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### The Missing Jurisprudence of Merit, 11 B.U. Pub. Int. L.J. 141 (2002)

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## ARTICLES

### THE MISSING JURISPRUDENCE OF MERIT

ALLEN R. KAMP\*

#### I. INTRODUCTION

This article examines and dispels the pervasive assumption that our society legally mandates the distribution of rewards based on merit. The assumption provides justification for the frequently held view that anti-discrimination laws and affirmative action policies undermine our supposed merit based system. No body of law defines merit, measures merit, or selects on the basis of merit; hence, "the missing jurisprudence of merit."

As an initial matter, this article describes how certain rhetoric uses "merit" to argue against anti-discrimination laws and affirmative action. The article next discusses the relationship between anti-discrimination statutes and the dominant system of employment-at-will in private business. The following sections discuss merit-based student admissions in academia; how the academic definition of merit has changed, and how such cases as *Hopwood v. Texas*<sup>1</sup> fit into the academic selection process. The discussion continues with two exceptions to the thesis, areas of the law where merit plays a role. The exceptions include merit as a defense to charges of employment discrimination and merit selection in civil service.

In conclusion, this article discusses the problems a lack of merit jurisprudence causes, including the flourishing of rhetoric against anti-discrimination laws and our nation's inability to define and apply a merit system. This article does not claim that merit is nonexistent, or that selection decisions should not include considerations of merit. Rather, this article argues that society should use merit in decisions, but its use must be rigorously defined, studied, and debated.

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<sup>1</sup> 78 F.3d 932 (5th Cir. 1996).

## II. THE RHETORIC AND REALITY OF MERIT

In the literature on discrimination, affirmative action, disparate impact, and racial preferences, it is assumed, though seldom subjected to critical scrutiny, that merit is, and should be, the determining factor in employment and academic selections.<sup>2</sup> Critics consider anti-discrimination legislation and affirmative action to be deviations from a merit-based system.<sup>3</sup> These critics believe affirmative action and anti-discrimination laws interfere with the right to be rewarded on the basis of perceived merit.<sup>4</sup> However, in reality, no such right exists.

During Senate debates on the Civil Rights Act of 1964, opponents argued that anti-discrimination laws would work against an existing merit-based system.<sup>5</sup> Senator Lister Hill of Alabama "feared that federal civil rights bureaucrats might find violations on a federally aided construction job 'because there were less [sic] carpenter, proportionally, of a given race than of another race, and that the job was not racially balanced.'" <sup>6</sup> Senator Hill's comments reflect the fear that racial balancing would lead to hiring practices that ignored the relative qualifications of applicants in an effort to fill racial quotas. Such a quota system could ring the death knell for a merit-based selection system.<sup>7</sup>

While Congress was debating the Civil Rights Act, the Illinois Fair Employment Commission decided *Motorola, Inc. v. Illinois Fair Employment Practices Commission*.<sup>8</sup> The Illinois decision questioned the legitimacy of an employment test, neutral on its face, which disproportionately affected minorities.<sup>9</sup> The hearing examiner held that the employment test was unfair to "culturally deprived and . . . disadvantaged groups."<sup>10</sup> The ruling gained public notice, receiving comment by *The New York Times* and protest by the *Chicago Tribune* and the Illinois Manufacturing Association.<sup>11</sup> In response to *Motorola*, Senators Joseph S. Clark and Clifford P. Case reassured the Senate that:

There is no requirement in Title VII that employers abandon bona fide qualification tests where, because of differences in background and education, members of some groups are able to perform better on these tests than

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<sup>2</sup> See generally, HUGH DAVID GRAHAM, THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY 1960-1972 (1990).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 140.

<sup>7</sup> See generally, HUGH DAVID GRAHAM, THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY 1960-1972 (1990).

<sup>8</sup> 215 N.E. 2d 286 (Ill. 1966).

<sup>9</sup> See generally, GRAHAM, *supra* note 2; see also *Motorola, Inc. v. Ill. Fair Employment Practices Comm.* 215 N.E. 2d 286 (Ill. 1966); MICHAEL J. ZIMMER, CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 442-54 (5th ed. 2000).

<sup>10</sup> *Motorola, Inc.*, 215 N.E.2d at 288.

<sup>11</sup> GRAHAM, *supra* note 2, at 149-50.

members of other groups. An employer may set his qualifications as high as he likes, he may test to determine which applicants have these qualifications, and he may hire, assign, and promote on the basis of test performance.<sup>12</sup>

It may take a moment to realize the irony or rather idiocy of this debate. Prior to the enactment of Title VII, it was perfectly legal to have 100% white male quotas and totally unbalanced or balanced ratios of employees in any workforce. No one – least of all the opponents to the Civil Rights Act of 1964—could pretend otherwise. These opponents mounted a “record-setting Filibuster . . . that had consumed 82 working days, 63,000 pages of the *Congressional Record*, and ten million words.”<sup>13</sup> Opponents to the Civil Rights Act wanted to be allowed to choose employees, not on the basis of merit, but rather on the grounds of sex, race, national origin, and color.

Richard Epstein, a prominent critic of anti-discrimination legislation, assumes that society rewards merit and argues that civil rights laws deviate from that practice.<sup>14</sup> He indicates that employers choose employees based on merit as a natural function of the market.<sup>15</sup> According to Professor Epstein, Title VII of the Civil Rights Act interferes with an employer’s choice by replacing subjective preferences, such as intelligence, initiative, honesty, and reliability, with external preferences that disregard merit.<sup>16</sup> Civil rights laws, he argues, encourage disadvantaged classes to blame external forces for their lot in life, to adopt defeatist attitudes, and aspire to little more than making excuses and playing the role of victim.<sup>17</sup> Professor Epstein contends that civil rights laws have caused disadvantaged classes to lack self esteem and the drive to succeed based on their own intelligence and work ethos.<sup>18</sup>

The observation that American society bases rewards on ascertainable and definable merit is commonly expressed by politicians and found in the press and scholarly literature. A Wall Street Journal editorial praising Scholastic Aptitude Tests (“SAT”) credits the SAT with god-like powers of judging merit:

As to the SATs themselves, a bane for most high school students, the truth is they are highly accurate predictors of college performance, of who is and isn’t likely to graduate. They were also designed, as a study by Washington attorney Lenore Ostrowsky notes in the publication Academic Question, to “see through” inferior education and the results of poverty, to discover cognitive ability and uncover talent. This they have done the past 75

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<sup>12</sup> *Id.* at 151.

<sup>13</sup> *Id.*

<sup>14</sup> See generally, RICHARD EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS (1992).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

years.<sup>19</sup>

If one has merit, conventional wisdom asserts, one deserves rewards. The Heritage Foundation<sup>20</sup> cites to "the 'inherent' right to obtain whatever economic or other rewards he (or she) has earned by virtue of merit . . . ."<sup>21</sup>

Scholars frequently assume merit principle regulates selection. Professor Jody Davis Armour argues that the merit principle ensures that every person gets no more and no less than what he "deserves."<sup>22</sup> What an individual deserves is judged by specific "standards and approaches," precisely calculated for their "accuracy, neutrality, and objectivity."<sup>23</sup> Ideally, the results of these standards and approaches will not dramatically alter with changes in the testing environment.<sup>24</sup> Additionally, merit standards must not be applied in a self serving or hypocritical manner.<sup>25</sup> Professor Armour argues "[t]hat the standards and approaches currently employed to gauge deserts are neither accurate, neutral, nor objective in relation to blacks and other marginalized groups."<sup>26</sup> This article contends, however, that there is no merit principle to start out with.

Supporters used a merit-based rhetoric to argue in support of California's Proposition 209, which placed a ban on preferential treatment.<sup>27</sup> Proposition 209 created a new cause of action where a party suffered discrimination, and a separate cause of action when another was preferred.<sup>28</sup> Supporters of this proposition sought to establish a functional meritocracy that notices neither race nor gender in fields such as construction and education.<sup>29</sup>

In support of the tenets proposed in Proposition 209, Governor Pete Wilson of California stated in a 1996 article that "achievement of diversity cannot be justification for either lowering qualifications (which is a disservice to the public) or preferring race/gender to merit (which is a disservice to the meritorious

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<sup>19</sup> *Blaming The SATs*, WALL ST. J., June 10, 1999 at A26.

