

AMERICAN JOURNAL
of LAW and EQUALITY

A 2020 PERSPECTIVE ON MERIT—ONE INTERSECTIONAL
VISION OF A RACIALLY JUST SOCIETY
Comment on M. Sandel's *The Tyranny of Merit*

Camille Gear Rich* and Omar H. Noureldin**

INTRODUCTION

When, in December 2020, New York officials selected the first person to receive the COVID-19 vaccine on camera in the United States, they were faced with a pressing question: How should they signal priority in allocating the vaccines among the population? Each state, responsible at the local level for distributing this life-saving material, wrestled with this key symbolic issue. The virus had ravaged the nation—19 million were already infected, with 300,000 deaths, and counting¹—and more suffering and loss were expected before the next spring's thaw. New York officials knew the media coverage of this first recipient would, therefore, be seen as a symbol of American values; the recipient would reflect our current understanding of merit and deservingness. Should the first recipient be the intellectually greatest and the best of us—perhaps a key scientist who developed the vaccine—or the least and most vulnerable—perhaps an anonymous, elderly impoverished soul, desperately in need of protection? Given the scarcity of doses as the vaccines were first introduced, Americans had questions about who merited being first in line for treatment. However, this question accompanied a larger question—how should merit be determined?

Authors: *Camille Gear Rich is Professor of Law and Sociology, University of Southern California Gould School of Law; Associate Provost of Diversity and Inclusion, University of Southern California; and Director of PRYSM, the USC Initiative for the Study of Race, Gender, Sexuality and the Law.

**Omar H. Noureldin is a Lecturer in Law, University of Southern California Gould School of Law.

1 Centers for Disease Control and Prevention, *CDC COVID Data Tracker* (2021), <https://covid.cdc.gov/covid-data-tracker>.

Michael Sandel's provocative book *The Tyranny of Merit: What's Become of the Common Good?*² gives us purchase on how America currently answers these question and why our current assessment and sorting process threatens to drive us further apart. Despite the fact that Sandel's book provides us with several key revelations, the book suffers from conceptual myopia in one key respect: it fails to fully wrestle with the concept of merit's racialized and gendered origins. Specifically, Sandel does not reckon with how America's race and gender history and current racial strife fundamentally shape our valuation and recognition of work. Sandel, like many other philosophers, fails to recognize that race and gender considerations, rather than being mere distractors, are key to the political conundrum at the heart of merit questions.³ Wrestling with these issues, unraveling how race- and gender-related assumptions distort our perceptions of worth and common purpose, will make us more intellectually agile and accurate in our assessments of fairness. In short, rather than taking Sandel's approach—segregating and isolating these dynamics in his analysis—true escape from the “tyranny of merit” requires an inquiry into how race and gender shape the meaning of merit.

This essay introduces readers to a variety of inquiries that help us contextualize Sandel's key concepts: merit, the common good, and the dignity of work. We offer three approaches that allow readers to shift perspective and get critical distance on his primary claims: a discursive lens, a structure of government inquiry, and an intersectional analysis that uses the concept of the “welfare queen” to advance our understanding of citizens' proper relationship to the polity. The essay explores a deep intersectional analysis of the three approaches, with the understanding that this method helps surface a key, fundamental truth. Work's value, historically, has been tethered to the race and gender of those who perform it.

The visibility of marginalized group workers in perceptions of public good, in particular the sacrifices required of them, often are rendered invisible in common-good conversations. This dynamic threatens to persist today during the 2020 COVID-19 pandemic. However, COVID-19 also has simultaneously produced a revelatory moment for open and honest conversations about prior patterns of racial and gender hierarchy. This moment calls on us to consider how racialized and gendered valuations of work shape our expectations of the sacrifices we call upon people to make for the general welfare. Thankfully, there is evidence that today's policy makers recognize that concepts of merit and the common good have a certain racialized and gendered history, and they are making wise choices to

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

3 LINDA MARTIN ALCOFF & EDUARDO MENDIETA, *IDENTITIES: RACE, CLASS, GENDER, AND NATIONALITY* (2003); LUCIUS T. OUTLAW, *ON RACE AND PHILOSOPHY* (1996); NAMITA GOSWAMI, MAEVE M. O'DONAVAN & LISA YOUNT, *WHY RACE AND GENDER STILL MATTER: AN INTERSECTIONAL APPROACH* (2014); *RACE AND RACISM IN MODERN PHILOSOPHY* (Andrew Valls ed., 2005).

signal to marginalized communities that their sacrifices for the common good are fairly valued. Indeed, New York officials chose a Black female nurse as the first person to officially receive the vaccine in the nation, signaling their clear understanding of the worth of Black and brown female bodies and the importance of care. Some will argue that this symbolism is cosmetic and does not remedy structural inequities—they would be right. Yet, symbolism, as a first step toward a racially just society, can be an important tool to shift our collective understanding of whose work merits recognition and why.

In order to begin our intellectual journey, we first must understand the story Sandel tells of how America and other industrial societies have lost their moral footing by ordering society according to merit and just deserts. As he explains, we must find our way back to a more ethical sure ground by focusing on the common good.

