ARTICLES

A Theory of Merit

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Men at some time are masters of their fate:
The fault, dear Brutus, is not in our stars,
But in ourselves . . .

—William Shakespeare, Julius Caesar, act 1, sc. 2.

Self-trust is the essence of heroism.
—Ralph Waldo Emerson, Heroism, in Essays: First Series (1841).

INTRODUCTION

Consider the following examples:
(1) A corporate CEO earns $200 million dollars every year directing and supervising the development of his company. A migrant farm worker makes $7,500 dollars a year picking grapes. Both work equally long hours. The migrant worker’s activity is physically far more demanding, while the CEO’s is more stressful, psychologically.

(2) In each of two separate cases, two boys save two small children from drowning. In the first case, the rescuer is motivated by his knowledge that the child comes from a wealthy family and risks his life in dangerous waters in the hope of being handsomely rewarded. In the second case, the rescuer is motivated by compassion for the drowning child. He wades into a shallow pool to retrieve the infant.

(3) One student exerts great effort and industry in his studies, but earns only a "C," while another student does very little but, because of greater ability, earns an "A."

(4) An admissions officer at a "top ten" law school must admit one of two students on the basis of merit. The first student was born into a poor, white, Appalachian family. No one in his family had previously finished high school. While working jobs at night to support his family, he finishes high


merit must inevitably embody a tension between external, outcome-oriented indicia of value and an internal component. Specifically, understanding merit requires that we consider the more objective indicia of merit against the background of an inner standpoint—from a perspective that measures outward performance relative to the personal and social obstacles that each person individually has overcome. As such, the theory of merit proposed here will seek to chart a middle course between the Scylla of a completely “objective,” consequential, or outcome-oriented conception of merit, as measured by the market, by standardized tests, or by other external modes of valuation, and the Charybdis of the radical deconstruction of merit.

Part I develops a general outline and overview of three varieties of merit: moral merit, performative merit, and qualificational merit. This Part will examine the underlying similarities and contrasts between these three sometimes-competing ideals.

Part II examines the possibility of meritocratic justification. More specifically, it surveys a number of deeply philosophical challenges to any coherent theory of merit. Part II.A raises and considers three such problems: the problem of egoism, the problem raised by the need to distinguish innate from earned capacities, and the most all-encompassing issue of all, the problem posed by determinism. Part II.B briefly examines and rejects recent paradigmatic attempts to reinterpret merit by conservatives, on one hand, and egalitarian progressives, on the other. Finally, Part II.C seeks to resolve the three problems raised in Part II.A.

Part III considers four types of arguments of a more practical nature frequently marshaled against meritocratic standards. These are the problem of measuring merit against a background of social inequality, the belief that merit is invariably a means of replicating social inequality, issues concerning the precision and fairness of meritocratic criteria, and a challenge to merit, predicated upon the ethic of care, that holds that meritocratic standards lead to excessive competition and undermine a more cooperative work environment.

Part IV turns to the positive case for merit. It offers three arguments in favor of meritocratic justification. I dub these the Arguments from Fairness, Human Excellence, and Hope, respectively. In discussing the Argument from Fairness, in particular, we will have an opportunity to address the current debate concerning the tension between meritocratic and non-meritocratic conceptions of diversity.

Finally, Part V offers a more detailed discussion of the application of meritocratic ideals. Part V.A explores the relationship between merit and professional status and compensation, and argues that meritocratic assessments can only be made within rather narrow, standardized contexts. Thus, meritocratic criteria are reflected within, but not necessarily across, the various professions.

Part V.B examines merit and affirmative action. Following discussions in a number of previous sections, it offers a middle ground between strongly progressive and conservative positions. It argues that, at least in some contexts,
meritocratic assessments require the evaluator to consider the social, economic, and personal difficulties that each person has surmounted and overcome. Status criteria such as race, ethnicity, and gender are relevant, not in and of themselves, but insofar as they are relevant to understanding the obstacles each person individually has overcome.

Part V.C offers some suggestions for implementing meritocratic standards in the workplace. It argues that meritocratic standards themselves cut against the "hyper-competitive" ethos ascribed to them by their critics. One issue considered here will be the application of merit to concerns regarding the productivity of older workers. It argues that merit should "remember" and counsels that meritocratic standards require consideration of a worker's productivity over the course of a lifetime. In the broadest sense, this article argues that our adherence to meritocratic standards is a reflection not of some commitment to efficiency or productivity, but to human dignity and self-actualization.

I. THREE FUNCTIONS OF A CONCEPT OF MERIT

Today the concept of merit functions in three distinct ways as a moral norm that justifies the distribution of social goods. Each of the three functions of merit is derivative of the Greek ideal of arête—virtue or excellence as represented in Aristotle's teleological ethics.\(^4\) According to the traditional ideal, merit operates as a measure of the extent to which a thing has achieved its telos, or natural purpose, in the world. As applied to the domain of human activity in Aristotle's ethics, it was a measure of character, of the attainment of certain dispositions or virtues that define a person's character as good. This traditional conception of the ideal has fallen into desuetude, at least in most social and legal discourse, not simply because Aristotelian moral thought has gone out of vogue. Indeed, there has been a resurgence of virtue ethics over the last two decades.\(^5\) Rather, modern social thought is increasingly skeptical of the idea of

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5. \textit{See, e.g., Alasdair MacIntyre, After Virtue} (2d ed. 1984); \textit{Martha Nussbaum, Love's Knowledge} (1990); \textit{Tara Smith, Moral Rights and Political Freedom} (1995). Each of these sources rejects the two alternative traditions of moral realism in favor of a teleological view of morality. Teleological ethics gives a central place to issues of character. In contrast, deontology evaluates acts on the basis of whether they are performed in accord with a rule that is defensible from the standpoint of some ultimate rational principle. \textit{Immanuel Kant}, \textit{Grounding for the Metaphysics of Morals} (James W. Ellington trans., Hacket Publ'g Co. 1981) (1785). Kant's various versions of the categorical imperative are perhaps the best example of such a rationally defensible moral principle. One version holds that one should never treat a rational being as a mere means to some end; rather, persons are to be treated as ends in themselves. Another, still more abstract version of the categorical imperative holds that the maxim for any principle of action must be universalizable. In other words, one should never act in a manner that one could not will to be the principle of everyone else's similar action.

Utilitarian thought, on the other hand, looks not to the principles but to the consequences of actions. The goodness of an act is a function of the beneficial consequences—measured in terms of the happiness they generate, or any of a number of other ethical values—that the act generates. See \textit{Jeremy
character as a product of the self-made, autonomous person. We shall return to this issue in Part II. Nevertheless, there exist three modern senses of the ideal of merit, each of which is an aspect of the former whole. Each finds merit in the functional relevance of certain forms of human conduct. We can designate these three forms of merit, which often are confused with one another, as "moral merit," "performative merit," and "qualificational merit."

A. MORAL MERIT

Moral merit looks backward to previous acts, rewarding the actor for the moral goodness of the meritorious act. While the archetypal form of this dimension of merit involves noble deeds, acts of heroism, or other forms of supererogatory conduct—such as that of rescue, as exemplified in case (2) above—it may also involve everyday instances of good conduct, as manifest in the acts of the Good Samaritan. Moral merit embodies what can only be characterized as a core moral component that serves to distinguish it from performative merit in two ways. First, while performative conceptions of merit tie the recognition of merit more closely to the performance or to the consequences of an act, moral merit is often not dependent upon specified consequences. What is important to moral merit is the way in which it reflects upon the person’s character, one’s inner strength, or the effort undertaken to complete an act, sometimes in unfavorable, even adverse circumstances. In sum, while the outcome of the act is immediately relevant to performative merit, it is not relevant in evaluating moral merit. Second, as a consequence of the first idea, moral merit operates on the assumption that the act was in no direct way motivated by the prospect of compensation or other reward. In other words, the motivation for the act is relevant to considerations of moral merit. Bad motivations detract from the ascription of moral merit, but not in evaluating performative merit.

6. See infra Part II.A.3 (discussing the problem of the disappearing self) and Part II.C.1. (seeking to resolve this problem).

7. In this respect, moral merit has a Kantian or deontological cast; nevertheless, it still may be argued that this act reflects an underlying excellence of character that gives it an Aristotelian cast.

8. While moral merit approximates a Kantian or deontological conception of merit, performative merit is distinctly utilitarian in its conception. However, as we shall see, the distinction between moral and performative merit does not perfectly track the Kantian/utilitarian distinction. Consequences sometimes are considered important in measuring moral merit. Put differently, even moral merit is often tinged with performative implications in the everyday use of these terms. But consequences are relevant in assessing merit for a different reason. For example, the foolhardy rescuer who unwisely risks his life to save another and fails is not merited for the act. The consequence—the failed act—is relevant as an indication of how well thought out was the act itself. In other words, failed consequences may be a sign of an ill-conceived plan, which itself may undercut moral merit. What this indicates is that moral merit depends not simply upon acts of will, but upon those acts that are intelligently conceived and carried...
Moral merit requires that we find a principle by which to distinguish non-meritorious acts that result in beneficial consequences from the meritorious. At the same time, this principle must permit us to draw a moral line between autonomous acts of the self and acts brought about by conditions of the world. The criterion I wish to offer for the ascriptions of moral merit requires that the actor make a moral effort in achieving the results or consequences that are the basis for reward. Moral effort may be described as the subjective psychological difficulty or the necessary persistence required in carrying an intention through to achieve the intended consequences. Moral effort is manifest in the experience of resisting the temptation to do what one believes one should not do. It is required in the overcoming of such internal constraints as inertia, fear, torpor, complacency, desire, or any sentiment or emotional state that blocks meritorious action, and in any of the variety of external physical obstacles that do the same. Moral effort also exists in subtler but more powerful form in the steady, assiduous attention required to pursue a distant goal over a long period of time. The successful exertion of moral effort, as this article will argue later, is perhaps the single most powerful, subjective confirmation of the reality of personal autonomy.

American law not only recognizes but enshrines as a central axiom the idea that an individual is responsible for certain acts, that he has control over them, and that he may undertake to achieve them. Many of our principles of exculpation in the law and in moral thought generally reflect our intuitive understanding of autonomy and its limits. The condition characterized by the futility of autonomy—where the most concentrated exercise of will is to no avail—constitutes genuine compulsion. Further, the unfairness of requiring a person to exercise autonomy in some cases where action is within the power of the will marks the boundaries of duress. Finally, our failure to exercise moral effort in

out. In sum, the outcome of the act is immediately relevant to performative merit, but is not relevant in evaluating moral merit.

9. The idea of autonomy is a version of the “free will” thesis, though it carries the additional requirement that, to be autonomous, an act must be fully rational and morally defensible. The distinction I wish to draw is between those acts that may be said to flow directly from external causes and those acts that are, in some defensible respect, self-generated. Of course, the possibility of any such distinction is disputed by those, from hard determinists to defenders of extreme forms of behaviorism and social learning theory, who argue that nothing is truly internally generated. While we will return to these questions in Part II—indeed, they are an example of perhaps the single most irresoluble metaphysical puzzle in history—here I hope to offer a principle that makes sense of this distinction from a psychological standpoint—that is, from the subjective experience of the acting individual. See infra Part II.C.1 (for the philosophical discussion of the problem of autonomy).

10. Compulsion is recognized as a defense in tort law and in the criminal law. Both areas of law conceptualize instances of compulsion as “no act” situations. See Restatement (Second) of Torts § 2 cmt. A (1965) (discussing the requirements of volition); Model Penal Code § 2.01(1) (requiring a voluntary act for criminal liability), § 2.01(2) (listing actions that are not voluntary, such as a reflex or convulsion) (1962).

11. See Joshua Dressler, Exegesis of the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits, 62 S. CAL. L. REV. 1331, 1365 (1989) (duress excuses when the decision of the coerced victim is not only hard, but unfair); John Lawrence Hill, A Utilitarian Theory of Duress, 84 IOWA L.
a given case is characteristic of the condition of akrasia, Aristotle's conception of weakness of will.\textsuperscript{12} Akrasia is distinguished from compulsion and duress in that it represents an instance where one could and should, but does not, exercise the required moral effort to achieve the proper results.

The requirement of moral effort serves to tie the concept of merit to the notion of desert, which itself lies at the core of our conceptions of merit. Merit is earned; it is a product not simply of a capacity born of good fortune, but of personal effort undertaken in the pursuit of a worthy cause. This deserved aspect is what distinguishes merit from productivity, and reward from mere compensation.\textsuperscript{13} It also makes clear why it is that we do not find merit in innate abilities, even where we may admire them, and even when we often compensate those who possess them.\textsuperscript{14} Inborn abilities are not deserved in the way that developed talents are. This raises a host of problems concerning the ways in which unearned external factors, from inborn talents to fortunate social circumstances, may contribute to performative excellence. We will discuss these issues in Parts II and III.A. The requirement of moral effort and, by implication, the intent to achieve meritorious consequences, marks an asymmetry between our prevailing conceptions of praise and blame. While one can in some cases be held morally responsible—and even civilly and criminally liable—for the foreseeable but unintended consequences of one's acts,\textsuperscript{15} the reverse is not true. Moral merit is not recognized in virtue of the beneficial but accidental results that flow from one's acts, even if such consequences are occasionally compensated. It is a telling, if not vaguely ironic, feature of our moral world that the ripples of responsibility for our actions extend well beyond the ambit of praise.
that we may be held accountable for the consequences of the same act for which we would not be rewarded if it were by some accident to eventuate in beneficial results.

B. PERFORMATIVE MERIT

In contrast to merit as reward, merit in its performative dimension is characteristic of contests, examinations, and any other activity in which there exists some specific performative criteria by which to evaluate an act. With performative merit we award, rather than reward, the actor. Performative merit differs from moral merit in a number of ways. First, performative merit involves evaluating a specific talent or capacity such as athletic ability or intellectual achievement. Second, it sets forth the criteria for evaluation in advance, whereas moral merit functions as a post hoc recognition of some good deed. Third, performative merit typically involves a comparative evaluation of competing contestants. In this respect, it has an inter-personal and competitive component not present in the context of ascriptions of moral merit. Finally, the presence of inducement is not detrimental to our conception of performative merit, as it is with moral merit. Indeed, inducement is usually present in the form of grades, scholarships, commission structures, gold medals for athletic competitions, and similar forms of award.

Though performative merit is measured by the level of achievement, rather than the level of effort, the moral component is not entirely absent even here.\textsuperscript{16} Consider why it is that we distinguish men’s from women’s sports, or different age classes among children’s athletic competitions, or different weight classes in some forms of adult competition. By limiting competition among those who are similarly situated, we bracket external differences, such as gender, age, and weight, that will often be outcome determinative, but that are irrelevant to the moral dimensions of merit. The central question in these cases is not who is the best performer overall. Rather, it is who is the best performer within a class similarly enough situated that differences in achievement will reflect, at least to a large extent, differences in effort. Thus, moral effort is typically a fundamentally important element in the development of the capacity for meritorious performance, even if one is ultimately awarded for the performance, rather than the effort that lies behind it.

C. QUALIFICATIONAL MERIT

The third conception of merit, and one that has been central to recent debates concerning affirmative action and racial and gender equality in the educational and professional contexts, is that of merit as qualification. Like merit as performance, qualification predicates the claim to an entitlement—to a job or educational placement—upon one’s abilities, capacities, and talents, innate or

\textsuperscript{16} See infra Part II.C.2 (discussing the relationship between such inner indicia of merit as effort and motive, and outward performance).
developed, relevant to performance in the particular social context. The measure of merit here is not past works, however, but rather the potential for performance in that capacity. To say that a particular job went to a specific candidate on the basis of merit—to say that he "earned it"—is to say that he is the best qualified to do the job, given the information available. This function of merit is neither a reward nor an award for past action as such. The employer or graduate school administrator is not compensating the hiree or admittee for his past acts, but is using past achievement to gauge the potential future performance of a candidate. As such, merit as qualification represents a prediction about performative merit. Its importance in contemporary debates, at least within the employment context, is underscored by the high costs of hiring, training, and terminating unproductive employees, as well as the costs inherent in lost productivity on the job.

One of the underlying misconceptions in the debate over affirmative action arises from a confusion of qualificational and performative merit, and the differing relevance of past accomplishments to each type of merit. In case (4) above, involving the two candidates for admission to the law school, the better-credentialed candidate may claim that he "deserves" the position over the applicant with slightly less stellar scores. Indeed, this is precisely the argument commonly made by those (often white males) with higher scores who have been passed over in favor of other candidates (often minorities) with slightly lower scores. The claim by non-minorities in this situation results from interpreting their claim as an instance of performative merit, and from viewing the admissions or hiring decision as a kind of contest or race in which the candidate with the highest grades automatically wins. The connection between past accomplishments and access to scarce educational or professional opportunities, however, is neither direct nor automatic because access is granted as a result of the recognition of ability or potential, not as an award for past achievement.

As we shall argue later, there are some contexts in which it is appropriate to award the position to the candidate who presently possesses the highest level of skill necessary to the job, while in other contexts, there is a greater "time horizon" in which a consideration of more subjective indicia of likely future development may be made. In this case, measuring potential or likely future ability requires more than evaluating objective test scores or past accomplishments. It requires evaluating the inner indicia of future success—those personal qualities than can be discerned by evaluating each person's history and the obstacles he has overcome in reaching his present station in life. This kind of evaluation, of course, does not mean that the candidate with the better objective criteria should inevitably lose, but it does mean that non-quantitative criteria will often be dispositive in what might otherwise be close cases.17

Our three conceptions of merit all reflect at one level their common deriva-

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17. See infra Part V.B (discussing the affirmative action controversy) and Part III.B (arguing that objective indicia of qualifications seriously overvalue the predictive accuracy of employment tests).
tion from the Aristotelian conception of virtue insofar as each recognizes a dispositional capacity to act well with respect to a particular domain of activity. Merit as reward reflects the inner, moral dimensions of excellence, while merit as award and merit as qualification embody our recognition of the highest intellectual, physical, or professional attainment. Interestingly, however, all three dimensions share a basic functional similarity. As we shall explore in the next Part, our conceptions of merit, predicated in turn on our ideals of personal autonomy, serve to steer a middle course between “crass consequentialism,” where all human value is reduced to the productive consequences of our acts, and an untenable idealism that views merit wholly in terms of good motives and noble intentions. In very different ways, both consequentialism and idealism eliminate any meaningful conception of individuality and personal responsibility from our social and political institutions.