<sup>20</sup> The Heritage Foundation was founded in 1973 as a research and educational institute whose mission is to formulate and promote conservative public policies based on principles of free enterprise, limited government, individual freedom, traditional American values, and a strong national defense. *The Heritage Foundation: Who We Are* at <http://www.heritage.org/whoweare/> (Feb 18, 2002).

<sup>21</sup> MICHAEL E. HAMMOND, THE DEPARTMENT OF JUSTICE IN MANDATE FOR LEADERSHIP 477-78 (Charles Heatherly ed., 1981).

<sup>22</sup> Jody Davis Armour, *Hype and Reality in Affirmative Action: A Preliminary Analysis*, 68 U. COLO. L. REV. 1173, 1186 (1997).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> CAL. CONST., art. I, § 31.

<sup>28</sup> See Allen R. Kamp, *Anti-Preference in Employment Law: A Preliminary Analysis*, 18 CHICANO-LATINO L. REV. 59, 62-63 (1996).

<sup>29</sup> See Yxta Maya Murray, *Merit-Teaching*, 23 HASTINGS CONST. L.Q. 1073, 1074 (1996).

applicants).<sup>30</sup> Governor Wilson stated that society should ensure fair competition and rewards for hard work.<sup>31</sup> He argued that affirmative action destroys competition by giving racial/gender preference.<sup>32</sup> Wilson urged that this destruction not be allowed to reach American children's individualized potential to compete.<sup>33</sup> In conclusion, he describes an American tradition of entitlement to rewards for hard work.<sup>34</sup>

This emphasis on merit has drawn some scholars to assume that a cause of action exists for being denied the rewards of merit, or that one can make a claim based on having more merit. In an otherwise brilliant article, Professors Susan Sturm and Lani Guinier state that, in cases like *Hopwood v. Texas*, plaintiffs advance the same two claims when suing on outcome oriented programs aimed at alleviating under-representation of certain groups.<sup>35</sup> First, plaintiffs claim they are more meritorious than those benefited by the affirmative action.<sup>36</sup> Second, plaintiffs claim entitlement to the positions, as a matter of fairness.<sup>37</sup> These claims illustrate the belief that education and employment opportunities must derive from superior qualifications.<sup>38</sup> Further, these claims demonstrate the unfairness of eliminating use of conventional merit standards. The plaintiffs base their claim on the assumption that they merit the sought after position.<sup>39</sup>

### III. MERIT AS A LEGAL REQUIREMENT

It is ironic, paradoxical, and even surprising that there is no right to be considered on merit and that *Hopwood* was not – could not be – basing her claim on merit. The United States Constitution and the civil rights laws prohibit discrimination on various grounds, but do not require merit selection.

#### A. Employment

The established principle underlying employment selection is employment

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<sup>30</sup> Pete Wilson, *The California Civil Rights Initiative: The Principles of Equal Opportunity*, 27 U. WEST L.A. L. REV. 295, 297 (1996).

<sup>31</sup> *Id.* at 298-99.

<sup>32</sup> *Id.* at 299.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 300.

<sup>35</sup> See Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953, 963 (1996). *Hopwood* bears resemblance to the paradigm civil servant affirmative action. In such cases, the white civil servant claims to have scored higher on the service exam, but lost the position to a person of color or a woman. See *id.* at 960 (citing *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); *Johnson v. Transp. Agency*, 480 U.S. 616 (1987)).

<sup>36</sup> *Id.* at 963.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 963-64.

at will. In the words of Professor Epstein, the freedom to contract "allows all persons to do business with whomever they please for good reason, bad reason, or no reason at all."<sup>40</sup> The reader will note that there is a contradiction in Epstein's writings: it is assumed both that employers will reward virtue and that their decisions may be irrational. This contradiction will be further explored later in my article. Title VII was enacted as an exception to the rule of employment at will. During the debate over its adoption, Senator Hill charged that Title VII would require racial preferences.<sup>41</sup> Andrew Biemiller, an AFL-CIO lobbyist, stated that Title VII's regulations "only forbid discrimination in employment 'because of' race or religion . . . and do not affect an employer's right to hire whomever he wants for whatever other reason."<sup>42</sup> No party to the debate mentioned that Title VII mandated merit selection in any way.

The basic principle of employment law, as discussed by Professor William R. Corbett, is the powerful concept of employer prerogative.<sup>43</sup> As stated by the Tennessee Supreme Court in 1884:

[M]en must be left, without interference to buy and sell where they please, and to discharge or retain employees at will for good cause or for no cause, or even for bad cause without thereby being guilty of an unlawful act *per se* . . . .

All may dismiss their employe[e]s at will, be they many or few, for good cause, for no cause or even for cause morally wrong, without being thereby guilty of legal wrong.<sup>44</sup>

Professor Corbett's thesis is that the domain of the employment-at-will doctrine is growing at the expense of the anti-discrimination laws.<sup>45</sup> Both Professor Corbett and Professor Ann C. McGinley see anti-discrimination laws as becoming an ever narrower exception to the employer prerogative as embodied in the employment-at-will doctrine.<sup>46</sup>

In her article, *The Emerging Cronyism Defense and Affirmative Action*, Professor McGinley posits that there are two possible interpretations of Title VII:

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<sup>40</sup> EPSTEIN, *supra* note 14, at 3.

<sup>41</sup> GRAHAM, *supra* note 2, at 139-40.

<sup>42</sup> *Id.* at 140.

<sup>43</sup> See William R. Corbett, *The "Fall" of Summers, the Rise of "Pretext Plus," and the Escalating Subordination of Federal Employment Discrimination Law to Employment at Will: Lessons from McKennon and Hicks*, 30 GA. L. REV. 305 (1996).

<sup>44</sup> *Id.* at 312 (quoting *Payne v. Western & Atl. R.R.*, 81 Tenn. 507, 518-20 (1884), *overruled on other grounds*, *Hutton v. Watters*, 179 S.W. 134 (Tenn. 1915)).

<sup>45</sup> *Id.* at 312-18.

<sup>46</sup> *Id.*; see also Ann C. McGinley, *The Emerging Cronyism Defense and Affirmative Action: A Critical Perspective on the Distinction Between Colorblind and Race-Conscious Decision Making Under Title VII*, 39 ARIZ. L. REV. 1003 (1997).

(1) Title VII is merit-based for persons of color and white women;<sup>47</sup> or (2) Title VII entitles employers to make any hiring decision they choose, as long as that decision is not made with conscious discrimination.<sup>48</sup> Under the second interpretation, Title VII allows employers' decisions to negatively affect persons of color and white women.<sup>49</sup> Professor McGinley concludes that courts have increasingly adopted the latter approach.<sup>50</sup> She sees *St. Mary's Honor Center v. Hicks*<sup>51</sup> and *Hazen Paper Co. v. Biggins*<sup>52</sup> as exemplifying the valuing of employer prerogative over merit.<sup>53</sup>

The *St. Mary's* court ruled that proof that an employer's "legitimate, non-discriminatory reason" need not be true.<sup>54</sup> *St. Mary's* modified the structure set forth in *Texas Department of Community Affairs v. Burdine*<sup>55</sup> by holding that the plaintiff does not automatically win if the employer's reason is false.<sup>56</sup> The Supreme Court recently held in *Reeves v. Sanderson Plumbing Products, Inc.* that usually the fact-finder may infer discrimination from the falsity, but is not required to do so.<sup>57</sup>

Professor McGinley argues that *St. Mary's* discards any requirement for rational, non-arbitrary decision-making under the equal employment laws.<sup>58</sup> Professor McGinley's article demonstrates how the law ignores any criteria of merit by "A Tale of Two Sharons" – a description of two cases which reach opposite conclusions.<sup>59</sup> In one tale, the employer hired a white fishing-buddy to the more qualified African-American applicant<sup>60</sup>; in the other, the employer invoked an affirmative action policy to break the tie between two equally qualified members of different races, one of whom needed to be laid off.<sup>61</sup> If merit were the criteria, the employer would lose the first case, and win the

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<sup>47</sup> See McGinley, *supra* note 46, at 1015.

<sup>48</sup> *Id.* at 1015-16.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 1016.

