflect what members of society owe each other as members of a shared community.<sup>123</sup> This proposal is an alternate view of society that pursues something more transcendent than meritocratic racing for economic achievement.<sup>124</sup> That “something more” is a vibrant communal life rather than the private enclaves of economic activity that the current American meritocracy has prioritized.<sup>125</sup>

Sandel’s proposals provide a powerful lens to look at American society. He considers how society defines its values and merit, how it educates its citizens, and how it engages in work. The legal academy and profession have much to say about each of these. The final section of this review briefly looks at what legal academics and practitioners may be able to do in response to the problems Sandel identifies and the proposals for change he offers.

#### D. MANAGING MERIT IN THE LAW

None of Sandel’s critiques of meritocracy are unique to the legal academy or practice. They are relevant to both, however. They present significant questions that all lawyers should consider about how law can ameliorate some toxic aspects of meritocracy in society and how the education, placement, and professional activity of lawyers could be reimagined to avoid them.

A first and fundamental opportunity for the legal academy and profession is to reinvigorate discussions of philosophy and political theory within the public sphere. As Sandel notes, while there may be debates about outcomes, there is little debate about the propriety of current meritocratic values and structures themselves.<sup>126</sup> As Sandel discusses, that background assumption presents deep philosophical questions.<sup>127</sup> What constitutes virtue? How do we value that virtue within our society? How do social and political structures advance or hinder that? These are not new questions, but answers to them are less debated than assumed, often unthinkingly and unknowingly, within society.<sup>128</sup>

The legal academy and profession have the opportunity to change this, but it will take ongoing and difficult work. The legal academy does this work

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122. *Id.* at 214-15.

123. *Id.* at 221.

124. *Id.* at 224-27.

125. *Id.* at 227.

126. *Id.* at 11.

127. *Id.* at 18-19, 29, 119-20.

128. *Id.* at 11.

already.<sup>129</sup> The opportunity that exists is to popularize these discussions more.<sup>130</sup> Expanding the focus and means of public outreach, popular writing in broad-based media and public lectures and colloquia are ways for those legal academics conducting scholarship on political structures and civic engagement to pull the general public into sustained deliberation, not mere assumptions, on the topic. Encouraging the general public to reconsider basic assumptions about the structure and purpose of society is timely.<sup>131</sup> Reasoned public deliberation helps build the bonds of community that Sandel forcefully calls for.<sup>132</sup> Having widespread public debate on the fundamental questions of what society should be results in more well-reasoned, broadly shared, and sustainable conclusions. This does require actual deliberative debate, not the public shouting of irreconcilable shibboleths

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129. See, e.g., ANTHONY T. KRONMAN, *THE ASSAULT ON AMERICAN EXCELLENCE* (2019) (discussing various issues confronting higher education that can advance or frustrate development of excellence); Richard S. Meyers, *Reflections on the Teaching of Civic Virtue in the Public Schools*, 74 U. DET. MERCY L. REV. 63, 65-66 (1996) (considering possible legal barriers to providing instruction on civic virtue in public schools); Stephen Macedo, *The Constitution, Civic Virtue, and Civil Society: Social Capital as Substantive Morality*, 69 FORDHAM L. REV. 1573, 1573-74 (2001) (describing the value of civic engagement to develop the store of civic virtue in citizens).

130. Robert E. Lutz, *On Scholarship in the Legal Academy: An Essay*, 46 INT'L LAW 673, 677 (2012) (describing the limited role of the general public in audiences for legal scholarship).

131. Currently, there are common calls in political debates to promote "civics education." Stephen Sawchuk, *\$1 Billion for Civics Education? Bipartisan Bill Eyes Dramatic Federal Investment*, EDUC. WEEK (Sept. 17, 2020), <https://www.edweek.org/education/1-billion-for-civics-education-bipartisan-bill-eyes-dramatic-federal-investment/2020/09>. There is not consensus on how to do that, however. Abby Wargo, *South Dakota lawmakers tell Department of Education to not pursue federal grants for history, civics education*, ARGUS LEADER (May 17, 2021), <https://www.argusleader.com/story/news/education/2021/05/17/south-dakota-education-federal-grants-history-civics-classes-crt-critical-race-theory-kristi-noem/5129491001/>; Bob Mercer, *Rights policy set for S.D. universities, 'opportunity centers' will be opened at each*, KELO.COM (Aug. 5, 2021), <https://www.keloland.com/news/capitol-news-bureau/rights-policy-set-for-s-d-public-universities-opportunity-centers-will-be-opened-at-each/>.