The ideal of merit celebrates the tension between the world of will and the world of consequences. In doing so, it preserves our ideal of the whole person as the originator of acts and the bearer of responsibility.

II. THE POSSIBILITY OF MERITOCRATIC JUSTIFICATION

A theory of merit must overcome two distinct kinds of challenges. First, it must be possible to make meritocratic assessments. In other words, the idea of merit must be philosophically defensible, conceptually coherent, or generally consistent with our deepest metaphysical convictions concerning human behavior. Second, it must be fair to engage in meritocratic judgments. This second set of objections raises more practical problems with merit as it is understood in our society. If meritocratic comparisons of persons are philosophically indefensible then, a fortiori, they will be unfair as a practical matter; but even if merit is philosophically defensible, it may be unjustifiable as a practical matter. This Part addresses the possibility of meritocratic assessments by examining three philosophical challenges related to meritocratic assessments. It seeks to clear the way, philosophically, for a consideration of four practical issues or problems of fairness in the measurement and application of meritocratic principles, which will be considered in Part III. While the problems addressed in Part III survey a number of very basic issues about the structure of distributive outcomes in our society, the present Part considers a number of more perennial problems inherent in any coherent conception of human action.

A. THREE PHILOSOPHICAL PROBLEMS

Section A.1 addresses a problem that threatens to undermine any consistent ideal of moral merit: the problem of psychological egoism. In Section A.2, we consider the difficulty in sorting out and distinguishing innate or given capacities and talents from those that are earned through acts of will or personal effort. Finally, Section A.3 considers the “problem of the disappearing self,” the most
encompassing challenge to merit (and personal responsibility) altogether. This problem stems from evaluating human acts from a deterministic standpoint.

1. The Problem of Psychological Egoism

As we saw in Part I.A, moral merit or merit as reward measures merit based upon the nobility of the deed performed; it looks backward to the genesis of the act and considers the motives of the actor along with any risk inherent in, and effort required for, the desired result. Central to the idea of moral merit is that there are more and less noble motives for various actions. In case (2) at the beginning of this article, for example, we question the moral merit of the rescuer who is motivated by profit, even if we applaud the consequences of the act, because the specter of self-interest taints the nobility of the act.

The importance of motive to our understanding of moral merit, however, raises a deeply philosophical quandary about the nature of human motivation that threatens to undermine any meaningful conception of moral merit. A long tradition in modern philosophy, beginning with the thought of Thomas Hobbes, holds that all motives ultimately are egoistic in nature; consequently, apparent instances of altruism are always manifestations of disguised self-interest.\(^\text{18}\)

Whenever we act, the theory holds, we are driven by a motivation that is itself a kind of passion or desire. Every desire, moreover, must be a desire for the actor's own pleasure or self-interest.\(^\text{19}\) In the case of the rescue of the drowning child above, the boy driven by concern for the child is in fact driven, the philosophical egoist would hold, by the distress he feels at seeing the drowning child, by his desire to be well regarded by others, or by some ultimately self-interested motive. What distinguishes, on this view, the motive of the boy animated by the desire for profit from that of the apparently more compassionate boy is not that one is more selfish than the other. Rather, the motives of the altruist are less apparent or possess more utilitarian value to society insofar as they indicate his willingness to risk his life in a greater number of situations than the selfish boy. Thus, the egoist maintains that it is inaccurate to depict those who are apparently altruistically motivated as making a greater moral effort than those motivated by profit or self-aggrandizement.

Psychological egoism may not present any difficulty to performative merit, but it obviously undermines any conception of merit that considers the character of one's motivation in acting. A defensible conception of moral merit requires

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\(^{19}\) Because all actions are motivated by appetites or aversions, Hobbes, supra note 18, every act we perform is motivated by self-interest. Thus, the doctrine of egoism is a product not simply of any view of human nature that emphasizes the aggressive aspects of our nature or the will to power, but more deeply, of any view of motivation that links action to desire and desire to self-interest. See John Aubrey, Brief Lives 158-59 (Richard Barber ed., Barnes & Noble 1983) (1813) (recounting Hobbes's encounter with a clergyman who accused him of being inconsistent when Hobbes gave alms to a beggar, to which Hobbes responded that he did it to relieve his own distress at the beggar's plight).
not that we be able to demonstrate that some acts do not flow from desires. Rather, it requires that we be able to show that not all desires are self-interested in the sense that the egoist maintains. We will return to this problem in the hopes of sketching a solution in Section C.3.

2. Distinguishing Innate From Earned Talents and Capacities

Performative merit raises a host of quite distinct issues regarding our ability to distinguish those capacities and talents that a person has earned from those that are simply given by nature and circumstance. There are actually two issues here. First, should innate talents, abilities, and capacities be counted among the attributes for which one is awarded, or should merit only apply to the capacities that each person has in some way earned through his own effort? Second, if we are to count only the earned aspect of one’s talents in meritocratic assessments, then how are we to distinguish that which is purely given by nature or circumstance from that which is earned?

Traditionally, liberals and conservatives alike agreed that the individual was to be rewarded for his natural talents and capacities, and that this was an inevitable consequence of the move from inherited aristocracy to what Jefferson called the “natural aristocracy.”20 Thinkers as diverse as Madison and Rousseau counted among the most essential aspects of one’s individuality the diversity of natural capacities that each person possesses.21 That government or society should not reward these inherent talents and capacities would have been unthinkable to social and political philosophers of the eighteenth and nineteenth centuries.

More recently, however, such preeminent liberals as John Rawls and Ronald Dworkin have suggested that this might not comport with the requirements of social justice.22 The crux of their argument is that native abilities are not really a product of individual choice or effort and, consequently, are not deserved. We may compensate such abilities in certain ways, but the individual cannot be praised for them. Of course, a person can be praised for the work he has performed in honing such abilities—the pursuit of education necessary to


21. See, e.g., The Federalist No. 10, at 130-31 (James Madison) (Benjamin Fletcher Wright ed., 1961) (“The diversity in the faculties of men, from which the rights of property originate, is not less an insuperable obstacle to a uniformity of interests. The protection of these faculties is the first object of government.”); J.J. Rousseau, Discourse on the Origin of Inequality (Patrick Coleman ed., Oxford 1994) (1754) (arguing that positions should be open to talents, and that redistribution of social goods cannot be carried out without rigorous equality).

develop one’s intellect, or the endless practice undertaken by the gifted athlete—but this is another matter.

Issues of performative merit also raise a similar, yet contrasting, problem. How are those affected by disabilities that obstruct personal achievement, notwithstanding herculean acts of effort, to be evaluated? Such issues raise questions about which disabilities critically affect performance in certain positions or professions and which have only secondary effects.

What becomes clear as we consider these issues is that our pre-analytic moral sentiments harbor an ambivalence: on one hand, to the extent that performative merit looks only to the achievement of successful consequences, it really should not matter that one has been born with a particular physical or intellectual capacity. What counts is the consequence—the successful performance—itself. Yet, there remains the nagging intuition that even performative merit must, in some sense, reflect personal effort. A robot that is built to run faster than any human being is not praised for this attribute, but human athletes are praised—precisely because human beings, but not robots, earn their excellence. Indeed, this intuition seems to be at least partially responsible for the negative judgment we commonly express in cases where athletes have gained some unfair advantage by the use of steroids or other illegal, performance-enhancing drugs.23

When we return to this problem in Section C, we will see that our judgments about performative merit often express a balance between a pure consequentialism that considers only results and the more idealistic conviction that even performative merit must embody some evidence of inner effort, the striving of the human will against the boundaries imposed by worldly limitations.

3. The Problem of the Disappearing Self

The problem we have just briefly surveyed may be viewed sui generis or may be understood as a species of a much more basic and all-encompassing challenge to the idea of merit. The very distinction between what one has been given and what one has earned is contested by those who reject any conception of free will or personal autonomy on categorical grounds.

In the most general way, most modern attempts to understand human behavior in a scientific way have sought to explain it in terms of a set of causal regularities. To call psychology or sociology a “science” requires that human action can be explained in a law-like fashion. Consequently, the underlying thrust of much of modern social and political thought is, increasingly, broadly deterministic in its conception of the world.24 The deterministic paradigm holds

23. See, e.g., Pan American Games: Two More Athletes Test Positive for Steroids, N.Y. TIMES, Aug. 9, 1999, at D6. Thus, the utilitarian will generate distinctions between "self" and "non-self" on the basis of utility—for example, that vitamins are permitted (and considered as not altering the essential self), while steroids are forbidden (and viewed as external) on the basis of their net social utility.

24. The literature on determinism is mind-bogglingly voluminous. Indeed, the "dilemma of determinism" has been a central problem throughout the history of the western philosophical tradition. See DETERMINISM, INDETERMINISM, AND FREEDOM (Sidney Hook ed., 1957) (providing an excellent compilation of responses to the dilemma from scientists and philosophers).
that each person is constituted by the confluence of biological, social, and environmental conditions that have coalesced in each of us. Of course, different sciences emphasize the importance of varying causal factors: medical science may emphasize the importance of biological factors, while sociology emphasizes social or environmental conditions. Nevertheless, all human sciences tend to be broadly deterministic insofar as they explain human behavior by appeal to some set of scientific laws.

From the vantage point of a deterministic understanding of human behavior, there is something quintessentially accidental about each of our histories, our personalities, and our accomplishments. Paradoxically, precisely because nothing is left to chance in the deterministic ordering of the world—that is, precisely because determinism holds that we are who we are by virtue of the world’s influences upon us—there is something contingent about who each of us turns out to be. Our accomplishments are not ours; they are, in some ultimate sense, those of the world itself as it has created us. Our physical traits, our personalities, our talents and shortcomings are all, on this view, a product of some combination of biology and environment. Even our characters and personalities are viewed to be the causal effects of these influences. Moreover, these causal influences can be traced backward in time to a point beyond which it is impossible to say that we are responsible for ourselves.25 The central implication of this view, ultimately, is what we will call “the problem of the disappearing self.”26

The problem of the disappearing self results from adopting what we might call an “external” viewpoint regarding the causes of a person’s behavior.27 The external viewpoint is characteristic of any deterministic framework.28 The problem results from the fact that ascriptions of merit require that we be able to draw a principled line between those causes of behavior that emanate from the self and those that are products of the world, according praise only to consequences that flow from the former. The external standpoint, however, admits of no such line. Where conventional wisdom may attempt to distinguish a person’s circumstances from his acts of will, motivation, character, and so forth, arguing that the latter are the basis for ascriptions of merit, the external viewpoint tends

25. The deterministic hypothesis is often implicit in modern social and political theory, particularly political theory from the left. Human behavior is viewed to be a function of external social and economic factors that rule out, or greatly narrow the scope of, personal autonomy or individual agency.


27. By the “external” standpoint, we mean a perspective that explains all aspects of personal agency as the product of external causes. They are external in the sense that they are not the product of the agent’s choices. Or, the agent’s choices are viewed as the mere effects of external precipitating factors. External conditions include biological endowments and social conditions that contribute to making each individual the person he is. One thoroughgoing view of human behavior from an external environmental standpoint is that of the behaviorist B.F. Skinner. See B.F. SKINNER, BEYOND FREEDOM AND DIGNITY (1971).

28. See THOMAS NAGEL, THE VIEW FROM NOWHERE (1986) (discussing the internal and external perspectives as applied to various metaphysical problems, including the problem of free will).
to explain away even these most “internal” aspects of the self as the residuum of causally determined conditions. For example, a hard determinist29 will argue that the choices we make are themselves the product of motivational and dispositional factors that are no more a result of our choices in an ultimate sense than are such attributes as height, weight, and physical abilities. On this view, character, motivation, and other aspects of personality that have traditionally been ascribed to the inner self are similarly explained away in deterministic fashion, viewed to be the effect of a host of biological and environmental factors that are antecedent and external to the self.

If left unresolved, the problem of the disappearing self undermines any useful conception of merit because it dissolves the necessary distinction between the acts of the self and the natural effects of the world. Nevertheless, as we will see next, recent political thought, both on the left and on the right, seeks to reconcile merit with determinism.

B. RECONCEPTUALIZING MERIT FROM THE LEFT AND THE RIGHT: THE Egalitarian AND UTILITARIAN REINTERPRETATIONS

In different ways, modern liberal and conservative thought minimizes the significance of merit, or tends to dismiss it altogether, though each does so for a distinct reason. As one moves left on the political spectrum, from a form of middle-of-the-road liberalism to more progressive and socialistic conceptions of political philosophy (represented by left-liberals in America and various forms of democratic socialism in Europe), equality increasingly becomes the predominant political value.30 On the other hand, contemporary thinking on the right is broadly utilitarian in its commitments. In contrast to more traditional conservative thought, rooted in religious authority, in monarchical or aristocratic political structures, and in the maintenance of a rigid class structure,31 modern political philosophy on the right draws its deepest sustenance from classical and

29. William James, The Dilemma of Determinism (1884), reprinted in The Writings of William James 587-609 (John J. McDermott ed., 1967) (coining the distinction between “hard” and “soft” determinism). For a modern defense of hard determinism, see Richard Taylor, Metaphysics 48 (2d ed. 1974) (refuting soft determinism, which is the view that holds that though all human behavior is determined, we are “free” to the extent that we act in accordance with our own desires and choices). See also John Lawrence Hill, Law and the Concept of the Core Self: Toward a Reconciliation of Naturalism and Humanism, 80 Marq. L. Rev. 289, 350-55 (discussing the hard determinist’s challenge to our conception of moral responsibility).

30. Norberto Bobbio, Left and Right (Allan Cameron trans., Policy Press 1996) (1994) (arguing that the distinction between the right and the left is a function of the importance of equality—that commitment to substantive equality distinguishes the right from the left more than such competing themes as the size of government, the level of economic centralization, the commitment to individualism, and so forth).

31. Joseph de Maistre’s thought is perhaps the best example of this traditional conservative thought. Indeed, some have argued that de Maistre’s philosophical conception of society is proto-fascistic. See Isaiah Berlin, Joseph de Maistre and the Origins of Modern Fascism, in The Crooked Timber of Humanity (Henry Hardy ed., 1973).
neo-classical economic thought. The modern conservative follows a line of thought that commences with John Locke and Adam Smith, but which takes a decidedly utilitarian turn in the late eighteenth and nineteenth century with Bentham, Mill, and Spencer. In the twentieth century, their Austrian and American intellectual heirs, Ludwig von Mises, F.A. Hayek, Milton Friedman, and others, came to occupy the position of "conservative" through the same curious twist of linguistic fate by which the term "liberal" came to embrace a host of ideas that would have appeared very anti-liberal to early nineteenth century liberals.

The "egalitarian" and "utilitarian" conceptions of social justice, as we will use the terms here, represent these two positions. Both egalitarians and

32. For this reason, economic conservatives call themselves "neo-conservatives." Nevertheless, even the older form of conservatism, in more moderate forms, melded themes of traditionalism—a skepticism of rapid social change and a less-than-optimistic view of human nature—with such economic concerns as the protection of property and market values. This is evident in the conservative thought of such thinkers as Locke, Burke, John Adams, and Henry Maine, among others. See THE PORTABLE CONSERVATIVE READER (Russell Kirk ed., 1982) (providing a compilation of readings representing the conservative tradition in English and American varieties).

33. See BENTHAM, supra note 5; MILL, supra note 5; HERBERT SPENCER, SOCIAL STATICS, ABRIDGED AND REVISED (New York, D. Appleton & Co. 1896) (1892).

34. LUDWIG VON MISES, HUMAN ACTION: A TREATISE ON ECONOMICS (1949); FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM (1944); MILTON FRIEDMAN, CAPITALISM AND FREEDOM (Phoenix Books 1963) (focusing on competitive capitalism in promoting economic and political freedom and noting that views rooted in classical liberalism have now been labeled conservatism); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (3d ed. 1986).

35. See EDWARD SHILS, RESEARCH INSTITUTE ON INTERNATIONAL CHANGE, THE RELEVANCE OF LIBERALISM: THE ANTINOMIES OF LIBERALISM (1978) (discussing the transition from early to modern liberalism and the way this has inverted many traditional liberal principles); L.T. HOBHOUSE, LIBERALISM (1977) (1964) (providing a similar history of liberal thought); STEPHEN HOLMES, THE ANATOMY OF ANTILIBERALISM (1993) (offering a response to various criticisms of liberalism).

36. Egalitarian and utilitarianism are not always viewed as theories representing mutually exclusive positions. Indeed, equality is sometimes viewed as the predicate for utility—for example, when creating conditions of equality is viewed to conduces to social utility. Conversely, there may be egalitarian justifications for utilitarianism when the pursuit of social utility is thought to equalize social and economic conditions. The first is reminiscent of those views that hold that the redistribution of wealth is necessary for economic growth—for example, where welfare and redistributive policies are defended not on the basis of need, but on the basis of economic growth or social stability. The latter view is found in economic arguments, grounded upon principles of equality, which hold that growth conduces to equality because it requires that a significant portion of society have sufficient spending power to fuel an expanding economy.