<sup>51</sup> 509 U.S. 502 (1993).

<sup>52</sup> 507 U.S. 604 (1993).

<sup>53</sup> See McGinley, *supra* note 46, at 1017-18.

<sup>54</sup> *St. Mary's Honor Ctr.*, 509 U.S. at 519.

<sup>55</sup> 450 U.S. 248 (1981).

<sup>56</sup> *Burdine* required a plaintiff to present a prima facie case (that he or she suffered an adverse employment decision and that a non-member of this plaintiff's group did not receive such a decision) and then the employer was required to "articulate a legitimate non-discriminatory reason for the decision." McGinley, *supra* note 46, at 1018-19. If the plaintiff meets his burden of proving the defendant's reason pretextual, the court must grant judgment for the plaintiff. *Id.*

<sup>57</sup> 530 U.S. 133, 147-48 (2000).

<sup>58</sup> See McGinley, *supra* note 46, at 1020-22.

<sup>59</sup> *Id.* at 1004-09.

<sup>60</sup> *Id.* (citing *Foster v. Dalton*, 71 F.3d 52 (1st Cir. 1995)).

<sup>61</sup> *Id.* at 1004-07.



second; the actual results were the opposite.<sup>62</sup> The law prohibits decisions based on race but allows preferences that ignore the relative merit of employees.

### B. Academia

Merit selection is not a legal requirement for admission to educational institutions. State institutions must conform to federal and state constitutions and legislation, while private schools are not governed by federal or state constitutions.<sup>63</sup> Like private employers, private schools can choose students using any criteria they wish, with a few exceptions.<sup>64</sup> Recent legal developments, such as *Hopwood* and California's Proposition 209, though perceived as pro-merit, only prohibit the use of certain criteria and, in fact, do not require the use of merit criteria.<sup>65</sup>

Historically, academia has used varying admissions criteria, some linked to academic ability (e.g., letters of recommendation, SAT scores), while others are not (e.g. legacy admits, geography, athletic ability).<sup>66</sup> A selection process once based on personal recommendation has changed to one based on a prospective student's SAT and high school grade point average.<sup>67</sup> After reviewing these two numbers, schools use supplemental criteria such as athletic ability, legacy status, affirmative action, and geography to make final admissions determinations.<sup>68</sup> To complicate matters further, merit has been defined differently over time. Elite ivy-league institutions, until recently, defined merit as "character."<sup>69</sup>

Like employer decision-making, academic decision making has evolved privately, largely free of government regulation or even public debate. The evolution of the academic meritocracy developed behind closed doors into a system relying heavily on mental tests as selection devices, making the system's judgments seem "my sterious, severe, and final."<sup>70</sup> One's natural impulse when faced with this type of system is to believe the results are unfair, and to "wo rry and squabble over them almost obsessively."<sup>71</sup> The analysis in this area begins with what Nicholas Lemann calls the "Ep iscopacy," a distinct American upper-

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<sup>62</sup> *Id.*

<sup>63</sup> Private schools are not governed by the federal Constitution by virtue of the limited reach of the Fourteenth Amendment; Both the federal and state constitutions apply to government action while private action need not comply with these constitutions.

<sup>64</sup> See *supra* text accompanying note 63.

<sup>65</sup> See *Hopwood*, 78 F.3d at 932; CAL. CONST., art. I, § 31.

<sup>66</sup> See generally, KATHARINE T. KINKEAD, HOW AN IVY LEAGUE COLLEGE DECIDES ON ADMISSIONS (1960).

<sup>67</sup> *Id.* at 22-25.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 25.

<sup>70</sup> *Id.*

<sup>71</sup> NICHOLAS LEMANN, THE BIG TEST: THE SECRET HISTORY OF THE AMERICAN MERITOCRACY 346 (1999).

<sup>72</sup> *Id.*

class that emerged around 1900.<sup>72</sup>

Early in the 1900s, elite schools focused on “character” and one determined character by the personal recommendation of the headmaster or principal.<sup>73</sup> As late as the 1960’s, Yale University admitted its freshman class mainly from elite Eastern boarding schools, relying largely on headmaster recommendations.<sup>74</sup> Those recommendations were based on personal assessment of the character of the applicant, and not necessarily his intellectual ability.<sup>75</sup> In fact, intellectualism was considered a negative in the evaluation.<sup>76</sup> Character was believed to have “supreme status” at Yale in the 1950s.<sup>77</sup> Young men enrolled at Yale devoted themselves to constant and fair competition and believed leadership counted above all else.<sup>78</sup> The definition of merit was “ambition and industry and character,” as demonstrated on the football field and in campus politics; the beau ideal was the golden young man whom everyone naturally followed because of his athletic ability and his pure devotion to high ideals.<sup>79</sup>

Most elite schools were not open to Catholics, Jewish or women in the early 1900s. Upon reading the biography of Endicott Peabody, the rector of Groton School for Boys, one recognizes that there was not an affirmative program of anti-Semitism, Catholicism, or feminism in Groton’s admissions process, however Groton was an Episcopalian school for boys and did not intend to admit women or those who practiced another faith.<sup>80</sup> Generally, only Episcopalian, Caucasian, wealthy boys were considered sufficiently meritorious for Groton attendance.

Yale University drew its freshman class primarily from elite private schools with policies similar to Groton.<sup>81</sup> Recommendations of headmasters and principals were crucial in the admissions process.<sup>82</sup> In 1961, Katherine T. Kinkead wrote of the admissions process at Yale, explaining that the admissions staff grouped candidates according to desirability, a process utilized at Harvard University and Princeton University.<sup>83</sup> The group rankings were based on preliminary aptitude test scores obtained in the next-to-last year of secondary school.<sup>84</sup> The application procedure also required an evaluation of the

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<sup>72</sup> *Id.* at 12.

<sup>73</sup> See LEMANN, *supra* note 70, at 15, 146.

<sup>74</sup> *Id.* at 141.

<sup>75</sup> *Id.* at 15, 146.

<sup>76</sup> *Id.* at 141.

<sup>77</sup> *Id.* at 143.

<sup>78</sup> NICHOLAS LEMANN, *THE BIG TEST: THE SECRET HISTORY OF THE AMERICAN MERITOCRACY* 143 (1999).

<sup>79</sup> *Id.*

<sup>80</sup> FRANK ASHBURN, *PEABODY OF GROTON* 99 (1944).

<sup>81</sup> See generally, ASHBURN, *supra* note 80; KINKEAD, *supra* note 66.

<sup>82</sup> See KINKEAD, *supra* note 66, at 31.

<sup>83</sup> *Id.* at 30-31.

<sup>84</sup> *Id.* at 31.

applicant's talents by Yale staff in consultation with the secondary school's principal, headmaster, or guidance counselor.<sup>85</sup> Yale did not accept those who were odd, or did not fit in. Kinhead described one rejected applicant:

Still another lad rated C, [the lowest ranking] who wrote on his application form that he "was not one of the boys," was described by his alumni interviewer, through various circled adjectives in a series on a printed form, as "sensitive," "frail," "intellectual," "odd," "eccentric," and "neat." The man had written, "Surely there is room for a boy like this in a university as large as Yale. I expect him to make no contribution as an undergraduate, but he will be heard from in later life."<sup>86</sup>

Proponents of the SAT sought to replace the Episcopacy's elitist system with one based on neutral testing.<sup>87</sup> John Bryant Conant, the president of Harvard University (1933-1958), a main proponent of this movement, "wanted to unseat the Episcopacy and replace it with a new elite chosen democratically on the basis of its scholastic brilliance, as revealed by scores on mental tests."<sup>88</sup> When SAT testing replaced the established system, this goal was realized. Today's prevailing system of admissions is based on an applicant's grade point average, combined with SAT scores. Schools do, however, continue to set aside a percentage of admissions for students who meet other criteria, such as being of a certain race, being an athlete or a legacy.<sup>89</sup>

The University of California is an example of one school that moved from a system based on personal recommendations to today's prevailing system of SATs combined with GPAs. John A. Douglass, Acting Deputy Director of the Center for Studies in Higher Education at the University of California, Berkeley, studied the school's admission history.<sup>90</sup> According to Mr. Douglass, using standardized testing in admissions decisions provided the University of California with an adjustable formula for determining a student's eligibility and aptitude.<sup>91</sup> The University found this formula particularly useful given the end of high school accreditation done by the University of California and a significant rise in applications and enrollment to the University.<sup>92</sup> However, Douglass argues that relying on a testing and eligibility index de-emphasized criteria such as economic hardship and geographic diversity, which had previously played a role in admissions decisions.<sup>93</sup> The new system moved away from guaranteed

<sup>85</sup> *Id.*

<sup>86</sup> *See* KINHEAD, *supra* note 66.