PART I: SANDEL'S STORY: THE DIGNITY OF WORK AND THE ALLURE OF THE COMMON GOOD

A. The Perils of Our Current Path.

The *Tyranny of Merit: What's Become of the Common Good?* offers a compelling, but incomplete, examination of the conditions that created the current populist backlash circling the globe. This backlash is represented, for example, by the election of Donald Trump in the United States and the passage of Brexit in the United Kingdom.⁴ Sandel faults political elites for the populist rage and calls on political influencers to recognize and account for the critical role they played in creating current conditions.⁵ He argues that diagnosing the populist anger as either animus against immigrants and racial minorities or as economic insecurity misses something important.⁶ Instead, he offers a full story of the tragedy of globalization: Governing elites of both political parties and on both sides of the Atlantic designed and implemented the project of globalization in such a way that it created the conditions for today's populist backlash and increased inequality.⁷

4 When describing the populist backlash that led to the election of Donald Trump as U.S. President, Sandel, again, does not take stock of the racial fractures in the electorate. In the 2016 presidential election, sixty-four percent of white voters without a college degree voted for Trump. However, only eighteen percent of Black voters without a college degree voted for Donald Trump. In fact, a larger percentage of Black voters with a college degree voted for Trump (twenty-six percent) than their non-college-degree counterparts. See PEW RSCH. CNTR., FOR MOST TRUMP VOTERS, 'VERY WARM' FEELINGS FOR HIM ENDURED (Aug. 9, 2018), <https://www.pewresearch.org/politics/2018/08/09/an-examination-of-the-2016-electorate-based-on-validated-voters/>.

5 *Id.* at 85.

6 *Id.* at 18.

7 *Id.* at 27. Although both parties promoted and ushered in the era of globalization over the past forty years, the populist backlash has been generally directed toward center-left political parties, like the Democrats in the United States, because these parties were traditionally the political home of working-class people.

Two aspects of this project—the technocratic way of defining the common good and the meritocratic way of defining winners and losers—explain much of what is wrong with America and other economically developed nations across the globe. Once these dynamics are made plain, Sandel explains, we can see that the true tragedy is that we have abandoned our prior ethos in which the dignity of work was a central part of public conversations and social esteem. We have strayed from a path in which this concept played a key role in our understanding of the common good.

As Sandel explains, the technocratic way of defining the common good is defined by experts and articulated in the language of GDP and stock market gains. Under this model, the common good, and the politics necessary to achieve it, are both rooted in economic growth, as defined by GDP, the sum of all our preferences, and a faith in markets.⁸ As such, the best way to achieve the common good, according to technocrats, is to produce economic efficiencies—an area that is the province of experts—rather than to foster a public discourse rooted in substantive moral and normative arguments—the province of the community. This technocratic approach to governance has treated many public questions as matters of technical expertise beyond the reach of ordinary people. Consequently, nonexperts, people without college or advanced degrees, have little say on key political matters. Sandel complains that the project of globalization, economic growth, and market efficiencies, even with the best of intentions, has narrowed the scope of the democratic process, hollowed out the terms of public discourse, displaced the role of civic engagement, and produced a growing sense of disempowerment and inequality.⁹

Equally concerning, Sandel explains, technocrats have ensconced a meritocratic way of defining status and just deserts in society: we pick winners and losers and do so based on the level of education they achieve and how much wealth they accumulate, rather than on anything intrinsic to the nature of the tasks they perform.¹⁰ This celebration of meritocracy and competition has decreased all Americans' investment in the so-called common good. Instead of a shared future we are interested only in clear and fair terms of competition, where people are perceived to “deserve” whatever lot they have in life. We may pity those who have not “done well” economically in life, and even offer them charity, but we feel morally superior and entitled to the good life we enjoy. Relatedly, we fail to recognize the role chance (luck of birth) and external arbitrary factors often play in our advancement (like possessing beauty and other qualities celebrated in society).

8 *Id.* at 19–22.

9 *Id.* at 31.

10 *Id.* at 155–56.

Sandel's solution is for us to recenter the contributions of all workers regardless of the market value of their services to the economy—the dignity of work.¹¹ Anyone who contributes something to the public good should be equally affirmed. In Sandel's solution, winners let go of the values of meritocracy to acknowledge that their successes are not the result of their own doing, and that they could have just as easily been among the losers.¹² In other words, by increasing our sense of contingency, Sandel argues that we will better understand our connectedness and will form bonds of solidarity. This type of solidarity would naturally lead to a society that honors “the dignity of work” such that, once again, everyone who contributes to the common good would lead lives of decency and dignity. Citizens in this environment would then develop and use their abilities in work to attain social esteem—even if they did not achieve great wealth or position.¹³ In other words, we would build a society of equal condition (rather than simply equal opportunity or equal result), in which people's contributions to the collective would be recognized beyond their going rate on the market.¹⁴

Sandel's utopian vision begs the question: What would it mean to center the work of everyone who is perceived to contribute to the public good? How is value ascertained? Put differently, after reading the book, one grows concerned that he has not fully interrogated the type of work or notion of the public good he puts forth as part of the Golden Age in America. In later sections, we explore how his silence about the race and gender of the paradigmatic worker in his analysis allows him to (perhaps unconsciously) default to a white cisgender male experience of work and dignified work conditions. Yet we contend that one cannot make true use of concepts like merit without understanding the racialized and gendered context of their origins and current conditions of manufacture. We cannot fully understand these concepts without acknowledging their prior historical deployments and even their role in subsidizing violence. Evidence suggests life structured by discussions of merit, work, and the common good is far more complicated than Sandel imagines. These propositions merit further discussion.

11 *Id.* at 205–11. Unlike the protests against injustice which look outward—e.g., the winners have cheated their way to the top because the system is rigged—the protests against humiliation are psychologically more fraught. They combine resentment of the elite with a nagging self-doubt: maybe the elite are more deserving than me, and maybe I am complicit in my misfortune after all. It is this combination of resentment and self-doubt that Sandel claims Donald Trump weaponized. Unlike previous presidential candidates dating back to Ronald Reagan, Trump did not speak of opportunity, rising, talent, or hard work. Instead, he spoke of winners and losers. The biggest divide in American politics today, according to Sandel, is between those with college degrees (the winners) and those without (the losers). In the 2016 and 2020 presidential elections, Trump won voters without college degrees by two-thirds.

12 *Id.* at 227.

13 *Id.* at 213–19.

14 *Id.* at 223–26.