I use the terms in a more general way. The egalitarian believes that it is the role of society, and government in particular, to equalize the accidents and inequalities inherent in the natural lottery and in social disparities, even at the cost of lost overall wealth, growth, or other indicia of utility. On the other hand, the utilitarian is oriented to consequences or social utility in particular. What distinguishes the utilitarian from the egalitarian is not only the emphasis on utility as such, but the view that greater overall wealth or utility justifies potentially great disparities, from the standpoint of equality. In this sense, utility is trans-personal. It can be traded off between persons in a manner that generates inequality as long as the overall amount is greatest. See THOMAS SOWELL, A CONFLICT OF VISIONS: IDEOLOGICAL ORIGINS OF POLITICAL STRUGGLE (1987) (comparing the "constrained" and "unconstrained" visions of political philosophy). While the analogy is not perfect, the egalitarian tendency in modern political thought is similar to what Sowell calls the "unconstrained" vision, while the utilitarian drift in conservative thought has obvious similarities to what he calls the "constrained" vision.
utilitarians recognize the problems, which were discussed in the previous Section, inherent in a conception of merit. In particular, contemporary political thought on the left and on the right is, increasingly, either explicitly or tacitly deterministic. Each confronts the problem of the disappearing self in social and political thought, and each responds to it in a different way.\footnote{I do not argue that utilitarianism and egalitarianism are themselves deterministic. Though many utilitarians and egalitarians are determinists of one variety or another, others are not. Indeed, utilitarianism and egalitarianism are ethical theories with political consequences, while determinism is a metaphysical position. Consequently, in this article I use these terms to refer to those social thinkers who adopt the utilitarian or egalitarian approaches as a consequence of their belief in determinism.}

For the egalitarian, the political and social consequence of the problems discussed in Section A, particularly the problem of the disappearing self, is that unequal distributions of wealth or other social goods are unjust because they are not “earned” from the ultimate vantage point. If all that each of us \textit{is}, \textit{does}, and \textit{has} is, in the last analysis, a result or effect of things beyond our control, as the deterministic hypothesis holds, then there is a fundamental injustice in tying varying levels of social reward to our accomplishments. Depending upon the degree of rigor with which the view is held, the egalitarian concludes that merit is completely illusory because it is dependent upon a conception of personal autonomy that is inconsistent with the deterministic hypothesis. In the absence of any justification for inequality, the egalitarian holds that there can be no social and political response other than the (more or less) equal distribution of all social goods.

The utilitarian view, on the other hand, justifies the apparent unfairness of inequality generated by the problem of the disappearing self by appeals to social utility, where “utility” may be defined variously as the greatest good for the greatest number, as economic efficiency or growth, or as any other maximizable social goal.\footnote{The utilitarian may define utility variously, but what is essential is that utility represents some empirical quality inherent in the consequences of actions. The utilitarian justifies social arrangements by their capacity to maximize this quality. In turn, this quality has the property of being an ultimate end in the utilitarian system. On traditional accounts, for example, happiness is conceived as the ultimate end, by which all other means are justified. \textit{See} BENTHAM, \textit{supra} note 5. More recent utilitarian accounts, such as those embodied in neo-classical economic thinking, define utility in terms of efficiency, by which the widest array of consumable goods are made available at the lowest cost. \textit{See}, \textit{e.g.}, von Mises, \textit{supra} note 34, at 11-29.} The utilitarian adopts a hard-nosed “realism” and embraces inequality and hierarchy by appealing to the anti-utilitarian consequences of attempts to equalize the distribution of social goods.\footnote{These negative effects include loss of liberty, increased governmental centralization, and of course negative utility in the form of lost efficiency, in terms of economic opportunities and consumer choices. For two classic defenses of the position described here, see HAYEK, \textit{supra} note 34, and FRIEDMAN, \textit{supra} note 34.} For example, one of the leading exemplars of modern law and economics rejects the traditional ideals of personal autonomy and merit, suggesting instead that merit and autonomy are simply useful social fictions.\footnote{RICHARD A. POSNER, \textit{The Problems of Jurisprudence} 167-74 (1990) (arguing that free will is a dubious fiction approximating nothing more than rational choice). The refusal to relinquish some form}
has an important function insofar as it tends to generate socially productive behavior.

The utilitarian may concede that no talent or personal attribute is deserved in any ultimate sense; some people may be born twice lucky—once to have the talent and the second time to be rewarded for it. Nevertheless, the utilitarian holds that rewarding those things that we find socially valuable is a way to encourage their development as productive capacities. We provide social incentives for some behavior by recognizing it as meritorious; conversely, we establish disincentives to unproductive or harmful behavior by punishing it in the hope of deterring similar acts. 41 Good and bad behavior is to be developed and discouraged, respectively, by arranging external determinants in a manner that is most conducive to utility. 42

Free market liberals argue that meritocratic standards, at least when generalized over all professions, are untenable both because they assume an objective value for labor, and because they do not accurately reflect the volatility of changing market demands. As Milton Friedman argues, "The operative function of payment in accordance with product in market society is not primarily distributive, but allocative." 43 In other words, the worker’s payment reflects demand for the product; wages serve to allocate labor efficiently, but not in accordance with ex ante standards of desert. F.A. Hayek put it this way:

In any system which for the distribution of men between the different trades and occupations relies on their own choice it is necessary that the remuneration in these trades should correspond to their usefulness to the other members of society, even if this should stand in no relation to subjective merit. Although the results achieved will often be commensurate with efforts and intentions, this cannot always be true in any form of society. 44

of instrumental rationality is essential to the utilitarian paradigm, for it permits the utilitarian to argue that incentives and disincentives motivate human behavior. Individuals are “free” only in the sense that they are capable of fitting means to ends. ld. at 174, 177 (“Deterrence presupposes . . . rationality, though no stronger sense of free will . . . “).

Economists often adopt a soft determinist perspective that permits them to talk of “choice” and “free” behavior from within a deterministic perspective. A choice is “free” in the soft determinist’s theoretical perspective if it is not coerced, or generally, if it is a product of the agent’s desires. It is free even if these desires themselves are the product of antecedent causal conditions. Accordingly, many free market liberals embrace a form of metaphysical determinism. ld. at 178; von Mises, supra note 34; John Stuart Mill, Principles of Political Economy (1866).

41. Oliver Wendell Holmes, for example, held this view when he remarked rhetorically that, because a murderer’s acts may be causally determined, we should think of his execution as a form of martyrdom—that, in a sense, he dies in the name of social order, to discourage others from following a similar path. 1 Holmes-Laski Letters: The Correspondence of Mr. Justice Holmes and Harold J. Laski, 1916–1925, at 806 (Mark DeWolfe Howe ed., 1953).

42. It is for this reason that behaviorist psychology goes hand in hand with utilitarian philosophy. For the classic statement, see Skinner, supra note 27.

43. Friedman, supra note 34, at 166.

44. Hayek, supra note 34, at 122.
As we shall argue in Part V.A., when meritocratic standards are used in professional assessment, they should operate within the context of the market by functioning within the wage range of particular professions.

In the most basic way, the egalitarian intuition is predicated upon the desire to right the wrongness of an unfair world, to offset the advantages that biology, education, and social status give some at the expense of others. The utilitarian, on the other hand, may grudgingly acknowledge the cosmic unfairness of the world, but argues that the less well off benefit indirectly from the socially exploited advantages of the lucky natural aristocrats. (Indeed, some recent egalitarians justify inequality to the extent that it inures to the benefit of the less well off.) Moreover, the utilitarian rejects the redistribution of wealth or other social goods on grounds that it undercuts natural incentives on the part of the talented and the productive. For the utilitarian, productive differences are to be exploited, rather than equalized.

Contemporary egalitarianism seeks justice but finds only the accidents of a deterministic world, while utilitarianism rejects motives, intentions, and generally, the "stuff of merit" as metaphysical fictions, but reinterprets them in a manner that reduces justice to a function of utility. Extreme forms of egalitarian and utilitarian social thought evince the most profound symptoms of self-alienation. Egalitarian liberalism conceives the genesis of all human acts from the outside, while economic conservatives measure all productivity from an external perspective. Contemporary egalitarian liberalism reconceptualizes all individual failings as the failure of social conditions. As a result, it undervalues the potential for autonomy and misconstrues the role of the state as compassionate leveler. Modern conservative thought makes largely the opposite error. It conjures up a self ex nihilo and dismisses as irrelevant the limits imposed by social conditions. It disregards the boundaries set by social and personal limitations against which the self must strain in order to achieve independence and self-actualization. Egalitarians contend that we do not de-

46. At the deepest level, what separates the egalitarian and the utilitarian is likely to be some basic psychological orientations to the world: The egalitarian may be more risk-averse, preferring that all share equally, given the risks of the natural lottery, rather than permitting luck to govern; or he simply may be offended in some fundamental moral way by the natural inequality inherent in the world. The utilitarian may ground his maverickism in some evolutionary justification for inequality. See Spencer, supra note 33, at 149 (arguing that true social progress, like evolutionary development itself, requires that the stronger should survive and, in corresponding fashion, that the state should not rescue the "weak" from their inferior economic condition). Alternatively, he may simply harbor a deep-set intuition that the unfairness inherent in natural inequality does not justify a second wrong implicit in the centralized reordering of the distribution of social goods. At any rate, egalitarians and utilitarians share a common metaphysic, but differ profoundly regarding what to do about it.
serve our excellence because we are each simply the confluence of accidental influences, while utilitarians measure each person by the value of what he gives back to the free market. For the egalitarian, merit is an unearned accident of fortune, while for the utilitarian, it is a readily exploitable social fiction.

The basic differences in the egalitarian and utilitarian approaches to distributive justice are apparent in the way each reconceives moral merit, performative merit, and qualificational merit. The consequentialist pull of utilitarian theory leads the conservative to applaud "good results" over "good intentions."49 Moreover, he looks for definitive, objective criteria by which to measure these results. This drives the utilitarian to collapse moral merit into performative merit. The intentions of the rescuer are not important; only the results are. Conversely, the well-intentioned bumbler is not to be praised or rewarded for his ineffectual efforts. What counts is the performance itself. Nor is the utilitarian concerned by egoist motivations in human behavior; indeed, characteristically, he embraces self-interest as the surest means to overall social utility.50 (At most, the utilitarian will concede that good and bad intentions serve utilitarian goals in an indirect way, to the extent that they indicate a disposition on the part of the actor to act in a beneficial way in the future.)51 Moreover, the utilitarian’s emphasis on consequences or results, and his preference for neutral, “objective” indicia in measuring these results, leads him to adopt standards of measurement that may not fully reflect a person’s potential in the context of qualificational merit. Utilitarians are drawn to grades, test scores, or other quantifiable measures of past performance. Nevertheless, this singular reliance on such objective variables causes them to seriously undervalue the importance of more subjective or less quantifiable factors. In some cases, for example, what may count most in assessing future potential is not who has climbed the highest, but who has gone the furthest or surmounted the greatest number of obstacles along the way.

For the egalitarian, the further she travels along the road to determinism, the narrower will be her conception of merit. For the egalitarian who stops at the

49. The law of unintended effects, which holds that even apparently beneficial social changes inevitably result in a plethora of unforeseen, negative consequences, is a mainstay of conservative theory. See Sowell, supra note 36. Put colloquially, the old adage that “the road to Hell is paved with good intentions” is a great deal more apiece with conservative thought than with liberal or progressive thought, which finds its impetus in innovation.

50. Indeed, there is a long philosophical tradition that connects Hobbesian egoism, utilitarianism, and free market liberalism. See Bernard Mandeville, The Fable of the Bees (Irwin Primer ed., Capricorn Books 1962) (1714) (providing the earliest classic statement of the idea that private vice leads to public virtue). See generally von Mises, supra note 34.

51. It is for this reason that the utilitarian will distinguish between different degrees of murder, for example, in assessing the seriousness of the crime. While mental state is usually viewed as central to traditional and Kantian conceptions of punishment, by which the severity of the act is measured at least in part by its motivating condition, the utilitarian can justify these same distinctions as an indicator of likely recidivism. For example, the premeditated murderer is more likely to kill again than an accidental murderer. Similarly, the person who acts from noble motive will arguably be more likely to act in the same way in the future, without any promise of compensation.
idea that social conditions impose certain limitations on human achievement, there will still be some room for merit within the personal domain. But to the extent that social determinism merges into a kind of psychological determinism, on the other hand, there is progressively less room for any coherent conception of personal autonomy. For the egalitarian who adopts a thoroughgoing determinism, there can be nothing left of any of the three varieties of merit. Ironically, however, this places the egalitarian in a strange position: because there are still productive differences between different persons—that is, because some achieve more than others, whatever the causes for this—the egalitarian is compelled either to adopt a provisional consequentialism or a radical egalitarianism. She may argue that all social goods, privileges, and positions should be shared equally. More likely, the egalitarian will seek to cordon off certain areas of social life, arguing, in essence, that performance is so important in these areas that equality must take a back seat. The functions performed by airline pilots and brain surgeons are examples of the need to set limits on equality. In the context of qualificational merit, the egalitarian may embrace some type of quota to ensure that any existing disparities do not track racial, ethnic, or gender lines. Of course, once this approach is taken, the idea of qualificational merit has given way to the very different idea that all population groups should be more or less proportionately represented in any given profession.

The position offered in this article rejects both the thoroughgoing egalitarian and the uncompromising utilitarian approaches to distributive justice. It does so by virtue of the view, to be defended in the following Section, that there is indeed a zone of personal autonomy that can and should be rewarded through meritocratic evaluation. The next Section will seek to demonstrate that determinism and egoism do not capture the essence of human action and, thus, that merit is possible.

C. THE POSSIBILITY OF MERITOCRATIC INDIVIDUALISM

Merit, in its true form, is only philosophically defensible if we are able to proffer a sound response to the problem of psychological egoism, the apparent difficulty in distinguishing innate from developed capacities, and the problem of the disappearing self. Because the last problem is the most basic of all, both in the sense that it undermines all three senses of merit and because it subsumes the other two problems, we will address this first, and at greatest length.

52. Duncan Kennedy, for example, has argued that law teachers and janitors should rotate jobs in order to more fairly distribute the privilege and status that is associated with certain jobs. Duncan Kennedy, Legal Education and the Reproduction of Hierarchy: A Polemic Against the System (1983) (1982). See also Richard A. Posner, Overcoming Law (1995) (comparing this to the practice in the Chinese Cultural Revolution of forced job rotation).

53. In saying that the problem of the disappearing self subsumes the other two, I mean that the other two problems remain real problems even if we are able to solve the problem of the disappearing self, but become instances of the problem of the disappearing self if we cannot. In other words, if determinism is true—at least in its more robust, hard, deterministic variants—then the problem of
1. Resolving the Problem of the Disappearing Self

As we have already argued, defending a conception of merit requires that we be able to distinguish between those aspects of human behavior that must be actualized by the human will, and that are more or less attributable to the person in the sense that we can be certain that he can replicate them in his acts, and that portion of our behavior that is in every sense beyond the will of the agent. This latter aspect includes not only involuntary acts, products of compulsion, and the retinue of conditions that serve as moral and legal excuses, but all those performances that fall beyond our capacities, though we may wish with all intensity to be able to perform them. The ability to draw these distinctions lies at the heart of every form of moral and political individualism.

The determinist will argue that any distinction between autonomous or self-generated action and causally-precipitated action is spurious. From a deterministic standpoint, the inner stuff of merit—noble motives—is untenable because it depends upon a concept of will or agency that is inconsistent with the deterministic premise. By way of response, we will argue here not that determinism is inaccurate, but that it is largely irrelevant to a conception of merit. It is

egoism and altruism becomes philosophically meaningless insofar as the status of motivations will itself become irrelevant: if all motives are directly caused by external forces, then whether or not they are selfish or altruistic becomes a secondary issue. Put differently, the problem of egoism assumes a more important role with a background assumption of free will. Similarly, if determinism is true, the distinction between earned, developed capacities and raw, unearned talents becomes meaningless insofar as all capacities will be unearned, at least in an ultimate sense.


55. In the broadest sense of the term, individualism seeks to localize both the causes and the effects of collective action in the individual, justifying all collective action by reference to individual choices and actions. Individual responsibility, merit, liberty, and democracy all draw their intellectual legitimacy from a conception of the individual as distinct from the external causes and conditions of the world. Without this distinction, there is no genuine basis for attaching the predication of virtue and vice, merit and blame, to the individual. There is only social control—the justification of punishment and merit by some utilitarian rationale. Similarly, any truly liberal conception of political philosophy must view the person as capable of authentic, self-generated opinions and actions. Otherwise, where individual choice is simply a function of social conditions or market forces, these forces become self-justifying: choices and preferences are used to justify the market or social conditions, where these external forces in turn generate the same kinds of individual preferences. Only some form of the idea of personal autonomy breaks the cycle. See Hill, supra note 29, at 294-315 (arguing that the idea of the self grounds our conception of rights, responsibility, and personal, non-commodifiabile identity). See also Charles Taylor, Sources of the Self (1989) (providing an in-depth philosophical treatment of the relationship between the self and liberal political institutions).

56. A detailed discussion of the free will/determinism debate is beyond the scope of this paper. After twenty years of studying the problem, however, my own conclusions on the issue are as follows: At the most abstract level, determinism is true, but misleading, as a description of human behavior. It is true in the sense that, for any human decision, a complete description of the causal antecedents of the behavior would yield a causally sufficient set of neural conditions that may be said to have precipitated the decision or act. But many of these precipitating conditions are identical to one’s thoughts, desires, feelings, and other mental states. In this case, I am the cause of my acts and decisions insofar as my thoughts, feelings, and desires are part of my personality, part of my self. When we choose among alternative courses of action, in non-pathological situations at least, we manifest ourselves in the process of decision making. To the following dilemma—either human decision making is “open” in the
irrelevant because the truth of the determinist hypothesis does not entail that persons lack autonomous agency in an immediate sense; an actor has some control over his actions and even over the conditions of his own will.

The determinist holds that after every event, including those events that we call human actions, we can at least theoretically elucidate the set of causes that resulted in the event. Yet, before the event we are often unable to predict what a person will do in a particular case. Indeed, the person himself may be unable to predict what he will do under a given set of circumstances. There is an apparent “openness” in our objective capacity to predict future acts and in our subjective awareness of the decision making process as we experience it.