The legal academy should lean into vibrant discussions of how to teach civics broadly, not attempt to deflect it. The opportunity to push more focus in secondary and adult education toward the skills of public deliberation, understanding of political and legal theory, and renewed consideration of ideas that come in for little discussion it invigorates society. It also avoids the scenario of politicians decrying some ideas as "dangerous" or declaring them verboten (sometimes under the guise of advancing civics education). Morgan Matzen & McKenzie Huber, *Critical race theory: Gov. Kristi Noem signs executive order banning DOE from federal grants*, ARGUS LEADER (July 29, 2021), <https://www.argusleader.com/story/news/2021/07/29/gov-kristi-noems-executive-order-bans-applying-critical-race-theory-grants/5416733001/>; Stephen Groves, *Noem pushes to bar 'critical race theory' from universities*, ASSOCIATED PRESS (May 25, 2021), <https://apnews.com/article/race-and-ethnicity-racial-injustice-education-845298fc9f6ed084568a89749dc805b6>; James C. McKinley, Jr., *In Texas, a Line in the Curriculum Revives Evolution Debate*, N.Y. TIMES (Jan. 21, 2009), <https://www.nytimes.com/2009/01/22/education/22texas.html>; Eesha Pendharkar, *How Will Bans on 'Divisive' Classroom Topics Be Enforced? Here's What 10 States Plan to Do*, EDUC. WEEK (July 14, 2021), <https://www.edweek.org/policy-politics/how-will-bans-on-divisive-classroom-topics-be-enforced-heres-what-10-states-plan-to-do/2021/07>. Some ideas are bad, some political structures sub-optimal. Taking the position that any is above question or beneath discussion is the most dangerous idea, however. Pushing more informed, regular, and skilled deliberation into the public sphere is the antidote to this poison. KRONMAN, *supra* note 129, at 115-18 (describing how to effectively meet hateful or destructive speech). The legal academy and profession are uniquely suited to administer it. See Neil Fulton, *Aristocratic Excellence, Secular Ecumenism, and the Life of the Modern Law School*, 66 S.D. L. REV. 1, 19-23 (2021) (discussing the unique role of law schools in educating on how to maintain free expression in a free but cohesive society).

132. SANDEL, *supra* note 6, at 224.

that commonly passes for public discourse.<sup>133</sup> Here too, the legal academy can go into the world to model the neutral deliberative processes that the law embraces.

The legal academy and practitioners, particularly those actively engaged in public policy, must also demand consideration of concrete policies to respond to the excesses and misalignments of meritocracy. As important as the fundamental philosophical debate Sandel calls for is, public policy choices give life to the results of that debate. Legal academics and public lawyers can push for the implementation of policies to turn the focus of public policy from advancing commerce above all in favor of advancing other values, as Sandel suggests.

Public service lawyers must also democratize existing meritocratic structures. There is little reason to honor the promise of meritocracy if it is simply a hereditary succession.<sup>134</sup> For meritocracy to have validity, the competition cannot be rigged in favor of some at the start. How to structure a fair system must be a central debate for public service lawyers. These debates must include reassessing tax policy,<sup>135</sup> how to structure regulation of key industries to revitalize mid-level employment opportunities,<sup>136</sup> and how to provide funding and access for all forms of education.<sup>137</sup> More fundamental than what answer is reached is that public service lawyers get the debate onto the political agenda. No solutions will come without that first step.

The division between the elite and others that Sandel identifies calls on lawyers to wrestle with the epistemological crisis within society.<sup>138</sup> Many citizens currently lack the ability to distinguish truth from misinformation and opinion.<sup>139</sup> The excesses of the current meritocracy exacerbate divisions between elites and others.<sup>140</sup> This entrenched distrust promotes increased distrust of experts and

133. See Thomas B. Edsall, *No Hate Left Behind*, N.Y. TIMES (Mar. 13, 2019), <https://www.nytimes.com/2019/03/13/opinion/hate-politics.html> (describing members of opposing parties as “downright evil” and therefore worthy of violent suppression); Peggy Noonan, *Defuse America’s Explosive Politics*, WALL ST. J., Oct. 27-28, 2018, at A13 (calling on elected officials and candidates to empathize and respectfully engage with the anxieties and policies of the other major political party and to reduce the rhetorical excesses of their own); BILL BISHOP, THE BIG SORT: WHY THE CLUSTERING OF LIKE-MINDED AMERICA IS TEARING US APART 227-28 (2008) (discussing the polarization of American communities).