B. A Clearer Vision? A Deeper Understanding of the Dignity of Work and the Common Good.

Political fights about the common good have often been waged on the back of the American worker.¹⁵ In this way, Sandel's account is not new. Indeed, in the period he celebrates—a Golden Age for the American worker, roughly between the New Deal and the 1980s—America struggled mightily over the concept of the common good.¹⁶ We did so in a dialogue about foreign outsourcing, workplace discrimination, and environmental welfare in workplace conditions.¹⁷ We attempted to determine what a living wage was, whether equal access based on race and sex could be subsidized by affirmative action, and struggled mightily to consider the pros and cons of unions.¹⁸

Sandel does not account for these background political conditions when he talks about returning to a culture that fostered “dignity in work.” Rather than a mere oversight, Sandel's failure to engage these issues is linked to a fatal flaw. He fails to recognize how race and gender fundamentally structure our concept of the American worker. Indeed, race and gender, in addition to being variables in market accounts, play a key role in the dignity and respect accorded to work in society under a notion of the common good. So, although Sandel gestures generally at race being a relevant social consideration, he has not fully reckoned with how it shapes his proposed solution. He believes racism and xenophobia are only a slice of the story behind populist anger—fear of the other and a desire to exclude. He wishes to set them aside so that he can focus on the meatier issue of the status accorded to different kinds of work. What he misses is how gender and racial bias have fundamentally structured our understanding of normal wage work, dignified conditions, and social status.

What are the concrete analytic consequences of Sandel overlooking the role of race and gender in assigning work social value? For one, he fails to consider how his historical, ideal dignified work experience was subsidized by artificial constraints—the systematic

15 STEVEN GREENHOUSE, *THE BIG SQUEEZE: TOUGH TIMES FOR THE AMERICAN WORKER* (1st Anchor Books ed. 2009); Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1379 (1993); I. BERNSTEIN & F.F. PIVEN, *THE TURBULENT YEARS: A HISTORY OF THE AMERICAN WORKER, 1933–1941* (2010).

16 SANDEL, *supra* note 3, at 27.

17 GREENHOUSE, *supra* note 15; H.E. DALY ET AL., *FOR THE COMMON GOOD: REDIRECTING THE ECONOMY TOWARD COMMUNITY, THE ENVIRONMENT, AND A SUSTAINABLE FUTURE* (1994); Bruce A. Ackerman & Richard B. Stewart, *Reforming Environmental Law*, 37 STAN. L. REV. 1333 (1985); Mark Sagoff, *Economic Theory and Environmental Law*, 79 MICH. L. REV. 1393 (1981).

18 Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); Molly S. McUsic & Michael Selmi, *Postmodern Unions: Identity Politics in the Workplace*, 82 IOWA L. REV. 1339 (1996); Robert Rabin, *The Role of Unions in the Rights-Based Workplace*, 25 U.S.F. L. REV. 169 (1991).

marginalization of female homemakers as well as *de jure* and *de facto* discrimination against Black, Indigenous, and people of color (BIPOC) and lesbian, gay, bisexual, transgender, and queer (LGBTQ) persons.¹⁹ One questions whether a market that truly integrates all available workers could replicate the Golden Age of work he imagines. Additionally, his construct of dignified work renders invisible certain kinds of feminine care work (a growing area in our service-based economy) that raise wholly new questions about how we define dignified work conditions. Is the provision of intimate care, including things like sexual services, worthy of our esteem? What is the status of emotional work in our assessment of the value of labor? This often unacknowledged, yet critical, form of work is coupled with other jobs, exceeds the boundaries of nine-to-five employment, leads to various forms of indignity in the service of others' needs, and disproportionately is demanded of BIPOC workers.²⁰

Last, Sandel misses the opportunity to consider how work's value, historically, has been tethered to the race and gender of those who perform it. To be clear, there have been dramatic differences in how work is regarded depending on the race and gender of those who perform it. The distinction between maids and janitors traces the female-male divide in the workplace; custodians versus janitors often signaled differences in race. Compensation and esteem broke along these racial fault lines. History teaches that this phenomenon of race and gender distinctions for similar work will not magically disappear; rather, it will continue to shape our current merit assessments. In order to disrupt this dynamic, one needs to have an open and honest engagement with prior patterns of race-based and gender-based bias.

The dynamics we have described are sometimes masked and unclear to Americans. In this way, the COVID-19 global pandemic provided a realization: it made it crystal clear to many how our understanding of merit, deservingness, and value continue to be shaped by unfair race and gender considerations. The pandemic ushered in a great cultural and social reckoning about how the sometimes invisible low-status service work performed by female Black and brown bodies, in fact, has extraordinary value and often does not occur in spaces that affirm dignity. Political analyses and historical accounts that seemingly elevate and acknowledge the socially valuable labor performed by Black and brown women will be critical if we are to dismantle traditional status hierarchies that shape our views about merit.

19 IRA KATZNELSON, *WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA* (2005) (describing how New Deal labor regulations were passed only by forming a coalition with Southern Democrats who demanded a definition of "employee" that excluded agricultural and domestic workers—primarily Black people and women—so as to not disrupt the Jim Crow economy in the South).

20 Lucy Williams, *Poor Women's Work Experiences: Gaps in the "Work-Family" Discussion*, in *LABOUR LAW, WORK AND FAMILY: CRITICAL AND COMPARATIVE PERSPECTIVES* 195 (Joanne Conaghan & Kerry Rittich eds., 2005).

C. *The Benefits of a Different Lens.*

1. *Discursive Theory*—There are many frames that might be used to advance the important conversation Sandel begins. For example, the book gains new power when one applies a discursive lens to explore his insights. Discursive theory suggests that when Sandel critiques the technocratic and meritocratic ethos in American society, he is *more precisely* critiquing the current language constructs used to shape debate and public conversation. Without naming it as such, Sandel is charging that there has been a discursive shift, a values and norms shift accomplished through language, which makes certain ideas and values seem unintelligible or beyond the scope and range of meaningful public discourse. Is there value outside of one's market value? Is a change in language enough? Will abandoning market approaches allow us to shift back to a conception of the public good that thinks of Americans as more than workers producing domestic products and national wealth? Sandel, it appears, agrees with the insights of the Black queer theorist Audre Lorde as applied to discursive theory. Lorde tells us that the master's tools (his discursive constructs) will never destroy the master's house, but only lead to more oppression.²¹ Sandel contends that the way out of our current morass is to abandon a market discourse; it will never liberate us.