<sup>87</sup> *See generally*, LEMANN, *supra* note 70.

<sup>88</sup> *Id.* at 49.

<sup>89</sup> John A. Douglass, *Setting the Conditions of Undergraduate Admission Part III - 3* (Feb. 20, 1997) <<http://ishi.lib.berkeley.edu/cshe/jdouglass/pub/Part3-3.html#AdoptingtheSAT>>.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

geographic diversity and became “more standardized and less dynamic.”<sup>94</sup> In 1977, the Board of Regents of the University of California approved a linear formula of GPA and test scores to determine eligibility for admission.<sup>95</sup> The Board of Regents’ formula helps to illustrate the “on-going tension within all public universities: how to obtain a balance between elitism – often defined in the academy in traditional terms such as GPA and SAT scores – and egalitarianism and pluralism.”<sup>96</sup>

With the adoption of the SATs came a concern over “underrepresented groups.”<sup>97</sup> In 1968, the Regents selected 4% of students from certain ethnic and cultural minority groups “to encourage admission of more students ‘whose ethnic or economic background had disadvantaged them.’”<sup>98</sup> In 1974, the California legislature resolved that “[e]ach segment of California public higher education shall strive to approximate by 1980 the general ethnic, sexual and economic composition of the recent [California] high school graduates . . . .”<sup>99</sup> However, under pressure from a rising number of applications, both University of California, Los Angeles and University of California, Berkeley had to restructure their admissions criteria again.<sup>100</sup> Both universities admitted half their students solely on the basis of their “Academic Index” formula.<sup>101</sup> To determine admissions for the other half of the class, the universities relied on the index plus additional criteria such as economic background, California residency, race, and ethnicity.<sup>102</sup>

The use of race as an admissions criterion caused problems. Prior to 1984, the University of California, Berkeley campus included Asian-Americans as an “underrepresented” group.<sup>103</sup> However, the group’s academic success coupled with their special admission status resulted in the disproportionate admittance of Asian-Americans.<sup>104</sup> Therefore in 1984, Asian-Americans were dropped from the “underrepresented” list and their enrollment dropped 25% over the next two years.<sup>105</sup>

<sup>94</sup> See Douglass, *supra* note 89.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> John A. Douglass, *Setting the Conditions of Undergraduate Admission Part III – 4* (Feb. 20, 1997) <<http://ishi.lib.berkeley.edu/cshe/jdouglass/pub/part3-4.html>>.

<sup>98</sup> *Id.* (quoting minutes, University Board of Regents, June 1980).

<sup>99</sup> *Id.* (quoting “Report to the Legislature in Response to Item 349 of the 1974 Budget Conference Committee Supplemental Report: Student Affirmative Action at the University of California” (Jan. 1975)).

<sup>100</sup> *Id.* At the University of California, Berkeley, the number of applications received rose from 9,100 in 1980 to 22,330 in 1988. *Id.* (noting that this was due in part to a new system of filing).

<sup>101</sup> *Id.*

<sup>102</sup> See Douglass, *supra* note 97.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

Application to the University of California system kept increasing and political pressure kept mounting. In response, a multiple filing system was instituted in 1985, by which students who wanted to apply to multiple University of California campuses filed a single application.<sup>106</sup> This system created a 250% rise in applications from 1980 to 1990.<sup>107</sup> The increase forced admissions officers to adopt new admission formulas.<sup>108</sup> Additionally, the universities created an automated admissions process which decreased the chance that a student's application would actually be read.<sup>109</sup>

In 1995, the Regents resolved to remove "race, ethnicity and gender related decisionmaking in admissions" and utilize a process based more on objective numbers.<sup>110</sup> However, by 2001, the University President, Richard Atkinson, recommended that the University system drop the SAT as an admission requirement.<sup>111</sup> Mr. Atkinson called for the system to develop a new test that would gauge students' knowledge rather than their test-taking abilities.<sup>112</sup> Atkinson argued, to the approval of American Council of Education conference attendees, that the nation's schools are "bogged down with excessive testing."<sup>113</sup> Mr. Atkinson went on to argue that standardized tests "hinder students with adequate qualifications from attending good universities."<sup>114</sup>

The University of California admissions system shows an evolution from a process based on subjective criteria to one based on numbers. Merit is being defined by scores on an SAT test. However, the current reaction, as evidenced by that same system, is to downgrade these scores. The problem with defining merit by test scores is the limited predictive power of the tests. SAT-type tests are intended to correlate only with a student's performance in their first-year of college or post graduate education.<sup>115</sup> No attempt is made to correlate them with overall academic achievement or graduation rates.<sup>116</sup> There certainly is no attempt to predict "success," however defined, in later life.<sup>117</sup>

The correlation between scores and success in the first year is not high. The correlation between the SAT and the student's freshman GPA varies according to the size and type of college, and the student's gender and major.<sup>118</sup> The

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<sup>106</sup> *Id.*

<sup>107</sup> See Douglass, *supra* note 97.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> See Erin Gallagher, *Atkinson Calls to Eliminate SATs*, DAILY CALIFORNIAN, Feb. 20, 2001.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> See Sturm & Guinier, *supra* note 35, at 970.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> See WILLIAM I. WILLINGHAM, PREDICTING COLLEGE GRADES 10-11 (1990).

lowest correlation is .35 for colleges with a SAT of 1200 or higher; the highest is nursing, at .46.<sup>119</sup> For SAT and high school GPA combined, the lowest is .44 for the colleges whose students have higher SAT scores and .60 for nursing.<sup>120</sup> Generally, “[t]he square of the correlation coefficient can therefore be interpreted as the proportion of the total variation in the one variable explained by the other.”<sup>121</sup> So for SAT colleges with higher SAT scores, the score explains 11.25% of freshman grades; for the highest programs (grades plus SAT for nursing) 36%.<sup>122</sup>

So, as with employment, the educational realm at best considers a narrow indicia of merit. Education selections utilize many other indicia – legacy, geography, ethnic and racial background, sports ability – which do not focus on academic performance per se. Most importantly, the selection process is not mandated by law. The replacement of the once prevalent subjective selection processes by SAT testing and eligibility indexes occurred largely outside of any legislative or judicial control.

#### IV. WHERE MERIT DOES MATTER

The title of this article, *The Missing Jurisprudence of Merit*, is not completely accurate, for merit does matter in two areas of the law: civil service and in equal employment law as a defense to a disparate impact lawsuit. Usually, civil service hiring must be done on a merit basis.<sup>123</sup> In disparate impact discrimination lawsuits, the employee claims that an employment practice, neutral on its face, actually has a “disparate impact” on a protected group.<sup>124</sup> Then the burden shifts to the employer to demonstrate that the practice is “job related for the position in question and consistent with business necessity.”<sup>125</sup> Merit, in the sense of a characteristic being job related, exists in equal employment law as a defense, not as an element of a plaintiff’s cause of action. A plaintiff cannot sue because he or she was meritorious and did not get the just rewards, but a defendant can defend on the grounds that an employment decision is related to merit.<sup>126</sup>

##### A. Civil Service

Merit selection is usually prescribed for civil service employment.<sup>127</sup> There is,

<sup>119</sup> *Id.* at Table 1-1, 11.

<sup>120</sup> *Id.*

<sup>121</sup> Sturm & Guinier, *supra* note 35, at 970 n.64.

<sup>122</sup> *Id.*

<sup>123</sup> See generally, Kipp v. California, 72 Cal. Rptr. 2d 758 (1998).

<sup>124</sup> See Civil Rights Act of 1991 sec. 703(k), 42 U.S.C. § 2000e-2(k)(1)(A)(i).