134. MARKOVITS, *supra* note 7, at 275-84 (laying out proposals on taxation and investment to avoid hereditary passing of meritocratic advantage).

135. *Id.* at 281.

136. *Id.* at 279.

137. SANDEL, *supra* note 6, at 188-89.

138. TOM NICHOLS, THE DEATH OF EXPERTISE 147-48 (USA 2019); Cade Metz, *Internet Companies Prepare to Fight the ‘Deepfake’ Future*, N.Y. TIMES (Nov. 24, 2019), <https://www.nytimes.com/2019/11/24/technology/tech-companies-deepfakes.html> (describing effort to use AI technology to identify videos which have been manipulated from the original and true form); Richard Stengel, *The Global War on Truth: How Russia’s Information War Started and How to Stop It*, TIME, Oct. 7, 2019, at 37-39; see also Sean M. Kammer, ‘Whether or Not Special Expertise is Needed’: *Anti-Intellectualism, The Supreme Court, and the Legitimacy of Law*, 63 S.D. L. Rev. 287, 332-33 (2018) (internal citations omitted) (noting the declining public confidence in the United States government, news media, scientists, universities, and lawyers).

139. NICHOLS, *supra* note 138, at 147-48.

140. MARKOVITS, *supra* note 7, at 201-02.

expertise by extension.<sup>141</sup> Distrust can run from the relatively trivial to matters of life and death.<sup>142</sup> The entrenchment and isolation of merit-based elites and their financial advancements does little to bridge this gap.<sup>143</sup> This is to say nothing of the condescension and distrust that can flow between groups. The law is uniquely skilled and focused on identifying truth through structured processes.<sup>144</sup> The legal academy and legal profession needs to drive public education on assessing fact from falsity.<sup>145</sup> Expanding understanding of elite processes in finance, medicine and science, law, and other professions may not alone resolve the epistemological crisis, but it can help bridge the gap of distrusting elite persons and processes. People may not trust the work product of elites, but they certainly are less inclined to do so if they have no comprehension of how such processes work.

Lastly, legal academics and practitioners must wrestle with how meritocracy manifests in their midst. Far too often legal professionals and legal academics engage in one-size-fits-all discussions of what the law can and should be. All too often that one size looks like the “elite” institutions and opportunities that *The Tyranny of Merit* laments. A vibrant legal academy and profession requires many sizes, however.

Much within both the legal academy and legal profession perpetuates the meritocratic arms race. Law schools are ranked based on criteria that overwhelmingly favor replicating the model of larger schools like Harvard, Yale, and Stanford.<sup>146</sup> Assessments often turn on criteria that are subject to manipulation or that skew in favor of larger institutions with a research focus and student credential bias.<sup>147</sup> Unquestionably, these numbers provide one measure of a certain type of merit. But they can undervalue law schools with different missions such as smaller state schools, religiously oriented schools, or schools

141. NICHOLS, *supra* note 138, at 112-15.

142. Neil Fulton, *Covid, Constitution, Individualism, and Death*, 27 WIDENER L. REV. 123, 127-28 (2021) (describing resistance to epidemiological advice to wear masks); Geoff Brumfiel, *Anti-Vaccine Activists Use a Federal Database to Spread Fear About COVID Vaccines*, NPR (June 14, 2021), <https://www.npr.org/sections/health-shots/2021/06/14/1004757554/anti-vaccine-activists-use-a-federal-database-to-spread-fear-about-covid-vaccine>; Ed Yong, *America is Getting Unvaccinated People All Wrong*, THE ATLANTIC (July 22, 2021), <https://www.theatlantic.com/health/archive/2021/07/unvaccinated-different-anti-vax/619523/>.