Recent evidence, however, makes this proposition less sure. For one reason, technocratic accounts of how to fix the economy or tend to the public good can be untethered from the meritocratic notion while still adhering to a market discourse. Take, for example, technocratic arguments about guaranteed income. Although 2020 presidential candidate Andrew Yang popularized this account,²² technocrats have been calling for universal basic income to ensure that the economy keeps functioning and there are always available buyers.²³ This technocratic notion effects a dramatic shift, but still within market language. It eschews merit and deservingness inquiries. Instead, it boldly declares that the patriotic citizen is defined as a buyer, rather than a producer. Buyers power the economy, and these buyers can make wise environment choices, buy American industry, and reflect a number of important values.

The COVID-19 pandemic may be convincing others to take up this technocratic understanding of the critical role citizens play by buying things from domestic vendors.²⁴ Importantly, technocrats are on the other side of this debate as well. Some technocrats

21 AUDRE LORDE, *SISTER OUTSIDER: ESSAYS AND SPEECHES* (1984).

22 Matt Stevens & Isabella Grullón Paz, *Andrew Yang's \$1,000-a-Month Idea May Have Seemed Absurd Before. Not Now*, N.Y. TIMES (Mar. 18, 2020), <https://www.nytimes.com/2020/03/18/us/politics/universal-basic-income-andrew-yang.html>.

23 Nathan Heller, *Who Really Stands to Win from Universal Basic Income?*, NEW YORKER (Jul. 2, 2018), <https://www.newyorker.com/magazine/2018/07/09/who-really-stands-to-win-from-universal-basic-income>.

24 Michael Hiltzik, *Column: COVID-19 May Make Universal Basic Income More Palatable. That's a Good Thing*, L.A. TIMES (May 22, 2020), <https://www.latimes.com/business/story/2020-05-22/covid-19-universal-basic-income>.

argue we should reduce the dollar amount of federal stimulus checks (while providing immunity to corporations) to ensure people continue to work²⁵ and that we should end hazard pay for essential workers to keep the market functioning.²⁶ The point here is that uncritical celebration of work can happen inside or outside of market accounts, and technocrats understand the market from a variety of vantage points—some of which are not hostile to workers.

Yet Sandel’s concerns about technocrats and market culture must be taken seriously. The pandemic showed some of the worst elements of this discourse. In some quarters, there was a horrific, loudly whispered dialogue about whether the elderly should be allowed to perish and businesses allowed to open for the benefit of the economy.²⁷ It is not clear whether technocrats’ arguments challenging the economic exploitation and absence of protections for “frontline” and “essential” workers was merely spurred because technocrats feared we had not “set the right price” to get the working poor to brave the risks of disease to keep working. Market discussions forced a dialogue about the hidden utility of essential employees’ work and raised their status separate and apart from the markers of education and individual wealth production. In some ways, the technocrats’ focus on efficiency and the market created a community understanding about the need for the government to support these essential workers with free healthcare, in the form of testing and the vaccine, as well as guaranteed income to ensure that money was spent and the market would keep functioning. In short, by using a discursive lens, we can see that market language (and the expertise of certain technocrats) can be usefully redirected to communitarian norms. Technocrats are not in and of themselves a barrier to communitarian-focused change.

2. Structure of Government—A structure of government inquiry produces different insights. Specifically, Sandel’s critique about market language also calls on us to reflect on how different segments of government pick up these constructs and further shape merit understandings. We should be wary of technocratic language moving into deliberative

25 Mike DeBonis, Jeff Stein & Rachel Siegel, *Lawmakers Reach Compromise Over GOP Proposal to Rein in Fed’s Powers, Clearing Path for a Stimulus Package Deal*, WASH. POST (Dec. 19, 2020), <https://www.washingtonpost.com/us-policy/2020/12/19/stimulus-talks-raise-against-government-shutdown-deadline/>.

26 Laura Stater, Molly Kinder & Julia Du, *The COVID-19 Hazard Continues, but the Hazard Pay Does Not: Why America’s Essential Workers Need a Raise*, BROOKINGS (Oct. 29, 2020), <https://www.brookings.edu/research/the-covid-19-hazard-continues-but-the-hazard-pay-does-not-why-americas-frontline-workers-need-a-raise/>.

27 Editorial Board, *Why ‘Choosing’ Between the Elderly and the Economy Is a Phony, Barbaric Choice*, WASH. POST (Mar. 27, 2020), https://www.washingtonpost.com/opinions/risking-millions-of-lives-to-save-the-economy-is-a-terrible-idea/2020/03/27/f4726236-6fa4-11ea-aa80-c2470c6b2034_story.html; Noah Millman, *The Conservatives Who Would Sacrifice the Elderly to Save the Economy*, THE WEEK (Mar. 17, 2020), <https://theweek.com/articles/902582/conservatives-who-sacrifice-elderly-save-economy>.

places that were originally intended to allow for more expansive philosophical debates about public welfare and the common good. When Sandel talks about “the government,” he doesn’t distinguish between executives and legislatures. Rather, he refers to presidents and parties.²⁸ But legislatures are key. When we punt moral issues to technocratic experts instead of keeping them with elected legislators—think lobbyists, administrative agencies, and issue experts—public-good questions and decisions get isolated from the public conversations about problems the government is trying to solve.²⁹