The determinist attributes the objective uncertainty not to a break or ambivalence in the causal flow of events, but to our own imperfect knowledge of all relevant causal conditions that bring about a particular act. What happens must happen, the determinist argues, *given the conditions and circumstances that resulted in the act*. Yet these conditions are themselves at least partially a function of the human will. The realm of autonomous choice extends to the parameters of self-control. We are autonomous to the extent that we possess the psychological capacity to divert our actions or to alter the conditions of our existence, even the conditions of our character.

Of course, the expected determinist rejoinder is that every such alteration is itself determined, so we cannot even hold the person responsible for her character, in an ultimate sense. From the ex post standpoint, the determinist maintains that the state of a given person’s character is a function of multiple factors stretching back indefinitely in time in deterministic fashion. The determinist looks at the world as if it is already completed because, in an important sense, it already is completed from this viewpoint. Given a certain set of material conditions and the panoply of causal laws by which these conditions change and unfold, nothing can happen but that which does.

Yet even the determinist admits that persons can modify their behavior in accord with changed external conditions. Every modern form of social engineering, egalitarian and utilitarian alike, operates from a dualistic premise. This

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sense that more than one choice is possible (in which case determinism is inaccurate as a description of human behavior), or all “choices” are predetermined (in which case no one could choose other than they do)—I respond as follows: Choices are “open” but, once a particular decision has been made, we will be able to account for it causally. This does not entail, however, that the subjective experience of choice is illusory. Causes and effects can be traced backward in time once an event has occurred, but not forward in time. This view is borne out by certain interpretations of quantum physics, which posit a “forward-looking” indeterminism.

57. Thus, the determinist is distinguished from defenders of indeterminism by the latter’s claim that there is a real, objective uncertainty in the flow of events, rather than a lack of knowledge. For the determinist, but not the indeterminist, knowing all there is to know about the conditions of the world and the laws of nature would permit one to predict all future events.

58. It is for this reason that Spinoza used the expression *sub species aeterni* (under the aspect of eternity) to describe the view of the world from the standpoint of God, as well as that of the determinist with complete knowledge of all causal conditions and laws. See Benedict de Spinoza, The Ethic 91-94 (W. Hale White & Amelia Hutchinson Stirling trans., 4th ed. rev. 1910) (1677).
premise encompasses a concession to determinism and the recognition that, for any form of social engineering to work—for laws to deter and for social incentives to encourage various forms of behavior—the person must be able to change his behavior to avoid the negative and to garner the positive sanction. Moreover, even many determinists admit that there is a moral (as well as a psychological) difference between most human acts, which feel free from the subjective standpoint, and compelled acts, which do not. It is a curious aspect of our moral lives that even a commitment to the idea of freedom can enhance the propensity to respond to the conditions of our existence, to change them, and in this manner, to refashion the will itself.

It is not determinism, but rather either fatalism or what is usually thought to be its opposite, the unfettered omnipotence of the will, which renders meaningless any intelligible conception of merit. The notion of merit only has significance in a world where the will strains against the boundaries of what lies beyond it in the pursuit of the good or the valuable. Merit embodies, in its deepest sense, a collective recognition of the sublime pleasure we experience individually as willing beings at expanding the boundaries of the self, converting what once was the domain of the purely given—the dead, cold world of external limitation—into the realm of the chosen. Every expansion of the sphere of human autonomy involves an exercise of moral effort against this same boundary. Never is this more true than when it is some aspect of ourselves, our personality or character, that lies in the external realm and must be transformed. Merit is the recognition of human excellence in the domain of the contingent, where we cannot be certain of successful action, and where effort in the face of this very uncertainty marks the noblest aspect of human action.

Perhaps human agency is indeed explainable in terms of some yet-to-be-understood fabric of causal factors. Nevertheless, many of these same factors are still part and parcel of human personality, of the self. We are composed of those factors that make us who we are. Were it not for these, each of us would be someone different. Fate and free will, as Nietzsche suggested, may be two different sides of the same reality. "Fate is the endless force of resistance to free

59. This is what distinguishes "hard" and "soft" determinism, most basically. The soft determinist draws a distinction (morally and legally) between compelled behavior and behavior that follows from the agent's choices and decisions. The hard determinist rejects this insofar as even "chosen" behavior is causally determined. For the hard determinist, the difference between compelled and uncompelled acts is psychological, but makes no moral or legal difference insofar as both are equally causally determined. See R. Taylor, supra note 29, at 48.

60. Fatalism is distinguished from determinism in that the determinist believes that all events have some set of sufficient conditions that have produced them, while the fatalist believes that if a given event is "meant to happen" nothing can change it—not even the alteration of the conditions that usually result in the occurrence of the event. See W.C. Salmon, Determinism and Indeterminism in Modern Science, in Reason and Responsibility 351 (J. Feinberg ed., 3d ed. 1975) (comparing determinism and fatalism).
will" but "free will without fate is . . . unthinkable."61 In the end, free will may be nothing but "the highest potency of fate;"62 from the standpoint of the moment of decision, however, our fate remains open until the decision has been made. A commitment to merit pays tribute to our understanding of ourselves as willing beings even as it requires that we recognize the limits of this same capacity for autonomous action.

The concept of the will as a fundamental social category, as a basis for judgments about the equality of human action, is rejected in many philosophical conceptions today. Communitarian and like-minded liberals criticize its Kantian interpretation as disembodied noumenon, pointing to the potentially self-alienating nature of this picture of human personality.63 Others see in a philosophy of will the origins of totalitarianism.64 Still others, influenced by economic models of human behavior, maintain that the will is an unnecessary metaphysical abstraction, that it confuses preferences and desires for something which supervenes above them, sorting them out and choosing the most appropriate or achievable ends.65 The conception of will that I wish to present sometimes stands against the world, and at other times embraces it. In contrast to Kant's notion, it often, though not always, embodies our emotions and our desires. It is receptive and discriminating in the way in which it internalizes the world. The self develops—it is not innate—and so too does personal autonomy. At each stage of development, each of us becomes more of who we are and less of the world, even as aspects of the world are incorporated at every point along the way.66

The central problem of merit is that it requires that we be able to distinguish, in evaluating failed action, between the limits imposed by the world which are not within our power to change, and the failings of the human will, which are. While drawing this distinction may be problematic in practice, difficulty in distinguishing two things is no reason for abandoning the distinction. There is little doubt that the line separating what is possible and what is impossible is

61. Nietzsche wrote this when he was just eighteen years old. The passage is from an early essay and is quoted in LESLIE PAUL THIELE, FREDERICK NIETZSCHE AND THE POLITICS OF THE SOUL: A STUDY OF HEROIC INDIVIDUALISM 71 (1990).
62. Id.
64. See ROGER EATWELL, FASCISM: A HISTORY 3-13 (1995) (discussing the tension between the rationalism of the Enlightenment and the philosophy of will which developed as a counter to it, and which contributed to the rise of fascism); ISAAC BERLIN, THE ROOTS OF ROMANTICISM 139-46 (Henry Hardy ed., 1999) (tracing the relationship between a philosophy of will and modern totalitarianism).
65. See POSNER, supra note 44, at 157-74; see generally Charles H. Kahn, Discovering the Will: From Aristotle to Augustine, in THE QUESTION OF ECLECTICISM (J.M. Dillon & A.A. Long eds., 1988) (discussing the philosophical development of the idea of the will in ethical and political philosophy).
66. In this respect, the concepts of "self" and "autonomy" offered here follow the developmental model of psychology elaborated by recent humanistic psychology. See, e.g., ROLLO MAY, LOVE AND WILL (1969); ABRAHAM MASLOW, TOWARD A PSYCHOLOGY OF BEING (1968).
neither sharp nor purely empirical. There is no alternative but to make judgments about which things are impossible, which things are possible but require too great a sacrifice, and which things are possible and reasonable to expect of persons.

The domain of autonomy is the province in which persons exercise their capacity for choice. That human beings may be natural phenomena that exist within the same causal framework as the rest of the natural world does not prevent us from viewing human behavior as self-generated autonomous action, the “highest potency” of deterministic forces.

2. Distinguishing Innate Talents from Developed Capacities

Rewarding persons for their natural or innate talents raises a problem from the standpoint of merit. Put simply, natural capacities are not earned; they are given by nature and circumstance. We may applaud raw talent, but we praise developed capacities because they bear the sign of moral effort. As a practical matter, in making meritocratic judgments, how are we to distinguish that aspect of human action which has been earned from that which has not?

A theory of merit is not, as we shall see later, a theory of compensation. We sometimes, perhaps often, applaud and compensate the naturally gifted even though they have not earned their talent (or where they have not worked appreciably harder than the less gifted). We sometimes compensate persons for their talents because their talents are useful, productive, or otherwise salutary. This may be unfair, in some ultimate sense, when these talents have not been earned, but the situation represents perhaps the deepest dilemma inherent in the human condition. Existence itself manifests the tension between the outer world of physical consequences and the inner world of autonomous moral effort. We sometimes are required to reward the consequences of human acts in the absence of merit, just as we sometimes reward merit even in the face of failed acts or undesirable outcomes. Of course, even where two persons act with the same degree of effort, the more talented will realize the greater reward, so even with the aspect of effort, the differences of talent will continue to make a difference in the sphere of human action. Thus, there will always remain the specter of the unfairness of differing natural conditions in meritocratic assessments.

There are two points, however, that mitigate this unfairness. While performance- and qualification-based assessments will invariably reflect the element of natural chance, the natural level of disparity in particular innate talents is compensated for by a similarly wide and varying natural distribution with

67. This is because it is always possible to argue, given an instance of “failed agency,” that achieving the object of one’s will was possible if only one had made a greater effort. Thus, there are many instances where one could have achieved a goal, but where doing so would be too costly given one’s other goals and needs. There will always be a normative element implicit in the line between what is actually impossible and what is practically impossible.
respect to other such talents. Put simply, the great scholar is seldom the accomplished athlete, the great athlete is seldom musically or artistically gifted, and the musically gifted may lack the physical or emotional durability necessary, in so many other ways, to the good life. The point is that the natural disparity of talents and capacities parallels the great variety of ways of life and the many ways in which merit can be sought. This is not meant to suggest that there is some underlying, systematic fairness to the random distribution of natural talents, such that it all works out in the great scheme of things. It is only to point out that natural human excellence is manifest in myriad ways and is distributed liberally throughout the population.

Secondly, there appears to be something of a proportional correspondence between the level of exclusiveness inherent in a particular profession and the degree of intensity and commitment necessary to succeed within that profession. Fewer people may be suited to become professional basketball players than college professors, and fewer may be suited to be professors than plumbers, but the level of intensity required to be a person of even average standing in each respective profession, along with the rate of failure, is higher in each profession relative to the next. Natural advantage is no guarantee of success because, within the limited world of the gifted, the competition is correspondingly more severe. While factors over which we have little or no control may give one an edge over others on a particular opportunity, effort and commitment become all the more determinative of success in the more exclusive professions.

In light of these considerations, how are we to distinguish the earned from the unearned, the merited from the gratuitous aspect of human action? In the context of performative merit, where merit is measured largely or wholly in terms of worldly consequences, the dimension of moral effort is already built into our understanding of performative excellence in the particular categories of endeavor that we create. Most basically, we define categories so as to reduce the element of unfair natural advantage. Sports events distinguish between groups of contestants on the basis of age, gender, weight, and the characteristics of the contest itself. Children compete within their age groups, women do not compete against men in categories of competition where men hold a natural advantage, and the middleweight boxer is not required to fight in the heavyweight category. Thus, the way in which we define and limit the contest or category of competition reflects our understanding of merit and our desire to narrow the scope of natural differences that may affect outcomes. Again, these limitations do not eliminate the influence of natural disparity, but they set boundaries to these differences. Within each category, the potential influence of the natural is circumscribed, thereby making moral effort the most important factor for achieving excellence in any given category. It is our categories of competition themselves which function to screen out, in making meritocratic assessments, the influence of the natural lottery.

In the qualificational context, on the other hand, where decisions must be made regarding who gets a particular job or academic acceptance, the differ-
ences in natural ability often reflect not only natural, but social differences. In Part III.A, this article will offer a response to the problem of uneven baselines—the problem that results from the fact that some start off with certain social advantages over others that factor into qualificational merit. We will see then that a consideration of the inner indicia of merit—as evidenced by the hardships and disabilities, natural and social, that the candidate has overcome—is vital. Meritocratic assessments must take account of these initial differences not to reward the person who has overcome the most hardship, but to pick the individual with the most drive, as well as ability. In sum, in the context of qualificational merit, evaluating one's eligibility for a position requires that we distinguish not between two different aspects of a particular performance, the given and the achieved, natural gifts versus earned capacities, but that we consider one's potential in light of what one has overcome in one's past performance. In the end, the candidate with the most-likely-to-be-achieved potential should win the position, whether this is the result of inspiration or perspiration, natural gift or effort.

Finally, in the context of moral merit, the problem is not that of distinguishing moral effort from natural ability; for moral merit is the least consequentialistic of the three categories and is defined largely or entirely by reference to moral effort. Instead, the problem in this context shifts to the first of the three problems considered in this Part: the question of the nature of the motivation for the action.

3. The Problem of Psychological Egoism Reconsidered

The problem of psychological egoism applies with greatest force to questions of moral merit, where an important part of what is being evaluated is the nature of the motivation itself. In the second example at the beginning of this article, for example, two boys rescue small children from drowning. One boy is motivated by his knowledge that he will be rewarded for his efforts while the other is motivated solely by his concern for the drowning child. We applaud both acts for their results, but believe that the well-motivated act is special precisely because its motivation is more pure. Notice that, in contrast, we normally do not inquire into the nature of the motivation in the performative context; we do not care, and often even assume, that persons are usually selfishly motivated, at least in part. Contestants seek to win contests, candidates seek to be awarded positions, and applicants seek to obtain seats in academic settings, at least in part (and often wholly) to achieve self-interested ends such as recognition, status, and remuneration. This is why the focus shifts in these contexts from the nature of the motivation to the moral effort actually invested and the quality of the performance itself.

What is most significant, philosophically, is the way in which meritocratic assessments become more “internal” and more exacting as the relevance of external factors (differences in innate talents and social circumstances) diminishes. We are held to our highest in those aspects of human behavior where we
are most equal, where nature and circumstance make the least difference. And we are most equal with respect to the capacities that make us capable of moral merit where our excellence depends most upon the human will and least upon those factors that fall outside of human control. At this level, the inquiry becomes more exacting, and looks to the kinds of motivations that inspire the act.

Yet, as we have seen, the doctrine of psychological egoism holds that there is little hope of finding a morally relevant distinction between kinds of motivations because, in the end, all motivations are equally selfish. Altruism, the egoist holds, is an illusion based on a mistaken belief about human motivations, namely that motivations fall along a continuum that runs from selfishness to selflessness. In the end, the egoist holds that all apparently selfless motives are disguised, harboring a deeper, if less obvious, selfishness.

The doctrine of psychological egoism is ultimately based on two premises about human motivation. The first is tautologically true, and so says very little or nothing empirically about human action. The second is empirical in nature, but is far from being demonstrably true. The first premise holds that all human acts are motivated by some desire. In other words, all voluntary action proceeds from a desire to act in a certain way, to achieve a specified consequence. The second premise holds that all such motivating desires are selfish—that they have the interest of the subject as their motive.68 The second premise makes an empirical claim because it holds that, when the hero throws himself onto the hand grenade, sacrificing his life for the sake of his comrades, there is some disguised selfish motive at work—a motive to be recognized (posthumously or otherwise) as a hero, or to feel good about oneself, or because one believes that he will be rewarded in the next life.

What is difficult to explain, given the egoist’s assumptions, is not why heroic action is so frequent, but why it is so rare. If selfish motives operate surreptitiously under the guise of selfless motivations, why is selfless behavior comparatively more infrequent? Put differently, why is it that selfish behavior appears to explain itself, while we look for deeper (and more selfish) motives in understanding the genesis of noble acts? Within this second premise is an assumption that desires can only function mechanistically, carrying out the interests of the agent himself. The egoist assumes that selfishness is a predicate for voluntary human action, that there must be “something in it” for the self in order for an act to take place. But this is far from obvious. Indeed, the egoist’s underlying assumption is that desires always have a reasoned motivation and that spontaneous acts of heroism presumably have no role to play. Moreover, insofar as we introspectively experience our own motivations as more or less selfish, the egoistic assumption is that there is inevitable self-deception with respect to every apparently well-intentioned act.

To put the matter very generally, if the second premise is indeed a testable

empirical hypothesis, until the conditions for the test are specified and the test is actually done, the egoist must take his assumption about the inevitable selfishness of human behavior as an article of faith—an article of faith that runs counter to our subjective experience of our own motivations. But if, on the other hand, the second premise itself turns out to be a deeply philosophical but a priori prejudice about human behavior, there is little to recommend the egoist's conclusion. Even if human behavior is consistently motivated by desire, our desires are not demonstrably ubiquitously selfish.

All three problems discussed in this Section are, of course, perennial philosophical issues. Volumes have been written about each of these problems, particularly the first and third. My hope here has been to sketch the outlines of a plausible response to the problems of determinism, egoism, and the distinction between natural talents and developed capacities. If these responses are correct, then the way is clear for the possibility of a theory of merit.

In the following Part, we consider four arguments that raise questions concerning the practicality and fairness of meritocratic assessments of human action.

III. A CONSIDERATION OF THE FAIRNESS AND PRACTICALITY OF MERITOCRATIC STANDARDS

Four types of arguments have played prominently in contemporary critiques of merit. As might be expected, they focus on the use of qualificational and performative merit as bases for awarding social goods—usually jobs, compensation levels, or educational positions. Respectively, the arguments maintain that the use of merit is unfair because (1) merit ignores the different social positions from which the advantaged and disadvantaged start; (2) merit cannot be precisely operationalized because of the problems inherent in delineating specific, testable qualificational criteria; (3) merit is invariably a means for replicating prevailing patterns of social inequality; and (4) an all-encompassing commitment to merit conflicts with other values that we hold dear, particularly values implicit in what has come to be called the "ethic of care."