143. MARKOVITS, *supra* note 7, at 201-02.

144. Model Civ. Jury Instr. 8th Cir. 1.01 (jurors “must decide this case based only on the evidence received by the court here in the courtroom and the instructions on the law”); Model Civ. Jury Instr. 8th Cir. 1.03 (“Your duty is to decide what the facts are from the evidence. You are allowed to consider the evidence in light of your own observations and experiences. After you have decided what the facts are, you will have to apply those facts to the law that I give you in these and in my other instructions. That is how you will reach your verdict. Only you will decide what the facts are.”).

145. CARL SAGAN, *THE DEMON-HAUNTED WORLD: SCIENCE AS A CANDLE IN THE DARK* 326-27 (1996); LEE C. MCINTYRE, *POST-TRUTH* 163 (2018); Jonathan K. Van Patten, *Skills For Law Students*, 61 S.D. L. REV. 165, 188-89 (2016).

146. Barry Vickery, *The Changing Practice of Law and Law Schools: Why Would Anyone Go to Law School Today?*, 60 S.D. L. REV. 79, 84-85 (2015); Steven C. Bennett, *When Will Law School Change?*, 89 NEB. L. REV. 87, 119-23 (2010); Nancy B. Rapoport, *Ratings, Not Rankings: Why U.S. News & World Report Shouldn't Want to be Compared to Time and Newsweek—or The New Yorker*, 60 OHIO ST. L.J. 1097, 1097-99 (1999).

147. Nancy B. Rapoport, *Changing the Modal Law School: Rethinking Legal Education in (Most) Schools*, 122 DICK. L. REV. 189, 193-96 (2017).

connected to historically minority institutions.<sup>148</sup> These institutions may fall short on many criteria used by U.S. News, but on different metrics (such as preparing students for service in a particular geographic area, sensitivity to the needs of a local bench and bar, or facilitating the entry of first-generation and minority students into the profession and return to their communities), they commonly excel.<sup>149</sup> This is obviously not to say that what large, “elite” institutions do is bad. They provide invaluable resources and research to advance the development of the law, unique and well-funded clinical opportunities, and a rich environment where brilliant faculty and students can thrive.<sup>150</sup> It is to say, however, that their mission is not the only mission for all law schools. The dominant system to “rank” law schools, and attendant prestige and opportunity that comes with attendance,<sup>151</sup> suggests to students and lawyers alike that their mission *is* the only one.<sup>152</sup> Or at least the best one.

There is likewise a bias among legal practitioners that certain career paths are inherently superior. Large civil firms, the Department of Justice, and tenure track faculty positions (particularly in certain disciplines and at certain schools) are perceived as superior.<sup>153</sup> Again, the prestige attached to these positions is not without merit. What is problematic for the profession, however, is that the assigned prestige can dissuade excellent students from pursuing work with smaller firms, in legal services corporations, with state and local prosecutors or public defenders, or at law schools or even undergraduate schools focused more on teaching than on scholarship. Consistently the “prestige” positions are paid accordingly.<sup>154</sup> This creates the problem that although there are many needs for excellent lawyers, the system drives lawyers overwhelmingly into certain jobs and geographic areas. This is particularly so when the cost of attendance at elite institutions, and even some not so elite ones, ties the hands of students.<sup>155</sup> The profession needs to find a way to let the students put their degree to work where they want to, not where they must work to pay for their degree.

More data is becoming transparent about the real cost of attendance, debt loads, and salaries, however.<sup>156</sup> Entities like Law School Transparency are challenging the dominance of U.S. News as the means for students to gain

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148. *Id.*; Paula Lustbader, *Painting Beyond the Numbers: The Art of Providing Inclusive Law School Admission to Ensure Full Representation in the Profession*, 40 CAP. U. L. REV. 71, 114-19 (2012).

149. Rapoport, *supra* note 146, at 1101; Patrick T. O’Day & George D. Kuh, *Assessing What Matters in Law School: The Law School Survey of Student Engagement*, 81 IND. L.J. 401, 405-07 (2006).

150. *See, e.g.*, Paul J. Heald & Ted Sichelman, *Ranking the Academic Impact of 100 American Law Schools*, 60 JURIMETRICS J. 1, 34 (2019) (finding disproportionate scholarly impact from elite law schools).

151. MARKOVITS, *supra* note 7, at 244-45.

152. Olufunmilayo B. Arewa et al., *Enduring Hierarchies in Legal Education*, 89 IND. L.J. 941, 1002 (2014).

153. *Id.* at 1009-11; BRIAN Z. TAMANAHA, *FAILING LAW SCHOOLS* 140-43 (2012).