Ironically, one of the key centers of power in controlling discursive shifts, the courts, are given short shrift in Sandel’s discussion. Guided by precedent and logical reasoning, the courts would integrate considerations of moral philosophy, political theory, community norms, and other understandings to inform law. However, through legal experts, legislation stressing technocratic values, and deference to administrative agencies, even the courts have fallen prey to the dynamics of seeing the public good through a market lens. Although courts have a role to play, we conclude that legislatures, more than the executive or the judiciary, are probably the best place for such moral debates to take place. The function of the legislature, after all, is to debate societal issues in public view.³⁰ The executive and its alphabet soup of departments and agencies is not as well positioned to have these sorts of debates given the unitary executive theory of the U.S. presidency.³¹

3. Intersectional Perspectives—Our third approach invites readers to take advantage of intersectional perspectives. The authors have peeled off interesting questions about the book by consistently raising a challenging question: Do Sandel’s claims match up with the experiences and claimed history of those at the margins? Do they match with the perspectives generated by a Black woman or a Muslim man? We know that understandings of merit, worth, and the common good are shaped by different positionalities and different relationships to American history. Despite our occupation of different marginalized positions, we did find points of agreement with Sandel. We agree that Americans have been encouraged to dutifully celebrate white-collar, wealthy technocrats and the well educated

28 SANDEL, *supra* note 3, at 17–31.

29 Graeme T. Boushey & Robert J. McGrath, *Experts, Amateurs, and Bureaucratic Influence in the American States*, 27 J. PUB. ADMIN. RSCH. & THEORY 85 (2017), <https://doi.org/10.1093/jopart/muw038>; Lee Drutman & Steven Teles, *Why Congress Relies on Lobbyists Instead of Thinking for Itself*, THE ATLANTIC (Mar. 10, 2015), <https://www.theatlantic.com/politics/archive/2015/03/when-congress-cant-think-for-itself-it-turns-to-lobbyists/387295/>; H. Owen Porter, *Legislative Experts and Outsiders: The Two-Step Flow of Communication*, 36 J. POL. 703 (1974).

30 THE FEDERALIST NO. 51 (James Madison).

31 Stephen Skowronek, *The Conservation Insurgency and Presidential Power: A Developmental Perspective on the Unitary Executive*, 122 HARV. L. REV. 2070 (2010); JEREMY D. BAILEY, *The New Unitary Executive and Democratic Theory: The Problem of Alexander Hamilton*, 102 AM. POL. SCI. REV. 453 (2008), <https://doi.org/10.1017/S0003055408080337>.

as drivers of commerce and innovation.³² In some quarters, Americans are counseled to look past the blue-collar worker as a quaint relic of the past.

Our experiences during the height of the pandemic, however, also show a different story emerging, one that resonated more deeply. In the early days of COVID-19, Americans were offered a new account about the heroism and value of blue-collar workers, particularly the ones who previously had seemed easy to ignore. We were encouraged to lionize our “essential” and “frontline” workers who stock store shelves and care for the sick.³³ We grew more aware and indeed suspicious of those faceless importers and exporters that seem to be driving dangerous price gouging, but also ensure we have goods we need. And we grew increasingly wary of those global travelers whose business interests make them carry knowledge, capital, and, yes, diseases across time zones and geographical boundaries. Now, nearly a year into the pandemic, we find ourselves in the center of a disease puzzle that renders visible the fit between key ideas that Sandel says fundamentally altered our understanding of the American social compact: There is a lot of high-social-value but low-market-value work being done by members of society. These workers deserve to be seen and heard.

PART II: SEEING MERIT IN 20/20: INTERSECTIONAL REVELATIONS AND A NEW LENS ON THE DIGNITY OF WORK

Intersectionality analysis is a critical tool that renders visible otherwise hidden aspects of racial and gender hierarchies, including those at the center of the Golden Age for the dignity of work—a time when certain workers, primarily BIPOC people and women—were systematically excluded from the workforce or exploited because race, gender, national origin, or immigration status made them vulnerable. Intersectionality also helps us explain how the pandemic uncovered dynamics that shape our valuation and even our recognition of various kinds of work today. Indeed, COVID-19 has forced a cultural and ethical reckoning and dialogue about race and gender hierarchy in the valuation of labor. Additionally, it has forced an accounting of how claims regarding the common good and the value of one’s role in society ring hollow when we do not consider how race and gender subordination factor into representations of the common good and public welfare.

Frontline and essential workers, for example, received little to no personal protective equipment (PPE) and were prevented from social distancing—the list of coercive conditions was endless.³⁴ What these workers learned was, once policy makers’ supportive language was

32 SANDEL, *supra* note 3, at 81–85.

33 Catherine Powell, *Color of COVID and Gender of COVID: Essential Workers, Not Disposable People* (Fordham L. Legal Stud. Rsch. Paper No. 3713395, last revised Mar. 8, 2021), <https://ssrn.com/abstract=3713395>.

34 Clare Hammonds et al., *Stressed, Unsafe, and Insecure: Essential Workers Need a New, New Deal* (June 5, 2020), <https://www.umass.edu/employmentequity/stressed-unsafe-and-insecure-essential-workers-need-new-new-deal>.

pushed aside, they were expected to work for minimum wage to support a society that had little to no regard for them. They were revealed to be essentially disposable by American society even as they played a critical role in the market. Moreover, even technocrats, like medical doctors, were not immune from the race and gender bias that fueled society's disregard for frontline and essential workers. Take, for example, the tragic story of Susan Moore, a Black woman and medical doctor, who died from COVID-19 complications after she was discharged from a hospital where she was treated poorly because of her race and gender.³⁵

Yet, for today's frontline workers, Sandel's proposal to abandon the market logic to prioritize the public good has provided no salvation to Black and brown women tasked with serving our needs. Consider, for example, how the various constructs have been offered to show appreciation and build support for previously invisible Black and brown bodies during the pandemic—stepping away from pure market evaluations.³⁶ These constructs included requesting support for our “frontline” workers using militaristic language to ensure we understood they were doing hand-to-hand combat with the virus to save us. Many of them literally died to assist us, caring for the sick, policing the tension between us, and ensuring the distribution of food and other necessary supplies.³⁷ Alternatively, these employees were referred to as our “essential” workers, suddenly named as those we could not live without. Again, many of these “frontline” and “essential” workers were people of color, immigrants, and women.³⁸ Yet our patriotic celebrations did little to assuage the pain of Black and brown disproportionately women workers who saw high death rates and little support from their employers.