A. MERIT AND THE PROBLEM OF UNEVEN BASELINES

Perhaps the most prevalent argument marshaled against any meritocratic conception of social distribution is what we shall call "the problem of uneven baselines." The problem of uneven baselines challenges prevailing conceptions of qualificational merit and holds that differences in qualifications that are

69. It is difficult to know how this hypothesis would be tested because whenever an apparently selfless act takes place the egoist will posit some deeper, selfish motive about which we do not know. In this respect, the egoistic doctrine is much like determinism. Even if we were to specify a set of causes for a given behavior and could show that they do not necessitate the behavior, the determinist will assume that there is some other unknown cause that fills the "gap." In this respect, neither egoism nor determinism is a testable hypothesis. They are a priori articles of faith about the human condition.

70. Note that even where social differences account for differences in performance, these cannot be "compensated for" without violating meritocratic standards. Because qualificational merit looks ahead,
used to justify hiring and placement decisions are often the result of unequal conditions and varying circumstances, that some individuals have the benefit of better educational resources, access to superior health care, or come under the influence of others who are able to mold and shape one’s character and outlook in ways that better prepare the privileged at the expense of the disadvantaged.\footnote{This form of the argument is more receptive to the idea of merit, but cautions that our criteria for merit should be more flexible, that past performance may reflect previous advantages to a much greater extent than it does future performance. In this form, the argument represents a call for a revised set of standards by which to judge the criteria used for awarding particular positions to specific candidates. In another more radical form, however, the argument questions the very prospect of compensating for differing constitutive conditions that produce individuals with varying levels of merit.}{71}

The problem of uneven baselines is usually a component of a broader argument linking race (and sometimes gender) to differing social positions. Robin West, for example, argues that a commitment to merit forces us to deny the degree to which such celebrities as Madonna, Bill Gates, Cal Ripken, and others have their positions as the result of their being white.\footnote{Other factors independent of merit—from nepotism to sheer luck—also obviously affect decisions regarding who gets a particular position, but these too may reflect systemic socioeconomic disparities.}{73}

By way of response, we should first note that it is no argument against merit to point out that non-meritocratic factors are sometimes used in employment decisions. When someone is chosen for a position because of their family connections, their race, or other criteria irrelevant to merit, the solution is to restructure the decision-making process. Of course, we may decide collectively that there are certain hiring decisions where merit need not apply—for example, that a freelance carpenter should have the right to hire his son over a better-qualified applicant. We tend to justify these limitations of meritocratic prin-
ciples by our commitment to principles of privacy that apply in limited domains such as the family and sole proprietorship and that shield individuals, within the scope of their very personal affairs, from obligations grounded in public norms.  

The problem of uneven baselines cuts much deeper, of course, because it implicitly admits not simply that the less qualified sometimes obtain advantages by virtue of social “connections,” but that the superior qualifications of the better qualified often reflect patterns of social inequality. That different persons begin from different starting places, however, need not deter us from gauging merit relative to these varying starting points. Qualifications are largely or wholly a function of potential performance with respect to a particular task, and potential is measured not simply by reference to a candidate’s ending point (his grades, scores, and related accomplishments, for example) but by how far he has come along the way. The best indicator of how far an individual will progress along the path of professional or educational competence will often be how far he has come already. In the educational context, for example, administrators should engage in a sensitive weighing of the obstacles that each candidate has overcome along the way and evaluate grades, scores, and other objective data in light of past accomplishments. Again, this is done not as a reward for past action but as an indication of future potential. As we shall explain in Part V.B, a sensitive weighing of qualificational merit requires that employers ask administrators to look beyond the usual plethora of “objective” indicia of past performance to more personalized and subjective factors that indicate potential in an educational or professional area.

How is merit to be evaluated when there are two or more candidates who differ with respect to the capacities they have already actualized, but where the less presently qualified have overcome greater obstacles along the way? In case (4) at the beginning of this article, for example, should the law school admissions decision go to the more highly credentialed but more privileged applicant, or to the less socially privileged student with sufficiently high qualifications? And do the equities vary in different contexts?

In general, in the qualificational context, the more important a position, and the less time that exists to permit the development of the skills most essential to the job function, the more it will be necessary to use objective factors indicating present ability rather than future potential. On the other hand, where the person is still in the process of skill development, there is latitude for consideration of

75. Meritocratic principles are ultimately public principles. They govern the distribution of offices, compensation, and other social goods within the context of the public domain. We obviously do not consider merit in deciding which of our children to love, or whether to share time with a friend rather than a (possibly more meritorious) stranger, though considerations of merit—defined within the context of interpersonal relationships—will often influence our decisions to become someone’s friend in the first place. See infra Part III.D (discussing the limitations we place on the application of meritocratic standards).

76. See infra Part III.B (discussing objective and subjective factors used in evaluation); Part V.B (discussing subjective factors in the affirmative action context).
some of the more subjective factors discussed earlier. In the hiring of brain surgeons and commercial airline pilots, for example, present skill, as indicated by measured performance on a variety of relevant objective tests, will be dispositive. In law school or medical school admissions, on the other hand, there is time to permit for the development of necessary skills. Evidence of a strong work ethic, of the candidate's capacity for overcoming personal obstacles, and of the social "distance" traveled between the candidate's starting position in life and his current position are all supremely important in evaluating likely future excellence. The latitude for considering unrealized potential increases as the "time horizon" for its ultimate actualization grows more distant. Thus, merit may be more broadly measured in certain contexts. At the end of the day, however, it is still merit that is being measured.

It should also be remembered that, even as privilege bestows advantages on some, it also compels those from similar backgrounds initially to compete with similarly placed individuals. For example, the valedictorian of the prestigious prep school might have had every advantage society can offer—a good family, a top-rate education, and so forth—but he has also done well relative to other similarly situated students; he has demonstrated his potential as well. For this reason, West's argument that the celebrities she mentioned have gained their position because of their whiteness\textsuperscript{77} is not only dubious because it picks out one individual characteristic (racial background) and explains their success largely or solely in terms of this characteristic, but also because it fails to recognize that most whites do not achieve what Bill Gates or Cal Ripken have achieved, and that whatever privileges they have had, have also placed them in competition with other similarly privileged persons.

There exists a more radical form of the argument from uneven baselines. This version despairs of the possibility of overcoming some of the differences that result from social inequality. It implies that some of the inequalities have become constitutive of persons, that poor social conditions have more or less unalterably formed persons who will never measure up, that the differences are too great to permit the most disadvantaged from ever having a realistic chance of competing. While this argument bespeaks a deep pessimism regarding human potential that we should and usually do reject, even if it were accurate it is an argument against social inequality, not merit. A true commitment to merit motivates us to liberate human potential by eliminating social inequality.

B. THE IMPRECISION OF MERITOCRATIC CRITERIA

Awarding positions on the basis of merit requires that we have a solid conception of the qualities that constitute excellence in a particular context. Yet this is contested territory because it is often uncertain which criteria are relevant and how we ought to test for them. Some have raised concerns about the accuracy or validity of standardized performance tests in gauging an applicant's

\textsuperscript{77} West, \textit{supra} note 1, at 1014.
potential in an area. In particular, critics have pointed to the potential cultural bias inherent in some of these exams. Again, such criticisms may be interpreted as a call to revise our testing procedures, rather than as a rejection of merit on its own terms. Others, however, take a more radical view and argue that prevailing conceptions of merit are arbitrary, that they reflect qualities that are "culturally and ideologically contingent," or, less generously, that "merit is white people’s affirmative action." The latter argument presumably rejects any objective conception of merit. We will explore the more moderate argument here and the more extreme form in the next Section.

One way to distinguish more moderate from more radical forms of the "Argument from Imprecision" is by delineating three types of issues that arise in the context of debates about qualificational merit. Not surprisingly, all three levels are implicated in debates over affirmative action policies. The questions that arise are as follows: (1) what personal qualities are most important in fulfilling a particular task function; (2) what is the best means for testing for these qualities; and (3) at the most general level, what purposes or functions do various positions require? In other words, what does it mean to be a "good" teacher, doctor, or engineer? Moderate forms of the Argument from Imprecision raise concerns about the first two issues, while more radical critiques of merit question not only these but also the very possibility of determining appropriate job functions in a neutral way for any given position.

The first issue raises questions about which qualities are necessary to perform a particular function well. For example, should there be height and weight requirements for the job of fireman? Does a woman of average size possess the physical strength necessary for hand-to-hand combat? Is the ability to read and to communicate in standard English more important than personal familiarity with the inner city in qualifying for a police officer’s job? These are essentially questions of means: given a particular task or function, what qualities are most important to its successful performance?

The second issue is sometimes confused with the first; it involves the ways in which we test for the qualities that we have determined to be important to a particular task. For example, is a standard IQ test the best means for evaluating

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80. Kennedy, supra note 2, at 733.

81. Delgado, supra note 2, at 1723.


the functional efficiency of a police officer on the job? This question tends to be submerged within the first issue because questions concerning which qualities are functionally appropriate are often indistinguishable from issues of testability. The question raised by the facts in Washington v. Davis, 84 for example, might be viewed either as the question regarding whether the kinds of abilities tested on a standard IQ test are those most important to being a police officer or whether the IQ test accurately tests for these qualities at all.

At another level, however, a different kind of question has been raised by recent controversy in the affirmative action context. It is the question concerning what constitutes the proper function of a position in the first place, or whether there may be multiple or conflicting functions. Evaluating merit as qualification requires that we answer the question of function before we can determine which qualities candidates should possess to fulfill this function. The problem with answering this question, however, is that the description of any job function can be manipulated to incorporate anti-meritocratic criteria. 85 For example, it is sometimes argued that diversity hiring in higher education is important as a means of influence and encouragement to minority students who may otherwise lack same-race or same-gender role models. Traditional criteria regarding what it means to be a good teacher might be trumped, in this case, by consideration of a candidate’s race.

More routinely, many of the criticisms grouped together here under the rubric of the Argument from Imprecision raise legitimate concerns about the way in which we measure merit and about the predictive capacity of our tests, but do not necessarily question the validity of the concept of merit itself. 86 For example, we have a good deal of evidence indicating that many forms of objective testing are poor to moderate predictors of future performance. The average objective test measuring job performance has a correlation coefficient (the measure of the relationship between test performance and job performance) of about 0.3 (on a scale of 0.0 to 1.0). 87 Employment tests themselves are therefore often “poor performers,” yielding little information about a candidate’s likely ability. In general, employment tests may be most helpful in screening out those candidates who are least well suited for particular positions, but they may be considerably less helpful in choosing the best from among the

84. Id. The facts of Washington v. Davis indicate that tests measuring verbal ability, vocabulary, and reading comprehension effectively screened out a higher number of black vis-à-vis white candidates.

85. See Kennedy, supra note 2, at 733-35; Victoria Valle, Sitting in for Diversity, in The AFFIRMATIVE ACTION DEBATE, supra note 71, at 212-16.

86. For example, much of West’s attack on meritocratic standards criticizes the non-meritocratic way in which people are chosen today in many job contexts. See West, supra note 1, at 1012-18. Similarly, Victoria Valle underscores the unfairness of comparing people from diverse backgrounds. See Valle, supra note 85, at 212-16. These attacks are concerned with the imprecision of testing, or the problem of uneven baselines, without challenging the validity of the idea of performative merit itself. But see infra Part III.C (the radical critique is skeptical of even performance standards).

87. Selmi, supra note 78, at 1263 (citing cases and data on the correlation coefficient). The information about performance actually provided by the correlation coefficient is determined by squaring the coefficient. Thus, a correlation coefficient of 0.3 means that the test explains only nine percent of the variation in predicted performance among test takers. Id. at 1263-64.
better qualified. This suggests that such tests may be better suited for use at a preliminary stage of candidate screening, rather than as a final determinant of qualification. Moreover, the correlation coefficient between test performance and job performance tends to be downwardly biased in more limited cross-sections of the population from which top candidates are chosen. Similarly, while LSAT tests across the entire range of scores are somewhat predictive of law school performance, within narrower ranges there is little if any predictive value between different candidates.

All of this suggests that, in many contexts, a variety of more subjective factors including character, hard work, motivation, and determination may be better indicators of performative potential than the more "objective" data. Of course, these factors are difficult to evaluate in impersonal situations involving the review of large numbers of candidates. There is, at bottom, a basic tension between efficiency concerns and the evaluation of merit. At the same time, a more subjective evaluation is equally vulnerable to attack by the critics of merit on grounds of bias. Particularly in the educational context, where the choice of a candidate has a great deal more to do with the potential for growth than with possession of particular skills which must be immediately put to use, the evaluation of character, determination, perseverance in overcoming life's obstacles, and willingness to work hard should be important ingredients of any competitive admissions process. The straight "by the numbers" approach of some of the top law schools, as evidenced by overall entering GPAs and LSAT scores at these institutions, for example, makes it evident that efficiency has partially trumped the quest for merit in the law school admissions process.

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88. The more homogenous the population that is tested, the narrower the distribution of test scores. At narrower ranges, differences between scores indicate even less about differences in abilities. See id. at 1266-70.

89. In 1997 the LSDAS, the service administering the LSAT exam, conducted a study of the accuracy of LSAT scores as predictors of first year grades. Results of the study indicated that the correlation between LSAT scores and first year performance varied from school to school, with a correlation coefficient range from 0.09 to 0.59, and a median coefficient of 0.4. By squaring the median coefficient, we see that the LSAT provides relatively little information about future performance: on average, the test provides only sixteen percent of the information relevant to prediction of performance. When combined with undergraduate GPAs, the median correlation coefficient rises to 0.49. Thus, LSAT score and GPA together provide less than twenty-five percent of the information relevant to the prediction of performance. See LAW SCH. DATA ASSEMBLY SERV., LSAT/LSDAS REGISTRATION AND INFORMATION BOOK, 1999–2000, at 121 (1999).

90. The evaluation is more "subjective" in two senses: first, it considers qualities of character that are more difficult to describe, ascertain, and quantify; and second, it is more likely to be influenced by the decision maker's own personality. Indeed, objective testing is supposed to prevent subjective bias. See DAVID A. GOSLIN, THE SEARCH FOR ABILITY: STANDARDIZED TESTING IN SOCIAL PERSPECTIVE 102-03 (1963) (discussing the importance of objectivity).

91. The most recent data collected by the ABA indicate that top law schools posted entering LSATs and GPAs at the upper extremes of the ranges for each. Harvard Law School had a top quartile LSAT of 172 on the 120-180 range for the 2002-2003 academic year, indicating that twenty-five percent of its students were at or above this mark. Its third quartile score was 167 (indicating that seventy-five percent of its admitees had a score of 167 or above). Harvard's first and third GPA quartiles were 3.95 and 3.76, respectively, on a 4.0 scale. See AM. BAR ASS'N & LAW SCH. ADMISSION COUNCIL, ABA LSAC OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS, 2003 EDITION, 315 (2002). Yale had first and third LSAT quartiles of 174 and 168, and first and third GPA
Motivation is as important to performance in many employment settings as is the possession of the appropriate skills. Particularly in less structured settings, where personal initiative is vitally integral to performance, decisions should reflect a consideration of such factors as the reason for choosing a particular job and an indication of past preparation for the position that evinces a stable, long-term desire to occupy the role. It is striking how often these factors are overlooked in current debates over diversity hiring in academia, and particularly in law schools. For example, unlike other academic departments within a university, lawyers are not specifically trained for teaching; there generally is no equivalent of graduate teaching experience for law professors. A law graduate with even the most prestigious record may have little aptitude or preparation for the kinds of skills necessary to be an inspired teacher and a successful scholar. Both advocates of the traditional “numbers only” approach, which looks to the quality of schools attended, grades, clerkships, and so forth, and proponents of diversity hiring and affirmative action often overlook the inner indicia of potential, and underplay the importance of preparation, motivation, and inspiration. These are qualities, of course, that require a subjective appraisal on the part of those making the hiring decision, but they are the best indications of true potential as a teacher and a scholar.

Because it is more difficult to fire than it is to refuse to hire a non-performer, and because the costs of hiring and training are often high, questions of qualifications have taken on greater significance than they otherwise would where the costs of replacement are lower. Thus, one of the deepest ironies inherent in the employment market is that employers have been forced to become unnecessarily conservative in their hiring practices; increasingly, employers are reluctant to take chances on those possessing qualities other than those validated by traditional tests and hiring criteria. In many contexts where it is not imperative to hire people with a previously actualized high degree of skill, the best evaluation of merit takes place on the job. In sum, the Argument from Imprecision loses much of its force as a critique of merit to the extent that we are able to change the focus from qualification to on-the-job performance. Beyond changing the focus, while some imprecision will remain a part of the process of measuring merit, general agreement about the purpose or function of particular employment positions will serve to narrow the scope of uncertainty. Any remaining vagueness in the application of standards should not be deemed a decisive argument against merit unless the standard that takes its place as the criterion for placement decisions can more than offset the differences in the relative precision of each criterion by its justness and usefulness. Given that quartiles of 3.93 and 3.77, respectively. Id. at 813. Stanford Law School had first and third LSAT quartiles of 170 and 165, and GPA quartiles of 3.95 and 3.68, respectively. Id. at 659.

92. The difference between not hiring and terminating an employee is marked by the lost costs of training, the costs of litigation that increasingly attend termination, and the costs in terms of disruption of the workplace involving employees who have been terminated.
other criteria are likely to yield equally imprecise results, the Argument from Imprecision is not a decisive critique of meritocratic criteria.

C. THE RADICAL CRITIQUE OF MERIT

The radical critique of merit holds that merit is a social construct designed to "maintain the power of dominant groups," and that standards (that is, methods of assessing merit) are nothing but sets of "structured preferences," ways for the "victors" to impose their own standards on other groups. Richard Delgado, for example, argues that "merit is comparable to etiquette" in that no one set of standards is necessarily better than any other. Similarly, Duncan Kennedy maintains that judgments of merit are cultural artifacts that replicate the standards of the dominant group. More pointedly, Alex Johnson, a critical race scholar, argues that contemporary standards of merit constitute a "gate built by a white male hegemony that requires a password in the white man’s voice for passage."