154. MARKOVITS, *supra* note 7, at 11, 18; TAMANAHA, *supra* note 153, at 48-50.

155. TAMANAHA, *supra* note 153, at 140-43.

156. Andrea Fuller et al., *Law School Loses Luster as Debts Mount and Salaries Stagnate*, WALL ST. J. (Aug. 3, 2021), <https://www.wsj.com/articles/law-school-student-debt-low-salaries-university-miami-11627991855>; Lora Shinn, *Average Law School Debt*, THE BALANCE (May 14, 2021), <https://www.thebalance.com/average-law-school-debt-5184944>.

information about possible schools and their quality.<sup>157</sup> Access Lex and others are creatively challenging the cost barriers to entering legal education and practice that exist in LSAT prep, bar preparation, and financial aid.<sup>158</sup> To remain vibrant and accessible as well as to meet the multitude of legal needs in the world, law schools and the legal profession need to continue this reassessment and opening of the academy and the profession.

Merit does and should have a vital place in the legal academy and profession. However, if misaligned, it can harm both and the world in which legal academics and practitioners operate. It is imperative that lawyers from all settings consider the impacts of meritocracy, good and bad, and drive the conversations about how to reconsider its impact.

### III. CONCLUSION

It would be easy to either ignore or too readily accept *The Tyranny of Merit*. One could readily reject it by simply saying, “that’s the way it is” about American meritocracy. One could too readily accept it by saying meritocracy is inherently toxic and needs to be eradicated. Both would miss Sandel’s point and the opportunity that his call to rethink meritocracy provides.

Simply accepting meritocracy as it is misses Sandel’s call to consider our societal values and move them consistently towards values of common good, not just economic efficiency. Accepting the status quo is to accept inequity in society not so much because of differing abilities and effort but because some abilities and individuals are simply assigned less value. Sandel’s book should provoke significant introspection as a society and as individuals. The values society currently prioritizes need not be so. True meritocracy should consistently strive to maximize the value and achievement of all. That necessarily begins with ongoing consideration of whether society puts value on the best things.

Simply rejecting meritocracy entirely risks losing a social striving for greatness and virtue. Recognizing differing abilities promotes excellence.<sup>159</sup> Particularly in intellectual pursuits and the manifestation of character.<sup>160</sup> Society would be foolish to say that all individuals are entirely the same or that pursuit of excellence is too costly. But the dignity of all, the distinct contributions of all, can be recognized and honored without pretending that they are all the same. All

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157. See *How can Law School Transparency help me?*, L. SCH. TRANSPARENCY <https://www.lawschooltransparency.com/> (last visited Nov. 12, 2021) (collecting data on law school comparisons, legal professionals, student debt, and other topics related to law school).

158. See *Programs for Academic and Bar Success*, ACCESSLEX INSTIT. [www.accesslex.org/academic-and-bar-success?f\[0\]=areas\\_of\\_focus\\_tools:14](http://www.accesslex.org/academic-and-bar-success?f[0]=areas_of_focus_tools:14) (last visited Nov. 12, 2021) (collecting Access Lex resources for academic and bar exam success); Mara Leighton, *The top 6 online LSAT prep programs, including one that’s completely free*, BUS. INSIDER (July 27, 2021), <https://www.businessinsider.com/best-lsat-prep-courses> (discussing the cost of LSAT prep).

159. Will, *supra* note 105.

160. KRONMAN, *supra* note 129, at 34-37.

citizens can be asked to participate in public deliberation without failing to recognize that their relative contributions and insights will differ.<sup>161</sup>

Sandel calls us all to deliberation. Deliberation about who we are as a society and what we value. Deliberation about how to recognize what conduct advances our values and how to reward it. Deliberation about how to live more effectively and equitably together as a democratic community. Deliberation about how legal education and practice can facilitate this broader social deliberation. While he proposes answers that he believes that deliberation should produce, the most valuable thing that he does in *The Tyranny of Merit* is to insist that all of us participate actively in the deliberation. It is a demand that merits consideration by us all.

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161. There is particular risk that higher education can lose the differentiation and pursuit of excellence that is necessary in the course of tempering the excesses of the current meritocracy. *Id.* at 214-17.