Disturbingly, COVID-19 revealed how the notion of work for the “common good” and the dignity of work can be used to mask coercive and exploitative conditions. For many, these metaphors about essential and frontline workers were empty and insulting. These workers were represented as patriotically desiring to go out and save us all, even as they complained they were not being given the basic safety protections they needed to ensure their health and the health of their families. Their self-sacrifice seemed even more violent, given the police violence and social violence Black, brown, and Asian people faced during the pandemic—from police assaults to public insults and confrontations.³⁹ Ironically,

35 John Eligon, *Black Doctor Dies of Covid-19 After Complaining of Racist Treatment*, N.Y. TIMES (Dec. 24, 2020), <https://www.nytimes.com/2020/12/23/us/susan-moore-black-doctor-indiana.html>.

36 Catherine Thorbecke, “Heroes or Hostages?": Communities of Color Bear the Burden of Essential Work in Coronavirus Crisis, ABC NEWS (May 22, 2020), <https://abcnews.go.com/Business/heroes-hostages-communities-color-bear-burden-essential-work/story?id=70662472>.

37 *Id.*

38 *Id.*

39 Jack Healy & Dionne Searcey, *Two Crises Convulse a Nation: A Pandemic and Police Violence*, N.Y. TIMES (June 4, 2020), <https://www.nytimes.com/2020/05/31/us/george-floyd-protests-coronavirus.html>; Angela R. Gover et al., *Anti-Asian Hate Crime During the COVID-19 Pandemic: Exploring the Reproduction of Inequality*, AM. J. CRIM. JUST. 1 (2020).

industries that always had coercive conditions were now examined because of the public health risks they posed to us all and the things the market needs: farm workers with few sanitation sites, meat workers laboring elbow to elbow and initially forced to buy their own PPE.⁴⁰ Even when these workers were not represented as providing service to the market, providing service to their community proved to be a politically charged proposition. Many will argue that the profound support that mushroomed for Black Lives Matter during this same period was tied to this understanding: that Black and brown people who worked to keep society functioning through service jobs required more from their fellow citizens in the form of dignity. This was a proposition that exceeded market logic and exceeded their role as workers. Sandel's analysis provides no answer on how to name their pain, meet it, and build a path to an inclusive and participatory democratic union.

In short, although Sandel's book is helpful, it needs an account of the dignity of work that more dynamically responds to race and gender hierarchy in conceptions of work. Indeed, even in the Golden Age of the dignity of work, there were always workers who worked without dignity. Black and brown workers were not enslaved, but they were often locked out of fair labor conditions by legal restrictions and later informal, but equally pernicious, barriers that make up systemic discriminatory structures that still exist today.⁴¹ There is some shadow of recognition of this as workers today reflect on the conditions of undignified exploitative work in the economy of the global market, like outsourcing, where Black and brown bodies from outside the United States can be substituted for simple tasks and their products transported. One refrain is that the dignity of work in the United States is more at risk because of this global marketplace. Yet this depiction of the global marketplace as a threat is part of the nationalism dynamic that Sandel worries about. The technocrats and their focus on markets—and a fair market price—have frightened the American worker that seeks protection within the bounds of the nation and the return of American jobs at home. That return home is said to promise us dignity, if only, as the Republicans instruct, the weight of domestic regulation does not make the cost of doing business so high that we depress industry. But if we do not attend to the racial and gendered nature of the construction of work domestically, we will find that the same conditions yet again cohere, with the expected workers remaining at the margins.

40 Brenda Eskenazi et al., *Prevalence and Predictors of SARS-CoV-2 Infection Among Farmworkers in Monterey County, CA* (Dec. 2, 2020), <https://news.berkeley.edu/2020/12/02/california-farmworkers-hit-hard-by-covid-19-study-finds/>; Kimberly Kindy, *More than 200 Meat Plant Workers in the U.S. Have Died of COVID-19. Federal Regulators Just Issued Two Modest Fines*, WASH. POST (Sept. 13, 2020), https://www.washingtonpost.com/national/osh-covid-meat-plant-fines/2020/09/13/1dca3e14-f395-11ea-bc45-e5d48ab44b9f_story.html.

41 MARTHA MINOW, IN BROWN'S WAKE: LEGACIES OF AMERICA'S EDUCATIONAL LANDMARK (2010); Rebecca Brown & Omar Noureldin, *Congress Has Constitutional Power to Set National Police Conduct Standards*, BLOOMBERG LAW (June 8, 2020), <https://news.bloomberglaw.com/us-law-week/insight-congress-has-constitutional-power-to-set-national-police-conduct-standards>.

When Sandel talks about valuing all work, whether or not it contributes to market value, he may be gesturing toward recognizing the gender question. That is, the Golden Age of work was not possible but for the invisibility and lack of regulation and compensation for domestic work that was predominantly performed by women. This domestic work (i.e., childcare and house care) delivered the American white male worker to the market, ready and able. Once these background conditions of work are revealed, the desire to return to the Golden Age of work raises more profound questions. Now that domestic labor is seen and valued and, indeed, is even assigned a market value for those who must pay for these services, how will this work be valued and what constitutes conditions of dignity? Using gender as a lens and interrogating the terms and conditions of work in the pink-collar economy, the service economy, raises important questions about what constitutes dignified work. To be clear, we cannot discuss the dignity of work without considering the subordination and subjugation of bodies necessary to prepare that laborer for the market. We cannot consider the dignity of work without a full understanding of the commercial value of intimate labor, emotional and otherwise, to our current service economy.