At points, the radical critique of merit is little more than a misplaced application of moral skepticism or relativism, a deep ambivalence regarding the possibility of arriving at objective moral standards that serve as an absolute foundation for moral judgments generally. I call it a "misplaced application" because one need not even be a moral realist to believe that we can arrive at judgments about what it means to perform well in particular contexts. One can have a perfectly sound idea of what it means to be a good car mechanic, a good lawyer, or a good scientist without believing that there is some one principle or quality that defines "good" in all of these different contexts. Moreover, one need not believe that moral propositions have the same epistemological status as factual assertions to believe that we can entertain fair and coherent standards of merit in diverse contexts. Indeed, one of the more curious aspects of Delga-

95. Delgado, supra note 2, at 1721 ("Merit is what the victors impose.").
96. Delgado has his alter-ego, Rodrigo, say: "Conservatives would probably be irritated at the suggestion that merit is comparable to etiquette. But in some ways it is. All cultures have utensils for eating, but they vary and no one set is necessarily better than any other." Id. at 1725. Changing the standards will cause us to alter which qualities we think are meritocratic, but this does not mean that merit itself is an irrelevant concept. By "mov[ing] the basketball hoop up or down six inches . . . you radically change the distribution of who has merit," id., but this does not mean that merit itself is arbitrary or unfair. There is, thus, a big difference between the claim that standards vary depending upon the nature of the activity and the more problematic assertion that, because this is so, merit is itself arbitrary and unfair.
97. See Kennedy, supra note 2, at 733 (standards are "culturally and ideologically specific products").
99. Johnson appears to engage in the same fallacy as Delgado: because we cannot assign a truth value to normative standards, because meritocratic standards are a function of social consensus, they are questionable, arbitrary, and unfair. See id. at 2017 n.43. What is most puzzling about this type of argument is that it seeks to hold meritocratic standards to a much different level, as a meta-ethical
do’s inconsistent value skepticism is the way in which it not only yields before values that he embraces as important, namely equality, but also critiques merit by using the very criteria usually thought to be evidence of merit. In one of Rodrigo’s dissertations on merit and affirmative action, Delgado has his alter ego proclaim, apparently without registering the contradiction, that “traditional merit criteria are ensuring mediocrity” in the context of a broader discussion of the relativity of all standards for merit. Of course, we can and we do possess a rich understanding of what it means to perform well in these diverse contexts, pretensions to moral foundationalism notwithstanding.

Often the radical critique of merit adopts a more sociological gloss. In this guise, the critique concerns itself with the way in which standards tend to be self-replicating. The critique is legitimate when it points to the way in which irrelevant personal qualities such as family connections, habits and manners of speech, and membership in the local country club serve to block the entry of deserving social outsiders. Again, the answer here is more merit, not less; we can distinguish between aspects of character that are fundamental to personal performance and those that are not. Those making hiring decisions can learn to be aware of the difference and to act upon only relevant personal criteria.

Sometimes the radical critique of merit is remarkably essentialist in its terms when it suggests that men and women, blacks and whites, may possess different qualities or skills by nature, that there are “male” or “white” standards somehow out of reach to women and minorities. Again, Delgado argues that men look for logic, linear thinking, and problem-solving abilities while women bring substantially different, more “caring” qualities to the table. When a woman is hired as an attorney, however, it is not because she possesses the “male-defined set of skills,” whatever this means. Rather, she is hired because she possesses the qualities necessary for the job—the ability to reason, analyze, and communicate effectively. Moreover, Delgado does not acknowledge that redefining the qualities deemed to be necessary to do a job amounts to nothing other than redefining the job itself. Of course, even if the functions of particular jobs could be redefined, this would simply substitute a new set of criteria for the old.Merit would remain, although its measurement would change.

The claim that standards of merit are manifestations of the “majoritarian voice” appears misplaced when we consider that particular jobs do indeed require specific talents and qualities that have curiously little to do with class conflict as such. To say that a particular job description (take that of a lawyer or a physician or even an athlete) is culturally contingent is true enough, but it is

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matters, than other normative standards. We generally would find peculiar an argument that claimed, for example, that because the sport we call football might be reconfigured so that it would be a very different sport, the standards for what it means to be a good football player are fundamentally unfair. If everyone knows what the standards are, then of course, the specificity of football’s rules and required talents do not make success in the sport a matter of unfairness.

100. Delgado, supra note 2, at 1735. Of course, mediocrity itself assumes some normative standard.
101. See id. at 1722.
remarkably uninformative. Certainly a culture with a different conception of sport (for example, where sumo wrestling is the dominant athletic competition) would have very different standards for competition, perhaps emphasizing great bulk and physical strength rather than speed or agility. A culture where lawyers are predominantly counselors, rather than advocates, would also obviously call for different standards for performance. In this sense, standards for merit reflect a “majoritarian voice” only in the sense that the prevailing mode of legal practice or athletic competition calls for qualities required by our culture’s understanding of the meanings of these activities. Even the most egalitarian culture will embody and institutionalize its own version of these shared meanings and, in this sense, require that those seeking entry into a particular profession possess the necessary degree of skill or the willingness to acquire this skill. Thus, merit is aristocratic and perfectionistic in nature, but it is not elitist or exclusionary.

The radical critique sometimes attempts to saddle the concept of merit with the consequences of a free market. Most particularly, merit warrants rewards of social goods that permit the meritorious to “purchase” still other forms of merit. The educated get more education, the beautiful can buy the accoutrements of beauty, and the rich, of course, get richer. This argument, however, is severely undercut in a pluralistic society where there exist many spheres of activity with an equally varied diversity of measures of merit. There is no monopoly on merit because there is no one form of it. The athlete, the scholar, the artist, and the skilled technician, among others, all pursue very different conceptions of excellence. Moreover, as we discussed earlier, a true conception of merit that takes seriously the obstacles each candidate has overcome on the way to being evaluated for a particular position and that gauges each person’s development from the perspective of where each of us has begun and how far we have come, significantly overcomes the objection that merit begets merit.

What is most striking about the radical critique of merit is that it often appears to serve primarily as a means for attacking the underlying institutions that value the qualities enshrined by a particular conception of merit. Perhaps the entry of “non-linear” thinkers into the legal profession would have a beneficial effect on the development of the law. Perhaps education should be free to all so that all may equally pursue their own excellence. These are things about which we can argue, and perhaps we will revise our shared social understanding of the proper functions of various professions. Doing so, however, will result in a revised conception of merit for these activities, and not the rejection of merit. The radical critique of merit sometimes appears to want to achieve something like this reconceptualization and, as such, pays homage to

the concept of merit itself by seeking to improve it. On the other hand, to the extent that the radical critique critiques merit right out of existence, what remains in its absence? Presumably, left would be either the war of all against all or what might amount to the same thing: the use of the same arbitrary non-standards and class-conscious decision making that characterize pre-liberal modes of social organization.

D. THE ETHIC OF CARE AND THE LIMITS OF MERIT

In a recent article, Robin West undertook a critique of meritocracy from the standpoint of an ethic of care.103 From the perspective of “difference feminism,” she contrasts what she views to be the abstract, rule-oriented formalism of meritocratic ideals with the more “connecting virtues”104 that account for, rather than dismiss or deny, the affirmative acts of care by which people benefit every day. West’s point is not simply that our pretensions to meritocracy are undercut by our actual practices, by the fact that relatives and friends attempt to assist one another in their educational and professional aspirations, but that we generally applaud such anti-meritocratic acts of love and loyalty. She goes on to argue that the idealized meritocratic world would be “an unattractive and unappealing place,”105 that the “meritocratic imperative to maximize productivity, competency, and performance”106 would lead to a “hyper-meritocracy” in which competition between and, particularly, within firms would undermine loyalty, cooperation, and other “personal, connecting virtues”107 that are so basic to a meaningful life.

West’s critique of merit comes in the context of a defense of affirmative action. She argues that affirmative action constitutes the caring alternative, vis-à-vis meritocracy, to group-based exclusionary employment practices.108 The problem with West’s position, however, is not simply that she gives us no new standard or principle for determining who should get the job or the seat at the medical school. Despite her invective against merit, she would no doubt include in her own formula important meritocratic criteria, though we are given to assume that she would combine this with non-meritocratic elements in order to give effect to the “connecting virtues” of an ethic of care. If this is true, then West’s rejection of meritocratic ideals is half-hearted, and perhaps even hyperbolic. On the other hand, to the extent that all indicia of qualificational and performative merit are rejected outright, we are back to the problem discussed at the end of the last Section: How shall we decide? And what will be the results, both in terms of job performance and institutional stability, if every

103. See generally West, supra note 1.
104. Id. at 1019; see Carol Gilligan, In a Different Voice (1982) (for the psychological theory underlyin difference feminism).
105. West, supra note 1, at 1018.
106. Id.
107. Id. at 1019.
108. See id. at 1010-20.
hiring decision were to become a very unformalistic and unprincipled contest of wills?

Perhaps the deepest tension in West’s position is that her ethic of care begins to appear every bit as abstract and formalistic as the meritocratic ideals she purports to reject. Where our “connecting practices” that she contrasts with merit are based on personal relationships with those whom we know and care about, one can draw the kinds of distinctions she draws between such private virtues and other formalized, public ideals, like merit. But in an institutional context, where hiring decisions are inevitably impersonal and comparative in nature, the ethic of care, in its original form, undergoes a strange metamorphosis. How would we decide to whom the ethic of care should extend in a particular case? When a law school faculty must decide whom to hire, how does the ethic of care tell it which person—or even from which racial or ethnic group—it should hire? In its application, the ethic of care is bound to partake of some notion of racial or ethnic proportionality relative to the general population. One cannot imagine a less personal, more rarefied, and racially balkanized principle for making hiring and admissions decisions than this. Of course, West and others may embrace such principles as the most socially just, but they cannot consistently do so by linking them to the “feeling virtues” inherent in an ethic of care.

The human and social irony here is that we cannot formalize personal emotions, such as love, loyalty, and caring. This is the real paradox at the heart of West’s world: the very attempt to convert these private values and sentiments into public standards transforms them inexorably into the same formalized principles from which she purports to distance herself. West’s ethic of care is every bit as formalized and standardized as the principled, meritocratic world she rejects; it is simply a different set of standards to which she appeals.

West’s attempt to publicize and institutionalize private virtues, however, gives us insight into the limits not only of such private virtues as caring and loyalty, but of such public principles as merit.Merit is bounded in two dimensions: first, by the parameters of the public/private dichotomy and second, by the limits of the individual will. These mark off the social spaces where merit is not the appropriate principle for the distribution of social goods. As reflected in the foregoing discussion, the private world of interpersonal relationships is one animated by subtler, often idiosyncratic emotions. Love, loyalty, caring, friendship, recreation, spirituality, and a host of other values all embody different forms of virtue, but they are not distributive values, nor need they embody any productive or agonistic elements. Indeed, these values are often in tension with public values such as justice, the authority of law, and merit. Thus, not only is merit generally inapplicable within the context of private relationships, but we may similarly protect these private, non-meritocratic orderings from the application of public principles. For this reason, we do not hold small, family-run businesses to the same meritocratic principles that apply in the public realm.

Nor is merit applicable or just in those cases where what might be required
falls beyond the reach of the human will. Merit cannot be the sole basis for
distribution of social goods where what is required by human need cannot be
fulfilled by earnest efforts, whether because of physical or mental incapacity or
by virtue of a genuine lack of opportunity. In sum, we manifest our caring
sentiments by recognizing that merit cannot be the only distributive principle
with which we govern ourselves within the public domain. An ethic of care
demands that we recognize the limits of human capabilities, and a commitment
to moral merit virtually requires that good effort be rewarded, even where
consequences and accomplishments fall short of the mark. In this respect, the
ethic of care and principles of merit reinforce each other.

IV. THE PHILOSOPHICAL JUSTIFICATION OF MERIT

Even if meritocratic assessments are both possible and generally practicable,
it does not necessarily follow that merit provides the best criterion for selection
in contests, appointments, professional positions, and other contexts. The follow-
ing three arguments are offered to demonstrate that merit is indeed justifiably
considered the superior criterion of choice in these situations.

A. THE ARGUMENT FROM FAIRNESS

The argument to be considered in this Section concerns performative and
qualificational merit only. Because performative and qualificational evaluations
involve an interpersonal comparison of various contestants or candidates, while
moral merit typically does not, the Argument from Fairness applies only to
these two categories. The Argument from Fairness holds that, within the context
of a particular contest for a prize, a professional position, or placement in an
educational institution, the best criterion for choice among candidates or contes-
tants is that they exemplify the qualifications of excellence within that context.
Put differently, the prize or position should go to whomever does it best simply
because that is the most fair.

This principle is most obvious, and hardly in need of argument, in the context
of athletic contests and professional competition, where there exist clear stan-
dards of excellence and where those who compete are aware of the standards in
advance. To award the prize in a free throw contest, for example, to anyone
other than the person who finishes first would violate the very premise of the
contest. Moreover, there would be little point in holding the contest with the
aim of giving the prize to the second best, or to the worst. Within the context of
certain events, there can be other kinds of excellence that are awarded, of
course. There may be a prize for the most improved player, for example, but this
still embodies clear criteria of a certain form of excellence—in this case, the
contestant’s overall improvement.

Perhaps the most widely debated (and accepted) attack on merit today, at
least in the context of qualificational decisions, holds that there are other
substantive criteria that are more fair than merit in the distribution of some
hiring and admissions decisions. They involve the claim, most basically, that fairness has a collective component—that is, that criteria transcending individual competence and effort must be taken into consideration in the context of professional and educational placement. I wish to consider only one such suggested criterion here, but it is the criterion that has generated the greatest amount of controversy in both the academic literature and in case law. The question to be addressed here is whether diversity should at least sometimes be used in a way that trumps merit in evaluating applications for educational and professional positions.\footnote{109. This is the central question to be considered by the Supreme Court this spring in the \textit{Grutter} case, which has been set for oral argument on April 1. \textit{See} \textit{Grutter v. Bollinger} 288 F.3d 732 (6th Cir. 2002) (holding that the University’s interest in promoting diversity meets the required strict scrutiny standard), \textit{cert. granted}, 123 S. Ct. 617 (U.S. Dec. 2, 2002) (No. 02-241). The Supreme Court has never held, in particular, that diversity meets the compelling state interest test that will be required of it. \textit{See} Regents of the University of California v. Bakke, 438 U.S. 265 (1978) (Powell, J. concurring). Justice Powell was the only vote ever cast specifically in favor of this proposition. \textit{Id.} at 311-12. The author will hazard the prediction that, by a 5-4 vote, in a narrowly circumscribed opinion, the Court will overturn the ruling of the lower court and hold that diversity does not meet this standard.}

In Part III.A, we argued that it was appropriate to take into consideration the different social and economic backgrounds of candidates for various positions, particularly in the educational context, because doing so is an important part of meritocratic assessment. We argued, however, that one’s racial or gender status was considered only in order to understand the relative starting places of various candidates in order to evaluate the level of personal achievement of the individual. Diversity, in this sense, is \textit{taken into account}, but it does not become an additional factor that weighs in a candidate’s favor. Put differently, extrinsic personal factors such as race and gender are only relevant to the extent that they are proxies for the personal, social, and economic factors that have had to be overcome by the individual in his quest for advancement. These factors are relevant, but only on an individualized basis. To the extent that one’s race may be a proxy for one’s socioeconomic status, it flags a potential issue in the consideration of particular candidates. But it is the obstacles themselves, and not race as such, that are relevant.

The non-meritocratic argument for diversity, on the other hand, views diversity as a means to very different goals. It holds that there may be situations where two or more candidates are not evenly placed, even after consideration of the differing relative backgrounds of the candidates: Candidate A possesses more merit, however this is defined in the particular context, than Candidate B, but Candidate B is preferred because of something else he or she brings to the table. This “something else” is none other than the candidate’s diversity quotient—the candidate’s race, ethnicity, gender, or other extrinsic (that is, non-meritocratic) quality. Various arguments are made for the consideration of these non-meritocratic diversity concerns, but they generally fall into one or more of three arguments.
First, consideration of diversity becomes a way to compensate the members of historically disadvantaged groups for past injustices. Compensation may take one of two forms. It may simply be a way of saying, “We’re sorry,” or it may be linked to a corrective ideal. In the latter case, to the extent that one’s present social position is causally linked to past discrimination, diversity becomes a way of adjusting for this by giving the candidate a position that he or she would not have obtained on meritocratic grounds themselves.

The central problem with the use of diversity to compensate minorities is that it over-compensates some and under-compensates others, including some other deserving minorities. Because the theory of merit offered here already adjusts for differing social conditions, as we saw above, compensating the individual beyond the extent to which her background has disadvantaged her amounts to a kind of a windfall. To the extent that one’s starting position in life is linked to one’s racial, ethnic, or gender background (along with any other social, economic, or personal obstacle not of the person’s own making), this is taken into account in assessing merit itself. Moreover, status-based criteria do not necessarily track the causal influences of past discrimination. As many have pointed out, those who benefit from diversity criteria are often those who need it least, so that a double wrong is committed. Not only do the “objectively” better qualified lose out to the less qualified, but the “subjectively” better qualified—those who are genuinely under-privileged but who show, by an assessment of the inner indicia, the most promise of all—lose out as well. Thus, if society wishes to make reparations for past discrimination, there can be no better way to do so than to respect the dignity of each individual, to look at his achievements in light of where he has started in life, and to give him no more and no less credit than that which he has earned.