<sup>125</sup> Civil Rights Act of 1991 sec. 703(k), 42 U.S.C. § 2000e-2(k)(1)(A)(i); see also ZIMMER, *supra* note 9, at 422-54.

<sup>126</sup> See Civil Rights Act of 1991 sec. 703(k), 42 U.S.C. § 2000e-2(k)(1)(A).

<sup>127</sup> See H. Manley Case, *Project on the Merit System Protection Board*, 29 How. L.J. 283, 287 (1986).

however, very little law on what "merit" means in the civil service context. Using California as an example, the California Constitution requires the hiring of state civil service employees based on merit, but the provision has little history or legal exegesis. The California Constitution Article VII, Sec. 1(b), states, "In the civil service, permanent appointment shall be made under a general system based on merit ascertained by competitive examination."<sup>128</sup> The provision was adopted in 1934 by referendum.<sup>129</sup>

There was little to no contemporary discussion of the provision in case law or law reviews. The debate over Proposition 209 did not mention that there was an already existing merit requirement in the California Constitution.<sup>130</sup> In general, the original constitutional provision seems to be ignored. There have been few California cases addressing the constitutionally mandated "merit provision." *Dawn v. State Personnel Board* held that the provision did not apply to promotions, only to hiring.<sup>131</sup> *Kipp v. California* involved a program allowing minority females to be considered for employment when they did not test in the top three ranks.<sup>132</sup> The court invalidated the program on the grounds that it violated the constitutional merit provision as well as Proposition 209.<sup>133</sup>

An important contemporary issue raised by the merit provision is in the area of privatization. The California Supreme Court held that the constitutional provision invalidated the privatization of highway engineering by the State of California.<sup>134</sup> The Court ruled that the constitutional merit provision mandated the use of the civil service and prohibited the contracting out of services unless it could be shown that the civil servants could not "adequately and competently" do the job.<sup>135</sup>

Other states have faced this issue as well.<sup>136</sup> However the case law addressing this issue is scarce. There has been no working out of what "merit" means and how it could be determined by an objective test.

One California case held that an objective employment test was unjustifiable. In *City and County of San Francisco v. Fair Employment and Housing Commission*, the Commission attacked a promotional examination for fire

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<sup>128</sup> CAL. CONST., art. VII, § 1(b).

<sup>129</sup> *Id.*

<sup>130</sup> See generally, Richard Frankel, *Proposition 209: A New Civil Rights Revolution?*, 18 YALE L. & POL'Y RE v. 431 (2000).

<sup>131</sup> 154 Cal. Rptr. 186 (1979).

<sup>132</sup> 72 Cal. Rptr. 2d 758 (1998).

<sup>133</sup> *Id.*

<sup>134</sup> See *Professional Engineers in Cal. Gov't v. Dept. of Transportation*, 936 P.2d 473 (1997).

<sup>135</sup> *Id.* at 474.

<sup>136</sup> See *Vermont State Employees Ass'n. v. Vermont Justice Training Council*, 704 A.2d 769 (Vt. 1997); *Washington Fed'n of State Employees v. Spokane Cmty. College*, 585 P.2d 474 (Wash. 1978); Timothy P. Dowling, *State Civil Service Law - Civil Service Restrictions on Contracting Out by State Agencies*, 55 WASH. L. REV. 419 (1980).

department lieutenant as having an adverse impact on African-Americans which was not proven to be job related.<sup>137</sup> The Commission found that supervision is the primary function for the position of fire lieutenant, that the supervisory ability was not tested on the examination, and that there was no correlation between higher test scores and the performance of job incumbents.<sup>138</sup> The court stated that "[a] cursory reading of the examination reveals the ability to supervise is not tested, and we doubt that any paper and pencil test can measure this ability."<sup>139</sup>

*San Francisco* directly contradicts the spirit of the California Constitutional provision which calls for merit to be tested objectively. The *San Francisco* court however, never mentioned the constitutional merit provision.<sup>140</sup> Samuel Mistrano's article *The Politics, Substance, and Reality of Affirmative Action in California*, describes the actual practice of civil service hiring in California where managers are generally given inside discretion in hiring, but does not mention the constitutional provision.<sup>141</sup> All civil service applicants must score in the top three rankings on the civil service exam, and then "a manager" has the discretion to use many factors in hiring decisions . . . ."<sup>142</sup> Managers frequently tailor job descriptions to unique qualifications of friends and family while making the job appear unappealing to outsiders.<sup>143</sup> As managers are generally Caucasian males, it is most likely that those benefited by this tailoring are Caucasian males as well.<sup>144</sup> Recently the Long Beach, California Fire Department received five thousand applicants for twenty one positions. Of the twenty one hired, seven were related to existing Long Beach firefighters.<sup>145</sup>

Ignored in the courts and evaded in practice, California's constitutional merit provision has suffered a sad fate.

## B. Disparate Impact

### 1. The Necessary Demonstration of a Disparate Impact

As mentioned above, merit is an affirmative defense to a disparate impact lawsuit. Before merit becomes an issue, however, the plaintiff must demonstrate that a challenged practice has sufficient disparate impact.<sup>146</sup> A small differential, for example, in the percentage of African-Americans hired in comparison to

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<sup>137</sup> 236 Cal. Rptr. 716 (1987).

<sup>138</sup> *Id.* at 724-25.

<sup>139</sup> *Id.* at 725.

<sup>140</sup> *Id.*

<sup>141</sup> See Samuel Mistrano, *The Politics, Substance, and Reality of Affirmative Action in California*, 37 U. WEST L.A. L. REV. 311 (1996).

<sup>142</sup> *Id.* at 319.

<sup>143</sup> *Id.* at 321-22.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *City & Cty. of San Francisco*, 236 Cal. Rptr. at 721.



Caucasians is not enough to require justification for the practice by the employer.<sup>147</sup>

If the employee proves the requisite disparate impact, the employer must justify the practice.<sup>148</sup> In merit terms, the employer wants to argue that the practice's impact can be justified in terms of better job performance, that a test score for example correlates with job performance.<sup>149</sup> If a statistical significance cannot be shown, because there is only a small number of employees or because the practice has a slight impact, then an employer need not demonstrate any rationality for an employment practice.<sup>150</sup>

## 2. The Justification of the Practice

Once an employee establishes a disparate impact, the burden of justifying the challenged employment practice shifts to the employer.<sup>151</sup> Exactly what the evidence the employer must present, however, is a matter of some dispute.<sup>152</sup> The employer, of course, wants as slight a burden as possible, while the employee desires a higher burden on justification.<sup>153</sup> The employer, for example, may claim that a slight correlation or even logical relationship between a test and job performance is enough, while an employee is likely to argue that the employer must show that a test has a high correlation between scores and job performance.

Congress delineated the defendant's burden in the Civil Rights Act of 1991, overruling the Supreme Court case on point, *Wards Cove Packing Co. v. Atonio*.<sup>154</sup> To understand the legislation, one must interpret the 1991 Civil Rights Act in light of *Ward's Cove*. The Court in *Wards Cove* ruled that "[t]he dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer."<sup>155</sup> An employer's insubstantial justification is not sufficient, however "there is no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business for it to pass muster . . . ."<sup>156</sup> The employer carries "the burden of producing evidence of a business justification for his employment practice," but the burden of persuasion remains at all times with the plaintiff.<sup>157</sup> The Civil Rights Act of

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<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 724.

<sup>149</sup> *Id.*

<sup>150</sup> See *New York City Transit v. Beazer*, 440 U.S. 568 (1979).

<sup>151</sup> See *Ward's Cove Packing Co. v. Atonio*, 490 U.S. 642, 658-59 (1989).

<sup>152</sup> See generally Andrew C. Spiropoulos, *Defining the Business Necessity Defense to the Disparate Impact Cause of Action: Finding the Golden Mean*, 74 N.C. L. REV. 1479, 1504-17 (1996).

<sup>153</sup> See generally, *Ward's Cove*, 490 U.S. 462.

<sup>154</sup> See Civil Rights Act of 1991; *Ward's Cove*, 490 U.S. at 659.