One alternative under intersectionality theory is to explore these questions through the construct of the “welfare queen”: a woman whose domestic labor is devalued. The “welfare queen,” a reviled political construct in American society, is used to forestall conversations about the proper dividing line between public and private life and about the proper scope of our citizenship obligations and the fiduciary obligations of the nation.⁴² Using the trope of the Black, single, unemployed mother who milks the state for resources, state officials instruct Americans that anyone who makes claims for public support is suspect and they should instead submit their labor to the market.⁴³ Masked in racial stereotypes, the construct is used to discipline certain mothers, telling them that Black and brown motherhood is devalued and true citizenship requires them to submit to wage employment. Increasing market economics have provided that, even in two-parent homes, maternal labor is so devalued that women are told they must engage in paid labor work if only to keep their families economically afloat.⁴⁴ To be clear, market arguments have grown so powerful that all stay-at-home moms in economically stressed families now face the specter of the “welfare queen” when they look in the mirror.⁴⁵ If they choose domestic care and family obligations over earning a wage, they are

42 Camille Gear Rich, *Reclaiming the Welfare Queen: Feminist and Critical Race Theory Alternatives to Existing Anti-Poverty Discourse*, 25 S. CAL. INTERDISC. L.J. 257, 264–70 (2016) (discussing how the racialized construct of the welfare queen has been strategically deployed by pundits to alienate Americans from political interests and rights claims that could challenge existing exploitative institutional arrangements in American democracy).

43 *Id.*

44 *Id.*

45 Catherine Powell & Camille Gear Rich, *The “Welfare Queen” Goes to the Polls: Race-Based Fractures in Gender Politics and Opportunities for Intersectional Coalitions* (Fordham Law Legal Stud. Rsch. Paper No. 3605810, 2020), <https://ssrn.com/abstract=3605810>.

perceived as self-indulgent and not committed to the welfare of their families. Critical examinations of “welfare queen” discourse invite us to consider the role of private-sphere childcare in enhancing the wealth of the nation, the ways race is used to price and value labor, and the role we have in reimagining relationships between the citizen and the state to ensure child rearing is a right rather than a privilege accorded only to the wealthy.

In summary, the authors submit that the vast majority of Americans have a complicated relationship to this Golden Age that centered the dignity of work. They understand that earlier workers who looked like them were systematically driven from paid employment or were underpaid and exploited because race, gender, national origin, or immigration status made them vulnerable. Women still only make eighty-one cents on the dollar when compared with men.⁴⁶ The gender pay gap is even more striking when race is added to the mix—Black women make only sixty-one cents on the dollar when compared with white men.⁴⁷ The mantra “equal pay for equal work” is as aspirational today as it was in 2009, when President Obama signed the Lilly Ledbetter Fair Pay Act into law. And despite the 2015 Supreme Court ruling recognizing same-sex marriage as a fundamental constitutional right, nearly fifty percent of LGBTQ+ people are not “out” at work for fear of discrimination in the workplace.⁴⁸ As such, it may be difficult for historically marginalized people to jump onto the contemporary “dignity of work” bandwagon.⁴⁹ From their vantage point, it seems the analysis is at least implicitly focused on making white men without college degrees feel better about themselves in the contemporary economy. Yet this group’s utopia gestures back to a historical past that was unfair and seems to bracket the reality that many marginalized people are still fighting for basic dignity in many domains.⁵⁰

CONCLUSION

New York officials ultimately answered the question about who should be first in line for the vaccine in a satisfying fashion. They chose Sandra Lindsay, a critical care nurse and a

46 *Gender Pay Gap Statistics for 2020*, Payscale, <https://www.payscale.com/data/gender-pay-gap>.

47 Jocelyn Frye & Robin Bleiweis, *Rhetoric vs. Reality: Making Real Progress on Equal Pay*, CTR. FOR AM. PROGRESS (2019), <https://www.americanprogress.org/issues/women/reports/2019/03/26/467778/rhetoric-vs-reality-making-real-progress-equal-pay/>.

48 A WORKPLACE DIVIDED: UNDERSTANDING THE CLIMATE FOR LGBTQ WORKERS NATIONWIDE (2018), <https://hrc-prod-requests.s3-us-west-2.amazonaws.com/files/assets/resources/AWorkplaceDivided-2018.pdf>.

49 Dylan Scott, *The “Dignity of Work,” Sherrod Brown’s Plan for Democrats to Win Back Working-Class Voters, Explained*, VOX (Mar. 7, 2019), <https://www.vox.com/policy-and-politics/2019/3/7/18243447/sherrod-brown-not-running-for-president-2020-election-dignity-of-work>.

50 Omar Noureldin & Brenda Abdelall, *Communities Under Assault: Improving Federal Hate Crimes Enforcement* (2018), <https://www.mpac.org/publications/policy-papers/communities-under-assault-improving-federal-hate-crimes-enforcement.php>; Rebecca Brown & Omar Noureldin, *Congress Has Constitutional Power to Set National Police Conduct Standards*, BLOOMBERG LAW (June 8, 2020), <https://news.bloomberglaw.com/us-law-week/insight-congress-has-constitutional-power-to-set-national-police-conduct-standards>.

Black woman working in a New York-area hospital.⁵¹ Was this an example of what Sandel hopes we will obtain: a world in which people who contribute to the common good, regardless of the wage earned, are highly valued and respected in society? Centering the conversation around the dignity of her work, instead of her market value, could have made sense—a decision to inoculate her as a reflection on the nation’s character. Some of the rhetoric about her inoculation suggests this is the case. In other accounts, Lindsay’s deservingness directly attached to her role as an “essential” worker powering the economy, like grocery store clerks, public transit operators, and restaurant servers; these workers’ value was tethered to the demand that we keep our market economy running by whatever means necessary. Perhaps she was chosen as a low-level technocrat? She is not among the most elite of the professional class (i.e., medical doctors, epidemiologists, medical researchers, other public health professionals), but she is highly educated and “deserving” under a traditional merit paradigm and so should be first in line to receive this critical medication. These messages cannot be cleanly separated out when one examines coverage of New York’s choice to inoculate her ahead of everyone else.