Under a second justification for diversity, the recognition of diversity is a way to promote members of these same groups in a manner that serves to ensure greater representation in higher education and the professions. In contrast to the rationale of compensation, which is “backward looking” or corrective in nature, this second rationale is “forward looking.” It views the advancement of minorities as a means of breaking the cycle of inequality by giving the present generation the social and economic capital necessary to ensure that following generations have the material and psychological resources necessary to their own higher achievement. Better-placed parents will send their children to better schools and will expose them to the kinds of social influences necessary to educational and professional advancement. Another aspect of this argument holds that minority representation in high-level professional positions provides role models to younger minorities. Yet another aspect of this claim (when made in the context of educational placement) is that minorities will then return to service disadvantaged and under-served communities. All three aspects of this

second argument are utilitarian in spirit insofar as they are justified by the promise of future consequences viewed to be beneficial.

The Argument from Fairness is best conceived as a deontological moral argument,\textsuperscript{111} as such, it may be radically incommensurable with utilitarian concerns.\textsuperscript{112} Indeed, deontologists often argue that such considerations as dignity, liberty, and fairness usually take an absolute priority over utilitarian costs and benefits such as those here adduced by defenders of diversity.\textsuperscript{113} If it is unfair to deny the better-qualified person a particular position, even important policy goals such as the elimination of inequality will generally have to be achieved in a manner that comports with the requirements of fairness.

Nevertheless, even if we forgo the deontological “trumping” of utilitarian arguments and address the utilitarian on his own ground, it is not evident that the argument for non-meritocratic diversity is the best option. First, it must be remembered that, to the extent that the theory of merit offered here furthers these same social goals—and does so in a fair manner—the marginal utility gained by advocates of diversity will be reduced considerably. The baseline for consideration is now: how many more minorities will be offered positions under diversity criteria relative to the positions offered under our theory of merit proposed here. Even to the extent that there remain appreciable differences, however, this marginal gain must be weighed, in good utilitarian fashion, against the costs of having such a system. Many others have discussed these costs. They include the costs associated with the stigmatization of qualified and non-qualified minorities alike,\textsuperscript{114} increased racial balkanization at a time when the prospects for integration have never been better,\textsuperscript{115} lost productivity costs (to the extent that less qualified candidates perform less well), and the loss of

\textsuperscript{111} Deontological moral arguments may be classified as those that premise the rightness and wrongness of various actions upon considerations that have little or nothing to do with the consequences of the actions. Acts are viewed to be right or wrong because of their nature. Kant’s moral thought is the archetypical deontological moral philosophy. See generally KANT, supra note 5. Deontology is radically contrasted with utilitarian thought. See generally J.C.C. SMART & BERNARD WILLIAMS, UTILITARIANISM: FOR AND AGAINST (1973).

\textsuperscript{112} As John Rawls put it, utilitarian thought looks at actions as good or bad, while deontological thought views them in terms of right and wrong. See RAWLS, supra note 22, at 22-27. Rightness and wrongness are viewed as absolute moral categories in that certain actions either are or are not morally acceptable. Utilitarian thought, on the other hand, is more naturalistic. Goodness and badness are the results of consequences; moreover, as consequences change, acts that might not be acceptable with certain consequences become acceptable with others. To take the paradigmatic example, the deontologist is more likely to take an absolute stand against certain acts (e.g., lying, promise-breaking), holding that such acts are always wrong. Utilitarians, on the other hand, are likely to hold that the badness of lying, for example, varies, and that some lies are morally acceptable. See KANT, supra note 5; J.L. MACKIE, ETHICS: INVENTING RIGHT AND WRONG 149-68 (1977) (comparing consequentialism and deontology).

\textsuperscript{113} See KANT, supra note 5; RAWLS, supra note 22, at 26-27 (the “right” always has priority over the good); RONALD DWORIN, INTRODUCTION TO TAKING RIGHTS SERIOUSLY, at xi (1977) (rights “trump” policy or utilitarian considerations).

\textsuperscript{114} See Loury, supra note 71, at 58.

opportunities to the others who are denied the position,116 among others. Given
the necessary tradeoffs, it is far from clear that non-meritocratic diversity has
any utilitarian benefit over a meritocratic formula.

The real harm associated with non-meritocratic uses of diversity, however, is
to the dignity and self-respect of the qualified minority. As we will argue later in
Part IV.B, affirmative action is only justified as a means of enforcing meritocratic standards, where deserving minorities are systematically denied the positions they have earned.

Finally, a third argument in favor of diversity holds that members of diverse
social, ethnic, and racial groups bring a necessary variety of backgrounds to
their educational and professional positions. This not only gives minorities a
"voice" in law, medicine, government, or other areas in which they serve, but it
also ensures the representation of values and outlooks that are different from
those of mainstream culture. This is supposed to democratize these various
professional contexts, to expose these institutions and practices to the normative
world of the previously marginalized. Particularly in policy-making and -implementing contexts (for example, in the professions of law, law enforcement, and
the social services), this ideal is important as a way of opening up institutional
values to the perspective of those whose voices have been under-represented.

This aspect of the argument for diversity does have an important place in a
liberal culture. For our purposes here, it should be enough to note that there will
be contexts in which these concerns are relevant and others in which they are
not. While the marginalized voice will have something to add in a law school
classroom or a social welfare policy think tank, for example, the contribution is
less obvious when the position sought is that of a research scientist or a filing
clerk. Moreover, as with the response to the last argument, these concerns will
be furthered anyway to the extent that diverse and deserving candidates obtain
positions under a rigorous principle of merit.

The Argument from Fairness holds that merit-based criteria, as the idea of
merit is defined in this article, are ultimately the only fair criteria. Choosing
candidates partially or wholly on the basis of non-meritocratic or status-based
criteria affronts human dignity and individuality because it makes the award of
the position dependent upon factors that are not within human control. This
denies winners the benefit of knowing that, through the exercise of moral effort
as manifest in the development of innate potential, they have earned their
position. They deserve it. It does something even worse to losers, however,
because it deprives them of the assurance that they have lost out in the
competition for limited social positions for reasons that are within their control,
and that they potentially can change. As difficult as it is to know that one

116. On this ground alone, one must weigh the marginal utility of giving a certain job to the minority
candidate over the deserving minority or non-minority candidate. Because considerations of utility are
"color-blind," it is not clear why there should be greater utility in giving the position to the former,
rather than to the latter; in other words, the position will afford the same social and economic
opportunities to the latter group as to the former.
“deserved” to lose to a better candidate, it is more difficult still not knowing whether one lost “fairly,” and whether there is anything at all that one can change.

In the most general way, merit is the fairest criterion because it reduces the element of chance in one important area of our lives. It does so by placing responsibility for each individual’s personal development back in the hands of the individual herself. If there remains any unfairness in this, the remedy is certainly not to adopt a criterion for selection that is wholly outside the will of the competing subjects.

B. THE ARGUMENT FROM HUMAN EXCELLENCE

While the Argument from Fairness derives its normative force from the interpersonal aspect of merit, the Argument from Human Excellence draws its intuitive power from its more personal implications. Put simply, merit reflects our collective recognition of the central significance in human affairs of the unfolding of one’s innate potential and the manifestation of this potential in the world of action. In sum, it embodies our deepest understanding that true meaning, in the fullest existential sense, is tied to the realization of personal excellence.

It is at this juncture that we gain another glimpse of the ambiguous relationship between the inner indicia of merit—the far-sighted intentions, noble motives, and assiduous moral effort invested in certain human acts—and their external consequences. While we typically recognize merit or excellence through its consequences in the world, these consequences are only a sign of merit. They reflect merit, but merit itself is embodied in the structure of human actions. This is why we do not praise the ultra-efficient machine; it is also why we may compensate and even occasionally applaud unearned talents, but hold the greatest esteem for the Helen Kellers and the Theodore Roosevelts of the world. These are people who fashioned their own excellence, not without the assistance of others, but also not without a determination to make something noble of their lives.

Contemporary social values are almost inextricably entwined in the ethic of productivity, but merit is not equivalent to productivity. Indeed, the utilitarian ethic of productivity is contrary to the spirit of meritocracy in that it confuses the effects of an action with its substance. It is for this reason that utilitarian economists dismiss merit as an obstacle to efficiency, even as egalitarians dismiss it as a barrier to social leveling. As Hannah Arendt would have put it, both the modern ethic of utility and most versions of the ethic of equality are predicated upon an “economic” model of human existence that conceives the human condition exclusively in terms of production and consumption.117 The utilitarian ethic empties life of any meaning because all life itself is viewed instrumentally, a means to existence itself. But to what end do we put existence?

The egalitarian ethic, on the other hand, saps life of any striving, and ultimately, of any hope. It obviates the heroic dimension of human existence, the striving for self-unfolding, even self-transcendence.118

In differing ways, the quest for excellence is bound up in the Aristotelian concept of *arête*, and in the humanistic ideal of self-actualization. It is no accident that the Greek conception of virtue and the Maslovian ideal of self-development should be so closely linked, for they both presuppose that the agent discloses himself in action; thus, the pursuit of excellence is also the quest for self-realization. Dante wrote that “in every action, what is primarily intended by the doer, whether he acts from natural necessity or out of free will, is the disclosure of his own image.”119 Merit enshrines this pursuit of the potential self in a social ethic that extols the pursuit of the best in each individual.

C. THE ARGUMENT FROM HOPE

Merit serves yet another function in human affairs, a purpose that can only be described as deeply humanistic: it counsels each individual that her life is in her own hands, and that she may change it if she wishes. Where genuine meritocratic standards prevail, each individual can alter her station in life—can ameliorate, even transform, her prospects. The recognition of merit entails that we possess the potential, with perseverance, to achieve our ultimate aspirations. This imbues life not only with a sense of fairness, but with hope for the future. This hope is predicated not only on the prospect that each person may under his own power make his life better, so that he may look forward to a life increasingly filled with the material and existential rewards of effort, but what is more profound, that these rewards are the result of his own efforts, rather than an accident of chance.

The deep psychological significance of this connection between effort and consequence is often overlooked in contemporary social thought. Modern social thought places a great deal of emphasis upon achieving widespread conditions of material comfort, but it tends to overlook the psychic—one may even say the spiritual—significance of being the author of one’s own good fortune. Our understanding of the importance of this connection between moral effort and worldly consequence runs deep in our religious and philosophical traditions. From the Christian injunction that, “as ye sow, so shall ye reap,”120 to the Stoic conception of responsibility for the consequences of one’s own actions,121 to the Buddhist conception of karma,122 the separate ideas of hope and responsibility

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118. Nietzsche has his hero, Zarathustra, proclaim: “But, by my love and hope I entreat you: do not reject the hero in your soul; keep holy your highest hope.” Friedrich Nietzsche, Thus Spoke Zarathustra 71 (W. Kauffmann ed. 1969).
119. Arendt, supra note 117, at 175 (quoting Dante).
120. Galatians 6:7 (King James).
mutually reinforce one another. One must have a sense of self-control or autonomy over one’s life to have any realistic hope to be able to change it. Moreover, once one finds this hope in his own life, he embraces self-responsibility as a way of nurturing hope.

Alexis de Tocqueville saw clearly how important it is to “banish chance” from politics and social life, and argued that this is even more essential in a democracy than in other forms of government. He wrote:

So it is chiefly in times of skepticism and equality that particular precautions are required to prevent the favor of prince or people, which comes and goes at random, from taking the place of merit or duties performed. One must hope that all promotion will be seen as the reward of effort. . . . Governments must study means to give men back that interest in the future which neither religion nor social conditions any longer inspire, and without specifically saying so, give daily practical examples to the citizens proving that wealth, renown, and power are the rewards of work, that great success comes when it has been long desired, and that nothing of lasting value is achieved without trouble.

Merit serves the function of giving all persons that “interest in the future” that is seriously threatened by those conceptions of social justice that take the distribution of life’s rewards out of the hands of the individual and make it a function of collectivized social processes.

V. APPLICATIONS

A. MERIT AND THE PROFESSIONS

It is customary for many today to think of professional standing as a reflection of personal merit and of wages as an indicator of the talent, hard work, and perseverance required to succeed in a particular occupation. Embodied in the Horatio Alger story, and in the writings of such twentieth century pundits as Dale Carnegie, Anthony Robbins, and others, the American dream has vouchsafed native talent, hard work, determination, and the willingness to take risks as the road to the promised land of material success. Yet even if we put aside for the moment the problem of uneven baselines as applied across all professions—the fact that professional status sometimes reflects unearned differences in social capital—there are deeper problems with connecting professional status and compensation with merit.

When we think about merit in a socioeconomic context, as a form of social compensation for one’s livelihood, we observe that merit requires that there be a more or less direct connection between a person’s efforts and contributions and the social rewards received for these contributions. A meritocratic system, in

124. Id.
this sense, entails that each person’s “return” or level of compensation be proportional to his contributions, relative to that of all others.\textsuperscript{125} Represented mathematically, a meritocratic system would be one in which

\[
\frac{R_a - C_a}{C_a} = \frac{R_b - C_b}{C_b}
\]

where \( R \) represents the individual reward or compensation received for a particular act by two distinct individuals, \( a \) and \( b \), and \( C \) is the contribution of each.\textsuperscript{126}

But how do we measure one’s contribution? Should they be gauged by the results, the consequences or the social benefits of one’s acts, or should one’s contribution be at least partially a function of the level of moral effort one has exercised? While contributions are at least partially a function of the social utility of the consequences of one’s acts, where different degrees of skill, education, and qualifications are in some way factored into the equation to reflect the greater utility of various occupations, there is also an inner dimension to performative standards that reflects the American work ethic. The work ethic embodies a moral conception of merit that promises that hard work shall be rewarded with prosperity. Of course, hard work, determination, and moral effort are often converted into educational degrees, talents, experience, and the other indicia of professional standing, but not always, and probably not as frequently as the mythology surrounding the American Dream suggests. Herein lies the central problem with the relationship between merit and professional compensation: hard work and productivity are not the same thing, nor are we entirely clear about what we mean by “productivity.”

Recent labor department statistics indicate that there is a wide disparity in compensation levels between different professions: the average annual salary for attorneys in 2001 was $91,920; for surgeons it was $137,050; and for secondary school teachers it was $45,370.\textsuperscript{127} While these figures may or may not comport with our intuitions regarding each profession’s relative social value, certainly at the extremes we may question the validity of a market that pays an actor twenty million dollars annually while teachers, entrusted with the education of the next generation, are compensated at one-fifth of one percent of

\textsuperscript{125} Merit does not necessarily require a quid pro quo between contribution and return. Varying natural conditions in different locales may result in different levels of return on a given measure of contribution. Merit requires only a proportionality of return among different contributors so that each contributor receives the same return as every other contributor, relative to each one’s contribution.


\textsuperscript{127} Other figures include the following: marketing, advertising, and public relations managers earned an average of $69,213 in 2001; food service and lodging managers, $37,555; loan officers, $50,060; nuclear engineers, $80,200; medical scientists, $62,650; chiropractors, $76,870; veterinarians, $69,150; and reporters and correspondents, $37,800. These figures were obtained from the BUR. OF LABOR STATISTICS, U.S. DEPT. OF LABOR, OCCUPATIONAL EMPLOYMENT STATISTICS SURVEY by OCCUPATION FOR 2001, at tbl. 1, at http://www.bls.gov/news.release/ocwage.t01.htm (last visited Feb. 11, 2003).
this figure, on average. The difference in income between the corporate CEO and the agricultural worker in case (1) at the beginning of the article raises similar questions: how could anyone possibly merit nearly three thousand times the pay of another productive worker, short of discovering a cure for a terminal disease—and perhaps even then?

Moreover, there are fundamental problems with attempting to compare the performative or consequential aspects of different professions. While the market value of a worker’s services reflects the exchange value of that form of labor relative to all other available services and commodities, and while linking social value to market value may appear to have the advantage of providing an objective basis for determining the value of contributions (that is, the value actually assigned by the market), this results in an entirely tautological conception of merit. Where market value is viewed as a reliable indicator of merit, a worker will always be paid according to merit because merit requires payment for one’s contributions, and one’s contributions will necessarily equal their market value where they are defined in this way. When we ask whether the market operates meritocratically, however, we obviously want to know something more than whether people are paid what they are paid. What we want to know is whether what they are paid reflects some other set of social values—values that are indicative of merit, whatever this should mean. Perhaps for this reason, and contrary to popular belief, defenders of a free market in labor do not predicate their arguments on merit or desert, in some Kantian sense (although these are often secondary arguments). Rather, the free market is justified in allocative, not distributive, terms as the best means to maximize efficiency.\(^\text{128}\)

Thus, it appears that measuring merit requires that we find some set of values extrinsic to the market, by which we can measure the fairness of the market. There is, however, no general measure, no lowest common denominator, by which to compare the social productivity of the average real estate lawyer with that of the average auto mechanic, for example. Determining a rate of contribution for each respective profession would pose intractable problems not only because of differences in the number of working hours each year, the amount of education or training necessary in preparing for the profession, the costs (including opportunity costs) incurred in obtaining the necessary training, the inherent dangerousness or difficulty of the profession, along with many other differences between professions, but for an even more fundamental reason: there simply is no way to decide how valuable a particular service or commodity is relative to other services and commodities even where these other factors could be equalized.

The problem of the relationship between merit and employment compensation runs still deeper, however, because the problem is considerably more than

\(^{128}\) \textsc{Friedman, supra} note 36, at 166. The other, non-economic, rationale for the free market, of course, is liberty—as in the liberty to choose an occupation, and the liberty to get the return for one’s product available through the market. \textit{See id.}
one of comparing the productivity of different professions. As a basis for
distributing social goods, free exchange and desert or merit operate on entirely
different principles. 129 There is a fundamental tension between the conditions of
privacy and the capacity of the market to reflect changing conditions in price
structures and the interpersonal proportionality between contributions and re-
wards required by our concept of merit. Any central mechanism for ensuring the
proportionality of compensation across the professions would seriously under-
mine free market conditions. As we saw above, performative merit requires
objective criteria for valuing performances in different contexts and usually
involves a comparative evaluation of different performers. While purchasers of
particular services or commodities may make such evaluations within the
context of a single market, there exists no mechanism for achieving propor-
tionality across professions. There simply is no objective way to compare the level of
merit of a good lawyer with a good astronaut with a good farmer, for example.
Moreover, any attempt on the part of the government to set objective levels of
compensation for varying professions in order to achieve some measure of propor-
tionality would be counter-productive insofar as this would lead to lower
consumer demand for the products and services of professions whose level of
compensation had been increased to achieve proportionality. At the other end of
the spectrum, those who would be more highly compensated in a free market
would not remain long in the purely meritocratic market.