<sup>155</sup> *Ward's Cove*, 490 U.S. at 659.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

1991 changed the burdens as set forth in *Wards Cove*,<sup>158</sup> so that the employer is required "to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity."<sup>159</sup>

It is unclear exactly what standard of business justification the 1991 Act requires. Some see the Act as establishing a strict necessity standard under which "the employer must demonstrate that the practice is 'job-related' for the position in question" and that "the practice either predicts or is correlated with successful performance of the particular job at issue."<sup>160</sup> Civil rights organizations generally favor this stricter interpretation of the Civil Rights Act, while President George H.W. Bush and several Republican Congressmen encouraged a contrary interpretation.<sup>161</sup> The latter interpreted the Act as adopting the *Wards Cove* standard, requiring the employer to show that the practice serves "some valid business purpose." However, the practice need not be "essential or indispensable to the actual performance of the job."<sup>162</sup>

One might think conservatives, who supposedly value merit, would favor a stricter interpretation of the 1991 Act, because it rewards merit in employment. However, those in the Federalist Society generally believe that an emphasis on group rights "leads to the de-emphasis of the individual achievement."<sup>163</sup> Surprisingly, it is the conservatives who advocate little showing of a relationship between individual ability and employment tests.<sup>164</sup> In fact, many conservative commentators do not like the disparate impact theory at all. Professor Epstein argues that the theory is illegitimate and a mistaken reading of the Civil Rights Act.<sup>165</sup> He devotes a chapter of his *FORBIDDEN GROUNDS* to attack the disparate impact theory: criticizing its effects as "often counterproductive," its purported bias towards finding discrimination, and the business necessity criterion.<sup>166</sup> Professor Epstein concludes by positing that "[t]he intellectual case for the business necessity criterion . . . is weak."<sup>167</sup>

Among the conservative recommendations the Heritage Foundation made to President Reagan's administration, was the notion that the Civil Rights Act should concern itself only with intentional discrimination.<sup>168</sup> The foundation argued that the Secretary of Labor should file an action "only on a finding that the employer has intentionally engaged in an unlawful discriminatory practice and

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<sup>158</sup> See Civil Rights Act of 1991; *Ward's Cove*, 490 U.S. at 659.

<sup>159</sup> Sec. 703(k)(1).

<sup>160</sup> See Spiropoulos, *supra* note 152, at 1513-14.

<sup>161</sup> *Id.* at 1504-17.

<sup>162</sup> *Id.* at 1518.

<sup>163</sup> STANLEY FISH, *At the Federalist Society, in THE TROUBLE WITH PRINCIPLE* (1997) at 19.

<sup>164</sup> See EPSTEIN, *supra* note 14, at 205-41.

<sup>165</sup> *Id.* at 184-86.

<sup>166</sup> *Id.* 205.

<sup>167</sup> *Id.* at 213.

<sup>168</sup> See HAMMOND, *supra* note 21.

shall not be based on the results of a statistical sample or census of the employer's work force."<sup>169</sup> The argument states that recommendations based on merit give every person "an inherent right to obtain whatever economic or other rewards he (or she) has earned, by virtue of merit" and that preferential treatment should not be given those who have not earned the rewards.<sup>170</sup> It is "inherently wrong" to reward such lack of initiative.<sup>171</sup>

But, as discussed above, if a plaintiff has to show intent to discriminate, the merit issue does not arise. This allows conservative commentators to enjoy their merit rhetoric while trying to eliminate any legal issues involving merit.

### 3. Disparate Impact – Standardized Tests

Title VII allows employers to utilize professionally developed ability tests provided that the "administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion or national origin."<sup>172</sup> To serve as a defense to a disparate impact lawsuit, an employer must "validate" the test.<sup>173</sup> There are three ways to validate a test; (1) by criterion validation which identifies criteria that indicate the potential for successful job performance and then correlates test scores with the criteria; (2) by construct validation which measures the degree to which job applicants have identifiable characteristics that are important in job performance; and (3) by content validation which tests actual job performance tasks.<sup>174</sup>

Construct validation is extremely difficult to establish. Courts have found that developing such data is difficult, and when courts require the data, the tests are frequently declared invalid.<sup>175</sup> Generally, employers utilize the content validation instead.<sup>176</sup> In validation arguments, the employer-defendant generally argues for a low level of correlation between the test and the job, while the employee-plaintiff seeks a high correlation.<sup>177</sup>

There are several problems with the use of content validated tests to determine merit. First, the concept of merit based on test scores frequently does not reflect the actual requirements for successful job performance. *Washington v. Davis*, for example, held that it was enough that the written test related to an applicant's success at the police academy rather than success as a police officer.<sup>178</sup> Furthermore, content validation only measures some of the skills used on the

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<sup>169</sup> *Id.* at 448.

<sup>170</sup> *Id.* at 478.

<sup>171</sup> *See id.*

<sup>172</sup> 42 U.S.C. § 2000e-2.

<sup>173</sup> *See ZIMMER, supra* note 9, at 454; *Washington v. Davis*, 426 U.S. 229, 247 (1976).

<sup>174</sup> *See Davis*, 426 U.S. at 247 n.13.

<sup>175</sup> *See Guardians Ass'n v. Civil Service Comm.*, 630 F.2d 79, 92 (2d Cir. 1980).

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Davis*, 426 U.S. at 249-50.

job.<sup>179</sup> Since it is impracticable to test all job related skills, a limited number must be chosen. For example, the City of Cleveland's performance test evaluated the strength, but not the stamina of prospective fire fighters.<sup>180</sup> The Sixth Circuit held that it was not necessary to test for stamina, even though the stamina test would have qualified more women than the strength test alone.<sup>181</sup>

An additional concern with test scores is rank ordering. Since scores on successive tests will be subject to random variation, it is not meaningful to rank applicants based on numerical scores alone.<sup>182</sup> Standardized tests do not have a high correlation with performance; the correlation is, in fact, quite low, "with the best tests having correlations of approximately .3."<sup>183</sup>

Professor Selmi explains how to measure the information a test provides:

If we want to know how much explanatory information the test provides, there is a common method to determine that information based on the observed coefficient. The measure of variance in the criterion that is explained by the predictor is defined by squaring the coefficient. A correlations coefficient of .3, for example means that the test explains only 9% of the variation in predicted performance. In other words, the test leaves unexplained 91% of the variation reflected in the performance measure.<sup>184</sup>

Due to the problem of validation, standard error of measurement, and low correlation, standardized testing has limited effectiveness in determining merit.

#### 4. Note on Academic Selection

Courts have analogized Title VII's disparate impact analysis to educational selection processes.<sup>185</sup> For example, *Sharif v. New York State Education Department* invalidated the use of the SAT as the sole basis for awarding New York State merit scholarships under a disparate impact theory.<sup>186</sup> The court held that defendants "must show a manifest relationship between the use of the SAT and recognition and reward of academic achievement in high school."<sup>187</sup> Additionally, in *Groves v. Alabama State Board of Education*, the court invalidated an ACT cut-off score requirement for undergraduate teaching

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<sup>179</sup> *Id.* at 247 n.13.

<sup>180</sup> See *Zamlen v. City of Cleveland*, 906 F.2d 209, 218 (6th Cir. 1990).

<sup>181</sup> *Id.* at 219.

<sup>182</sup> See Michael Selmi, *Testing for Equality: Merit, Efficiency, and the Affirmative Action Debate*, 42 U.C.L.A. L. REV. 1251, 1270-77 (1995).

<sup>183</sup> *Id.* at 1263.

<sup>184</sup> *Id.* at 1263-64 (internal citations omitted).

<sup>185</sup> See *Sharif v. New York State Educ. Dept.*, 709 F. Supp. 345, 361 (S.D.N.Y. 1989).

<sup>186</sup> *Id.* at 363.

<sup>187</sup> *Id.* at 362.

training.<sup>188</sup> The court held that the test had an adverse disparate impact with no educational justification.<sup>189</sup>

## V. WHAT HARM COMES FROM HAVING NO JURISPRUDENCE OF MERIT

What is wrong with a missing jurisprudence? The lack of rigorous definition and delineation leads to empty rhetoric, a confusion of values and spurious attacks on affirmative action. Ultimately it leads to an avoidance of the hard decisions: how merit is determined and who decides it.