One thing is clear: modern philosophy here can gain insight from contemporary politicians as they navigate our racial shoals. Public officials understood Lindsay’s status as a Black woman was equally as important as her profession in her symbolic role in the vaccine campaign. First, officials understood that the symbolic resonance created by their choice for the first vaccinated person would be meaningful if it was someone who, through the dignity of her work and care, was visible to us in the way that the elite experts are not. Second, officials recognized that when allocating the vaccine, race and gender must play a role in public communications about the conception of the public good and the willingness to take communitarian action. Black and brown women service workers had faced the brunt of COVID-19 for the nation; fairness required that they should be first in line for the cure. Under this logic, Lindsay was chosen to receive the vaccine because she selflessly exposed herself to danger in this time of need and so many women from her community took on this burden. The apparent racial symbolism was not lost on Lindsay; she said she wanted to “inspire people who look like me” to contribute to the effort.⁵²

In total, by choosing Lindsay, officials delivered a combined message about race, gender, and merit: demonstrating that the sacrifices Black and brown women had made for the common good were being recognized, rewarded, and affirmed. The choice of Lindsay affirmed that Black and brown women stand among those most deserving and demonstrated visible proof of their “place in line” for the vaccine, which also affirms that the pathway to advancement and recognition in society is open to all comers. This

51 Sharon Otterman, “*I Trust Science,*” Says Nurse Who Is First to Get Vaccine in U.S., N.Y. TIMES (Dec. 14, 2020), <https://www.nytimes.com/2020/12/14/nyregion/us-covid-vaccine-first-sandra-lindsay.html>.

52 *Id.*

understanding of open access is equally important in cultivating an understanding of and commitment to the common good.

The choice to be inoculated also represents another kind of service, an issue Lindsay spoke to as well. Getting the vaccine was a demonstration of faith in government process; Lindsay showed a willingness to assume some limited medical risk in order to establish the herd immunity that will protect us as a collective. Black Americans know they have been last in line for cures but first in line for medical experiments.⁵³ Consequently, faith is difficult. Some media pundits have bemoaned Black mistrust in medical professionals as an obstacle to full inoculation, but they have been met with nuanced commentary that explains that Blacks' historical memory includes the Tuskegee experiment and others, in which Black people were unwittingly used as controls and subjected to disease in service of the "common good."⁵⁴ This is part of a larger, longer story in which Black and brown citizens have evinced a willingness to be of service to our democracy—but are exploited.⁵⁵ Again, this issue emphasizes that our account of the common good should factor in acts of service outside of the field of "work."

In short, willingness to bear burdens for the good of society varies for different communities because of their distinctly different, often fractious relationships to the State in American history. Willingness to sacrifice is tied to whether the burdens one has borne for the public good in the past have been named and acknowledged as part of the American story. True willingness comes only when we acknowledge that those "asked" to bear burdens for the public good in the past have done so involuntarily and are at risk of being forced again. Our current relative equality ensures that persons from previously silenced and marginalized communities will not bear these burdens in silent anonymity ever again.

In summary, Sandel's insight about the need for a common understanding and shared commitment to the common good gestures toward a past that cannot and should not be reclaimed. Our racial, gendered, and class fractures have made it clear that the American public is not and should not see itself as a homogeneous mass. Different constituencies have different views and different levels of trust in the government's ability to execute

53 Dezimey Kum, *Why Black Americans Distrust the New COVID-19 Vaccines*, TIME (Dec. 28, 2020, 8:30 AM EST), <https://time.com/5925074/black-americans-covid-19-vaccine-distrust/>.

54 Tina Sacks, *When Black People Are Wary of Vaccine, It's Important to Listen and Understand Why*, CNN (Dec. 18, 2020), <https://www.cnn.com/2020/12/17/opinions/african-americans-covid-vaccine-sacks/index.html>.

55 Jatia Wrighten, *Black Women and the Burden of U.S. Democracy*, VA. COMMONWEALTH UNIV., <https://chs.vcu.edu/archive/election-2020/expert-analysis/black-women-and-the-burden-of-us-democracy.html> (last visited Dec. 31, 2020); Maureen Pao, *Cesar Chavez: The Life Behind a Legacy of Farm Labor Rights*, NPR (Aug. 12, 2016), <https://www.npr.org/2016/08/02/488428577/cesar-chavez-the-life-behind-a-legacy-of-farm-labor-rights>); Peter Baker, *The Tragic, Forgotten History of Black Military Veterans*, NEW YORKER (Nov. 27, 2016), <https://www.newyorker.com/news/news-desk/the-tragic-forgotten-history-of-black-military-veterans>.

on its alleged fiduciary obligation to others. Different communities will unite around common goals for different reasons, rather than marching to a steady drumbeat in agreement about the common good. The vaccine rollout offers this lesson. One cannot talk about the public good without recognizing the ways in which certain populations understand that they are only newly and conditionally admitted to that conception of shared public interest. They know all too well that certain groups have labored in silence and invisibility, and that faith has allowed them to be sacrificed to serve others. Therefore, when asked to exercise that leap of faith now, they will need acknowledgment of the multiple truths of our past and the different stories we need to tell about our common, shared future. Sandel is certainly right that everyone must be acknowledged and given status and dignity in society for their work. But our challenge is deeper. America will require a fuller interrogation of what work is and a broader sense of our identities as people who offer service to their communities, whether through labor, reproduction, exposure to harm, or providing care. We cannot in this brief essay fully explore what that touchstone should be, but Sandel's provocative book inspired us to continue to ask these questions as we build a bridge to a more unified, racially just, and community-focused tomorrow.