Paradoxically, it is precisely because merit is not well-reflected in compensa-
tion structures across diverse professions that merit becomes an even more
important factor in determining who should obtain a particular job and who
should retain it within a particular market. If there were a perfect meritocracy
across all professions, at least each one of us could be secure in our understand-
ing that we were being compensated at the level we “deserved,” whatever the
differences between absolute levels of compensation among professions. But it
is precisely because the free market generates inequalities from the standpoint of
merit that fairness requires that the beneficiaries of these inequalities earn
their position, that one kind of inequality (the inequality of compensation
relative to merit) not result in still other forms of inequality (the inequality that
results when the less meritorious are able to obtain positions that reward their
holders with disproportionately higher levels of compensation relative to merit.)
In sum, because a free market permits movement within and between profes-
sions, qualificational and performative merit become all the more important as
bases for distributing those forms of social largess inherent in professional
status and compensation.

To sum up, meritocratic assessments cannot be made across the professions
because, even to the extent that we might be able to achieve some general social
consensus regarding the overall social value of various occupations—for ex-

129. Michael Walzer, Spheres of Justice 21-26 (1983) (discussing free exchange, desert (or merit),
and need as three distinct principles of distributive justice).
ample, even if we could agree that primary school teachers should be paid more and actors less—economic values do not track the social and moral worth of different occupations. The economist will disagree only because he can find no other social measure of worth than the market value of a commodity; consequently, he reduces the former to the latter. Human beings are hardly so rational, however. We often value one thing in the abstract, but pay for another. Rewarding proportional merit across the professions is thus a theoretical and practical impossibility. Nevertheless, given the freedom each individual has to choose his profession, he or she can choose which path to follow, and will do so partially for a more intrinsic reason: for the enjoyment derived from pursuing a particular line of work. On the other hand, meritocratic assessments within particular professional contexts are even more important, given the vicissitudes of the market.

B. MERIT AND AFFIRMATIVE ACTION

The radical critique of merit-based principles presupposes a conception of merit that often replicates patterns of social inequality. To the extent that placement and hiring decisions are partially or largely a function of race, gender, family ties, legacies, irrelevant class-based or cultural habits and mannerisms, and so forth, they operate on non-meritocratic principles. Certainly, in many contexts in American history and culture, meritocracy has existed more as aspiration than as reality. More subtly still, to the extent that we operationalize meritocratic standards by reference to “objective” test scores, we make a caricature of meritocratic ideals and sacrifice true merit to efficiency. As I have argued in this article, a more sensitive yet powerful theory of qualification merit looks to the respective candidates’ backgrounds, to the personal obstacles they have overcome—poverty, disability, social exclusion, and other conditions—and the way they have overcome them as factors to be considered in likely future professional development and competence. Particularly in the educational context, a consideration of merit should look as much to how far as to how high an applicant has climbed. It must also consider what evidence exists to support continued future development of an applicant’s potential.130 Objective data will continue to play an important role as a preliminary screening device for the clearly unqualified, particularly where there are large pools of candidates, but this cannot be the end of the story.

To the extent that affirmative action policies in placement and in hiring use race or gender as a proxy for poverty or other obstacles imposed by social factors that limit the otherwise-qualified, they share the same goals as the meritocratic principles developed here. But race, in and of itself, should never be used as a determining factor in such decisions. Indeed, the use of race as a proxy for these other achievement-limiting conditions sacrifices race to effi-

130. See supra Part III.A (for a discussion of compensating for uneven baselines in a way that is consistent with merit).
ciency in exactly the same way as does the exclusive use of objective test scores. A consideration of these other factors in themselves, rather than race, will be more accurate as a litmus test for merit, and fairer insofar as race alone is under-inclusive and over-inclusive with respect to merit. Race as the sole basis for affirmative action is under-inclusive when it leaves out disadvantaged non-minorities, and it is over-inclusive when minorities from privileged backgrounds benefit from such policies, as some evidence suggests they have.131 More disadvantaged members of minority groups, who are more deserving from the standpoint of merit, thereby lose out in the process.132

Of course, affirmative action is sometimes grounded on non-meritocratic arguments, upon the demand for diversity in the workplace or as a hedge against racial balkanization.133 Yet, diversity and integration can be achieved just as effectively through meritocratic factors, as we have defined them here, as through non-meritocratic factors. A sensitive weighing of the factors each individual has overcome will neutralize the differences reflected in the problem of uneven baselines. Moreover, a merit-based approach to hiring and placement would eliminate the self-doubt, stigmatization, and dissension that frequently attend minority hiring and placement, even where such decisions are based on purely meritocratic grounds.134 A meritocratic system sends a clear signal to all that each and every candidate has earned her place and deserves her position. Certainly this is a better response to the need to overcome racial stereotypes than the currently fashionable practice of diversity-based hiring and placement.

131. The evidence presents a complex picture. White women have been the primary beneficiaries of affirmative action. See Manning Marable, Staying on the Path to Racial Equality, in THE AFFIRMATIVE ACTION DEBATE, supra note 71, at 9; Loury, supra note 71, at 53 (arguing that the disparity in income among blacks is greater than that of Americans as a whole, and suggesting that affirmative action has helped the more privileged); see also CARTER, supra note 110, at 71-95 (arguing that affirmative action benefits minorities who least need it at the expense of the less well off); but see Heidi Hartmann, Who Has Benefited From Affirmative Action in Employment?, in THE AFFIRMATIVE ACTION DEBATE, supra note 71, at 93 (concluding that there is no evidence to support the claim that the better educated have benefited from affirmative action).

What emerges from the various data is that various forms of affirmative action have assisted white women and upper-middle class minorities (both men and women) in securing access to educational opportunities formerly closed to them, from which they are able to secure better employment opportunities. See Robert L. Woodson, Jr., Personal Responsibility, in THE AFFIRMATIVE ACTION DEBATE, supra note 71, at 112 (citing data that seventeen percent of Hispanic freshmen and fourteen percent of black freshmen at the University of California at Berkeley in 1989 came from homes with incomes over $75,000).

132. This is the case particularly where quotas are used to guarantee a set number of minority spaces. From a merit standpoint, to the extent that administrators fill these spaces with privileged minorities who may (arguably) be less deserving than less-privileged minorities, the inclusion of the former will entail the exclusion of the latter.

133. For example, Duncan Kennedy explicitly rejects merit as the basis for diversity hiring in academia. See Kennedy, supra note 2, at 733 (basing his argument on a culturally pluralistic conception of hiring that emphasizes the importance of the participation of persons from different cultural and racial backgrounds).

134. See CARTER, supra note 110; Loury, supra note 71, at 54 (discussing the effects of stigmatization resulting from affirmative action programs).
A more individualized assessment of merit can do all that affirmative action should do, and can do it better and more accurately.

Nevertheless, it has been argued that affirmative action may be required on meritocratic grounds as a means of overcoming structural inequities and institutional biases that block the access of qualified minority candidates to educational and professional opportunities. Specifically, voluntary affirmative action programs may be used as a means of counteracting the overt or unconscious racism and stereotypes of managers and others who overlook qualified minorities. Moreover, they may be utilized as a market signal to those who are qualified but have been discouraged from further efforts by previous discrimination. Finally, it has been argued that affirmative action can increase job satisfaction and lower the quit rates of minorities and women by preserving their perception of fairness within the work environment.

These arguments are not apposite in higher education today. While racism and sexism undoubtedly persist in some professional contexts, exactly the opposite is true in university and professional school admissions. Over the course of the last three decades, educational institutions have made an unprecedented effort to attract and retain women and minorities. This is evidenced most forcefully in the voluntary establishment and proliferation of affirmative action and minority outreach programs. Moreover, where there are large pools of anonymous applicants, and where administrators seldom interview candidates, the racial background of particular candidates is often unknown to those making admissions decisions unless the applicant volunteers this information because doing so will benefit them. Thus, the case for gender and race-based affirmative action measures, where individualized assessments of merit may still harbor subjective racism or sexism, is strongest in the professional context.

Of the three merit-based arguments marshaled in defense of affirmative action programs (the prevalence of biased hiring decisions, the need for market signals to the disenfranchised, and the imperative to engender the accurate perception of a fair work environment), only the first offers any advantage over non-race- and non-gender-based measures. Market signals to the qualified but disenfranchised can be given by aggressively seeking qualified women and minority candidates. Indeed, nothing prevents an institution that operates on merit-based principles from minority recruitment or outreach programs. As for the perception on the part of employees that the workplace is fair, a meritocratic system is superior to one in which race-based decisions take place. Indeed, fair implementation of meritocratic standards will ensure that all employees are held

135. See Loury, supra note 71, at 58-59.
136. See Selmi, supra note 78, at 1296 (asserting that an understanding of how discrimination persists helps to explain the impetus for employer voluntary affirmative action programs).
137. Selmi, supra note 78, at 1299-1301.
138. See Selmi, supra note 78, at 1301-08.
to the same standards and will prevent the occurrence of race-based stigmatization and dissension, which are the deadliest threats to employees' perception of fairness in the workplace.

Affirmative action is most persuasively urged as a means for ensuring merit where there is some evidence that hiring decisions in the past have been biased in favor of less qualified non-minorities, or where white male candidates are systematically preferred over equally qualified women and minority candidates. Of course, as even the defenders of such policies recognize, training managers and supervisors in gender- and race-neutral selection procedures and internally monitoring hiring decisions for evidence of bias can significantly offset discriminatory hiring practices. These programs may be costly, however, and affirmative action is offered here not as the best means of preventing bias but as the most cost-efficient alternative.\textsuperscript{139}

Explicitly race- or gender-based measures, particularly where these take the form of quotas, require that we set a mark that would represent the proportion of minority representation in the workforce if hiring were to take place on purely meritocratic grounds. Depending upon the locale and the employment context, however, this mark would not necessarily reflect the proportion of qualified women and minorities in the general population.\textsuperscript{140} To the extent that we set the mark too high, we undervalue meritocratic standards in favor of less qualified minorities; and to the extent that we set the mark too low, we undervalue meritocratic standards in favor of less qualified non-minorities. (Moreover, quotas make it unlikely that qualified minorities are hired above this mark, a likely prospect where affirmative action is required in a racially polarized environment.) In either case, not only is the system unfair from the standpoint of merit, it will result in lower productivity, along with the accompanying but more intangible effects (such as stigmatization and racial disharmony) that often result from these programs. Only the fair implementation of meritocratic stan-

\textsuperscript{139} See Selmi, \textit{supra} note 78, at 1277.

\textsuperscript{140} Data suggest that there exist persistent disparities between group representation in the general population and similar representation in the professions. The following chart gives some indication:

\begin{center}
\begin{tabular}{|c|c|c|}
\hline
& Blacks & Latinos \\
\hline
Total in U.S. Adult Population & 12.4\% & 9.5\% \\
Physicians & 4.2 & 5.2 \\
Engineers & 3.7 & 3.3 \\
Lawyers & 3.3 & 3.1 \\
Professors & 5.0 & 2.9 \\
\hline
\end{tabular}
\end{center}

Marable, \textit{supra} note 131, at 13. Nevertheless other factors, including employment choices, educational disparities, and cultural differences are undoubtedly at least partially responsible for the disparity between the relative representation of a particular group in the general population and its representation in various professions.
standards can ensure the respect and self-respect necessary for each person to actualize herself through her chosen profession.

To advocates of race-based measures, the promise of meritocracy may be cold comfort. They will doubt the efficacy of the system and they may even doubt the motives of the meritocrat. But where our conception of qualificational merit is redefined to account for the obstacles that each individual has overcome in his own right, insofar as this reflects genuine potential to perform well in a particular position, the call for purely race- or gender-based measures amounts to a demand for consideration above and beyond those disadvantages that make consideration of gender and race relevant.

C. MERIT IN THE WORKPLACE

We may be unable, consistent with market principles, to effect the conditions of meritocracy across the professions for reasons discussed above, but a commitment to the egalitarian component of meritocracy requires that people performing similar jobs within the same institution receive the same wages and be held to the same rights and responsibilities. Specifically, disparities in compensation for men and women, and for minorities and non-minorities with similar experience and responsibilities, are utterly unjustified.\footnote{141} Similarly, unexplained differences in promotion rates and “glass ceilings” for similarly situated persons of either gender or diverse racial backgrounds dramatically vitiate any claimed genuine commitment to true meritocracy.\footnote{142}

At the same time, however, for merit to be taken seriously as a defining principle within the workplace, there should be radical changes in pay structure and retention policies. First, and most fundamentally, employers must make explicit their standards and expectations regarding employees’ performance.

\footnote{141} In general, women earn 72% of what men earn, although this does not reflect differences in position or profession. Eleanor Holmes Norton, The Affirmative Action Debate, supra note 71, at 44. More specifically, recent figures indicate that, while 21.2% of minority males holding managerial positions had incomes in the top quintile for all management positions, only 3.6% of minority women holding managerial positions had incomes in the top quintile—even though the total number of minority women holding such positions outnumbers that of men. Hartmann, supra note 131, at 81-83. In specific professions, there are sometimes marked disparities between compensation for men and women. See Bur. of Labor Statistics, U.S. Dep’t of Labor, National Compensation Survey at tbl.39, at http://www.bls.gov/cps/cpsaat39.pdf (last visited Feb. 11, 2003) (providing data on differences in compensation within professions by sex). In general, across all professions, white males earned an average of slightly less than $32,000 annually in 1993 dollars, while black men earned just under $24,000; white women earned about $22,000, while black women earned less than $20,000 annually. Hartmann, supra note 131, at 83 fig.2.

\footnote{142} In 1997, white men held 97% of senior management positions in Fortune 1000 industrial companies and Fortune 500 service corporations, while African-Americans held only 0.6%. Similarly, there were only two female CEOs in Fortune 1000 companies. The Affirmative Action Debate, supra note 71, at 36; see also Cynthia Fuchs Epstein et. al., Report: Glass Ceilings and Open Doors: Women’s Advancement in the Legal Profession, 64 Fordham L. Rev. 291, 304-05 (1995) (providing data and discussion on the limited advancement of women in the legal profession). Although Asian-Americans are the single most educated class, with a total of 21% holding masters or other professional degrees, they are not promoted in proportionate numbers. The Affirmative Action Debate, supra note 71, at 36.
There should be clear guidelines regarding what is minimally expected of each employee in terms of productivity, and everyone should be held to the same standard. For example, within the legal academy, it is remarkable how vague and malleable the standards for tenure within even a particular institution can be. Novice professors are often unclear what exactly is expected of them. Moreover, few institutions engage in anything like the regular review of teaching and scholarship that reaffirms standards and provides the necessary feedback to new and continuing professors. Once a hire is made, new professors often feel “on their own,” without any guidance or direction. In any employment context, a commitment to merit requires clear guidelines, regular review, and constructive assistance in developing oneself fully in any particular position.

Nor do pay rates in most professions reflect a commitment to merit. If they did, there would be larger differentials in pay between those performing at the minimum level of competency and those performing at significantly higher levels. In some cases, pay rates operate as counter-incentives to improve one’s skills and to perform at the level of one’s highest potential. Again, from the perspective of a law school professor, the lost potential is striking. For example, in institutions where the differential in annual raises ranges from two to six percent from the lowest to the highest performer, there exists little incentive (beyond internal motivation) to seek excellence. Indeed, the truncated raise ranges function as a counter-incentive to performance: where a tenured professor making $100,000 annually knows that he can spend his time doing scholarship and improving his teaching to a maximum net advantage of $4,000 (the difference between the highest and the lowest pay raise) or can spend the same considerable amount of time developing an outside practice, it is clear which decision the financially motivated professor will make. In this case, it is the students and the institution that suffer. Salaries should commence at lower levels, if necessary, but with the promise that better performers will be paid at a higher rate than what they otherwise are paid under current practices. As they exist today, pay structures put a premium on being hired in the first place, and devalue the importance of continuing improvement.143

Finally, a commitment to merit requires continuing review of job performance. Practices that ensconce mediocrity and sub-standard performance should be abandoned. In the academy, for example, the institution of tenure for any

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143. The National Law Journal provides a sampling of median salaries from a number of law schools, based upon a survey by the Society of American Law Teachers, with data gathered as of June 1, 1999. These figures indicate that the salary for assistant professors at Boston College was $89,000; at the University of California, Hastings, $80,796; at the University of North Dakota, $44,000; at the University of Puerto Rico, $48,800; at Vermont Law School, $63,502; and at the College of William & Mary, $88,450. Salaries for full professors at these same institutions, however, was as follows: Boston College, $126,500; University of California, Hastings, $119,244; University of North Dakota, $67,064; University of Puerto Rico, $62,600; Vermont Law School, $86,553; and College of William & Mary, $119,250. What Lawyers Earn: Law Professors and Deans, Nat’l J., June 14, 1999, at B9.
reason other than the protection of ideas (for example, as a kind of property right acquired after a set number of years) is an outmoded institution and should be abolished; minimally, some form of strict post-tenure review should be implemented.

At the same time, however, commitment to the principles of merit requires recognition of an employee's service across a span of years. Businesses and institutions should make accommodations for age, and should evaluate the productivity of long-time employees from the standpoint of moral effort and the perspective of a lifetime of contributions, rather than from the usual indicia of productivity. People should not be "used up" and discharged once their time of peak productivity has passed. Put differently, the frame of reference by which merit is judged should be enlarged in proportion to the length of an employee's service.

A compassionate meritocracy values excellence and performance, but it rewards the inner qualities of strength, determination, and intelligence manifest in each person's performance. It nurtures talents and it seeks to foster the conditions of self-development and self-actualization. In the end, a true meritocracy is measured not by the things that it produces but by the people we become.