### A. *The Attack on Affirmative Action*

As demonstrated above, Governor Pete Wilson, Justice Antonin Scalia, Professor Richard Epstein and others have used merit to attack affirmative action: they posit a society which rewards merit only and characterize affirmative action as a deviation from that regime.<sup>190</sup> This criticism is often accomplished in subtle ways, where merit is posited, affirmative action invalidated, but the system that remains does not require any consideration of merit.

This pattern is demonstrated again and again. Professor Epstein's ideal of leaving decisions up to individuals does not require any merit consideration.<sup>191</sup> *Hopwood's* invalidation of affirmative action explicitly rejected any merit selection for the University of Texas Law School.<sup>192</sup> Proposition 209 banned preferences in California, but did not require merit, irrespective of Governor Wilson's contrary implications.<sup>193</sup> Justice Scalia's dissent in *Johnson v. Transportation Agency, Santa Clara County, California*, attacking affirmative action is a masterpiece of implication.<sup>194</sup>

*Johnson v. Transportation Agency* involved a male employee's challenge to an affirmative action plan after being passed over for promotion in favor of a female counterpart.<sup>195</sup> Both employees were rated as well-qualified, but the plaintiff scored two points higher on the promotion examination than the woman actually promoted.<sup>196</sup> The *Johnson* majority assumed that Johnson was better qualified, but justified the employer's promotion decision on the goals of the affirmative action program at issue.<sup>197</sup> By taking the scores at face value, and assuming that they would control promotion decisions, Justice Scalia characterized *Johnson* as a

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<sup>188</sup> 776 F. Supp. 1518, 1532 (M.D. Ala. 1991).

<sup>189</sup> *Id.* at 1532 (internal citations omitted).

<sup>190</sup> See Wilson, *supra* note 30, at 299; *Johnson v. Transportation Agency, Santa Clara County, California*, 480 U.S. 616 (1986) (Scalia, J., dissenting); EPSTEIN, *supra* note 14.

<sup>191</sup> See EPSTEIN, *supra* note 14.

<sup>192</sup> See *Hopwood*, 78 F.3d at 962.

<sup>193</sup> See Wilson, *supra* note 30, at 299.

<sup>194</sup> See *Johnson*, 480 U.S. at 667-77.

<sup>195</sup> *Id.* at 616, 619.

<sup>196</sup> *Id.* at 623-24.

<sup>197</sup> *Id.* at 626.

case where the more meritorious employee has been denied his earned rewards.<sup>198</sup> Justice Scalia emphasized that Johnson was more qualified than the woman who was promoted and that had Mr. Johnson been female, he would have been promoted.<sup>199</sup> Justice Scalia argued that Title VII, as interpreted by the *Johnson* majority, forces employers to hire the less qualified applicant if he or she is a minority.<sup>200</sup> He concludes by stating:

In fact, the only losers in the process are the Johnsons of the county, for whom Title VII has been not merely repealed but actually inverted. The irony is that these individuals—predominantly unknown, unaffluent, unorganized—suffer this injustice at the hands of a Court fond of thinking itself the champion of the politically impotent.<sup>201</sup>

Justice Scalia implies, but never states, that Johnson had a right to be promoted because he was the most qualified.<sup>202</sup> Johnson has a right under Title VII not to be discriminated against, but Justice Scalia has applied elsewhere a restrictive interpretation of the statute.<sup>203</sup> As noted above, Justice Scalia favored the Title VII defendant over the plaintiff in *St. Mary's*, where he ruled that an employer can defend against discrimination charges even if his “legitimate, non discriminatory reasons” are “unpersuasive, or even obviously contrived.”<sup>204</sup> Justice Scalia joined the majority in *Wards Cove*, limiting the disparate impact cause of action.<sup>205</sup> Justice Scalia’s concern for victims of discrimination is apparently limited to affirmative action cases.<sup>206</sup>

Much of the same rhetorical structure exists in *Hopwood v. Texas*.<sup>207</sup> The opinion starts with lauding the excellence of the University of Texas Law School:

The University of Texas School of Law is one of the nation’s leading law schools, consistently ranking in the top twenty. Accordingly, admission to the law school is fiercely competitive, with over 4,000 applicants a year competing to be among the approximately 900 offered admission to achieve an entering class of about 500 students. Many of these applicants have some of the highest grades and test scores in the country.<sup>208</sup>

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<sup>198</sup> *Id.* at 662-64.

<sup>199</sup> See *Johnson v. Transportation Agency, Santa Clara County, California*, 480 U.S. 616, 663-64 (1986) (Scalia, J., dissenting).

<sup>200</sup> *Id.* at 676.

<sup>201</sup> *Id.* at 677.

<sup>202</sup> *Id.* at 663-64.

<sup>203</sup> *Id.*

<sup>204</sup> *St. Mary's*, 509 U.S. at 507, 524.

<sup>205</sup> *Ward's Cove*, 490 U.S. at 645-62.

<sup>206</sup> See *Johnson*, 480 U.S. at 658-64.

<sup>207</sup> 78 F.3d 932 (5th Cir. 1996).

<sup>208</sup> *Id.* at 935 (internal citations omitted).

The law school based its initial admittance decisions on the "Tex as Index" (TI) – an composite of an applicant's undergraduate GPA. and LSAT score.<sup>209</sup> The admissions committee placed applicants into three groups according to the TI score – presumptive admit, discretionary and presumptive deny.<sup>210</sup> African-Americans and Mexican-Americans were put into separate tracks, with lower TI scores required for each category.<sup>211</sup>

In declaring that the state had no compelling interest for the racial classification, the *Hopwood* court indicated that admission selection must have a rational basis: "The use of race, in and of itself, to choose students simply achieves a student body that looks different. Such a criterion is no more rational on its own terms than would be choices based upon the physical size or blood type of applicants."<sup>212</sup> The Court seems to be saying that racial classifications for the purpose of affirmative action are invalid because the classifications lower standards and are irrational, that there is no correlation between race and academic success.<sup>213</sup> Promptly after noting that race classification was not rational, the *Hopwood* court indicated that admission based on residency and/or other factors is acceptable.

Ultimately, as in Justice Scalia's Title VII jurisprudence, the *Hopwood* court began with an invocation of excellence, complained about the lowering of standards and ended with a system allowing the decision-maker to use any selection criteria it wishes except affirmative action.

### B. *The Confusion of Values*

Not having a legal requirement of merit additionally lends to a confusion of values, where the values of anti-discrimination, merit and autonomy get hopelessly confused. Part II of Professor McGinley's article *The Emerging Cronyism Defense* is entitled, "Valuing Liberty Over Merit."<sup>214</sup> Professor McGinley's issue can be framed as such: is employer autonomy valued or is merit required? Criticizing affirmative action or discrimination laws in general on merit grounds is empty rhetoric. Professor Epstein again provides an example. He writes in his preface that autonomy, the freedom from state control, is a value.<sup>215</sup> One can exalt that value over others. Any legal requirement of merit may well be too intrusive, too inefficient and too difficult to enforce to be worth it.<sup>216</sup> But if autonomy is one's value, your values are not "intellectual

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<sup>209</sup> *Id.* at 935, n.1.

<sup>210</sup> *Id.* at 935.

<sup>211</sup> *Id.* at 936.

<sup>212</sup> *See Hopwood v. Texas*, 78 F.3d 932, 945 (5th Cir. 1996).

<sup>213</sup> *See id. generally.*

<sup>214</sup> McGinley, *supra* note 46, at 1017.

<sup>215</sup> *See* EPSTEIN, *supra* note 14, at xii.

<sup>216</sup> Several economists conclude that employment-at-will is the best employment system

excellence, personal dedication, effort, entrepreneurial zeal.”<sup>217</sup>

We have seen how autonomous decision makers have preferred fishing buddies, state residents, athletes, legacies, WASP male prep school graduates and relatives. Perhaps people should be free to choose, with only a few criteria being forbidden. But if that is the value choice, merit is not the highest value.

### C. Avoidance of Hard Decisions

Using rhetoric instead of reality has allowed us to avoid two hard problems: how do we determine merit and who determines it?

#### 1. How Is Merit Determined?

This article has shown that test scores are not an accurate way to predict future performance or evaluate present performance. Michael Selmi's critique of the *Johnson* decision emphasized this phenomenon.<sup>218</sup> He points out that it was assumed that the plaintiff was the most qualified because he scored a seventy five on an examination and the person actually promoted scored a seventy three.<sup>219</sup> This assumption was invalid, because the examination was subjective, making it less reliable, and the scores were within the standard error of measurement.<sup>220</sup> “[E]mployment tests are typically weak predictors of potential productivity and individual test scores are inaccurate measures of an individual's true abilities, as those abilities are measured by the examination.”<sup>221</sup> Many abilities, such as leadership, just cannot be quantitatively measured.<sup>222</sup>

Academic selection tests fare no better than employment assessments. Grade point averages and standardized test scores have limited predictive value.<sup>223</sup> Professor Michael A. Olivas posits that the GRE does not “predict graduate

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for all concerned. See Paul Krugman, *Unmitigated Gauls: Liberté, Egalité, Inanité* in THE ACCIDENTAL THEORIST 34 (1998), in which the economist points out the high unemployment rate in France is due to the French detailed, pervasive, pro-employee regulation. A French employer must pay his workers well and provide generous benefits, and it is almost as hard to fire those workers as it is to evict a New York tenant. New York's pro-tenant policies have produced very good deals for some people, but they have also made it very hard for newcomers to find a place to live. France's policies have produced nice work if you can get it. But many people, especially the young, cannot get it and, given the generosity of unemployment benefits, many do not even try.

<sup>217</sup> *Id.* at 504.

<sup>218</sup> See Selmi, *supra*, note 182, at 1252-54.

<sup>219</sup> *Id.* at 1252.

<sup>220</sup> *Id.* at 1252-54.

<sup>221</sup> *Id.* at 1253-54.

<sup>222</sup> *City and County of San Francisco*, 236 Cal. Rptr. at 725.

<sup>223</sup> See Michael A. Olivas, *Affirmative Action: Diversity of Opinions: Constitutional Criteria: The Social Science and Common Law of Admissions Decisions in Higher Education*, 68 U. COLO. L. REV. 1065, 1072 (Fall 1997).



school first-year academic performance with any meaningful statistical certainty.”<sup>224</sup> At the University of Texas Law School, the correlation between LSAT scores and first-year grades was .24 for Caucasian students, and for African-American students, it was .28 when combined with undergraduate grades.<sup>225</sup>

Professor Selmi concludes that the limitations of these indicators should be recognized and their use limited.<sup>226</sup> He criticizes the belief by affirmative action critics and many federal judges that higher scores indicate more “deserving” and “more meritorious applications” and that relying on objective measures, such as tests, “constitutes a fair, race-neutral practice.”<sup>227</sup> Professor Selmi believes standardized scores should only be put to “narrow, modest use.”<sup>228</sup>

The beginning of wisdom in this area of law is to realize that predicting and evaluating performance is difficult, requiring thought and work. Thinking that the SATs “are highly accurate predictors of college performance, of who is and isn’t likely to graduate” is indulging in fantasy.<sup>229</sup> Nicholas Lemann points out that the SAT’s creator, Henry Chauncey, sought to achieve the Puritan dream of determining grace.<sup>230</sup> “It will accomplish something not very different from what Chauncey’s Puritan ancestors came to the New World wanting to do—engineer systematic moral grace in the place of wrong and disorder—but via twentieth-century technical means.”<sup>231</sup> The Wall Street Journal described the SATs as “designed to ‘see through’ inferior education and the results of poverty, to discover cognitive ability and uncover talent.”<sup>232</sup>

It must be realized that humans do not possess godlike abilities to find merit. The limited correlation between the SAT and even first-year academic performance demonstrates the difficulty in predicting future performance. Certainly the creators of the SATs are sophisticated, have spent years developing and refining the tests, and test under rigorously controlled conditions.<sup>233</sup> Yet even the creators cannot achieve high correlations between the tests and first year academic performance. *City and County of San Francisco* recognized the impossibility of measuring leadership ability with a paper and pencil test.<sup>234</sup>

Prediction of future performance and present performance is hard and requires much work. Pretending that present evaluation methods are unbiased, definitive, and error free – as do the Wall Street Journal and Justice Scalia in his *Johnson*

<sup>224</sup> *Id.*

<sup>225</sup> *See id.* at 1071; *Hopwood*, 78 F.3d at 936-37.

<sup>226</sup> *See* Olivas, *supra* note 223, at 1117.

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> *Blaming The SATs*, *supra* note 19.

<sup>230</sup> *See* LEMANN, *supra* note 70, at 346.

<sup>231</sup> *Blaming The SATs*, *supra* note 19, at 5.

<sup>232</sup> *Id.*

<sup>233</sup> *See* LEMANN, *supra* note 70, at 83-85.

<sup>234</sup> 236 Cal. Rptr. at 725.

dissent – does not help at all.<sup>235</sup> The assumption of all the courts in *Johnson v. Transportation Agency* that the plaintiff was more qualified even though the evaluation process was subjective, the test was conducted in a male-biased atmosphere and resulted in a two point higher score for the male candidate, ignores any questions on how we should evaluate employees.<sup>236</sup>

The specific criteria that should be reviewed to evaluate total performance is an open question.<sup>237</sup> There is also the question of the proper relationship between criteria evaluated on job tests and present or future job performance. *Wards Cove* dealt with this issue and the business necessity requirement of the Civil Rights Act of 1964.<sup>238</sup> This is a difficult issue – one that has not yet been settled.

Behind the debate and the cases over affirmative action, discrimination and preferences, is the question of who evaluates people, distributes rewards and punishments and gets to set the criteria. This article has shown that college admissions have been under the control or influence of prep school headmasters, admission committees, and the SATs.<sup>239</sup> The faculty, administration, regents, and referendum process have made admissions decisions in the University of California system.<sup>240</sup> Behind the decisions in *Wards Cove* and *Johnson* is the question of whether the employer or the court should decide on selection criteria.<sup>241</sup> *Hopwood* decided that it was the province of Fifth Circuit, not the University of Texas, to decide the importance of having a racially diverse student body.<sup>242</sup>

The issues are complex and debatable. The present system, giving autonomy to the decision-maker with some exceptions, may be the best. Some groups are protected, but the majority of decisions can be made without governmental oversight. Under that system, however problems arise in determining which groups are protected, as demonstrated by the debate over handicapped status under the American with Disabilities Act.<sup>243</sup> The adverse decision must be discriminatory against the protected characteristic, e.g., gender or disability. Provided that the decision is not discriminatory, it may be irrational and have

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<sup>235</sup> See *Blaming The SATs*, *supra* note 19; *Johnson*, 480 U.S. at 667.

<sup>236</sup> 480 U.S. at 641; see also, *Selmi*, *supra* note 182, at 1252-53.

<sup>237</sup> For example, the SAT only measures about 9% of the abilities that produce first year college grades. It does not test the other 91% of determinants. See *Selmi*, *supra* note 182, at 1263-64.

<sup>238</sup> See 490 U.S. at 665-66, 42 U.S.C. § 2000e-2.

<sup>239</sup> See discussion III-B *infra*.

<sup>240</sup> *Id.*

<sup>241</sup> See *Ward's Cove*, 490 U.S. at 657; *Johnson*, 480 U.S. at 616.

<sup>242</sup> *Hopwood*, 78 F.3d at 962.

<sup>243</sup> See, e.g., *Williams v. Toyota Motor Manufacturing*, 224 F.3d 840 (6th Cir. 2000), *rev'd on different grounds*, 151 L.Ed.2d 615 (Jan. 8, 2002). The *Williams* court addressed whether plaintiff's carpal tunnel syndrome and tendonitis, which impaired movements in her arms, shoulders, and neck, constituted a "disability" under the Americans with Disabilities Act. She only receives protection from adverse job actions if she is judged disabled.

nothing to do with merit. The present system does, however, provide some protection for protected groups and flexibility with labor markets.

Perhaps a more European system, with employers forced to justify the decision on some national grounds would be better. But does America really want a "National Merit Employment Practices Act?" Under such a system, a great deal of rigidity would be introduced into the employment market, with the insuperable difficulties of defining and determining merit. Until Congress enacts such legislation, or Professor McGinley's proposal that at least members of protected groups be treated rationally is adopted, merit will not be the law, but merely rhetoric.