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The Most Qualified Applicant

Meritocracy is a system in which jobs or educational positions are given to the most qualified persons. Since the most qualified person may not be interested in serving in a particular job (or enrolling in a particular educational program), meritocracy in a society that has a healthy respect for liberty usually focuses on positions being given to the most qualified applicant. In this chapter, I argue that employers probably have no duty to hire the most qualified applicant. I focus on private employers to avoid the debate over the proper function of government entities. The discussion in this chapter of moral considerations surrounding the hiring of the most qualified applicant also sets up the discussion of strong affirmative action in the next two chapters, since this policy involves employers and other institutions selecting persons other than the most qualified applicant. Chapter 2 discusses where the state does this, and chapter 3 discusses where a private party does it.

My argument suggests that common intuitions with regard to merit and a common justification of the 1964 Civil Rights Act and other laws banning race and sex discrimination in the private realm cannot be sustained. For example, many people intuit that discrimination in favor of the most attractive model is appropriate for an advertising agency or in favor of the actress with large, shapely breasts is appropriate for a company making a movie about Las Vegas showgirls. They also view a college health center's choice of a female gynecologist as appropriate, where the largely female clientele have a strong preference for a female and are known to be much more likely to candidly discuss health issues with her than with a male gynecologist. In these cases, the nature of the job and the greater business efficacy of such persons combine to make these criteria seem acceptable. In contrast, many of these same people view the choice of a secretary or an air flight attendant in part on

the basis of her physical attractiveness, or a bartender in part on the basis of his whiteness as unacceptable, even where such criteria reflect customer preference and increase profitability. These intuitions differ in content. Sometimes they involve the view that attractiveness or whiteness is not a job qualification, and sometimes they involve the view that these are job qualifications but that an employer ought not engage in strict qualification-based hiring.

In part 1 of this chapter, I argue that the most qualified job applicant is to be identified by reference to the employer's preferences. I proceed by initially exploring the concept of a job qualification and then argue for a particular conception that focuses on the value of autonomy. In part 2, I argue that given this account of a job qualification, there is probably no duty to hire the most qualified. In part 3, I argue that this case thus undermines the meritocratic justification for antidiscrimination laws. In part 4, I fill out the notion of the most qualified applicant to an educational institution. The notion of the most qualified applicant in employment and educational settings then sets up the discussion of strong affirmative action that occurs in the next two chapters.

THE CIVIL RIGHTS ACT: AN OPPOSING VIEW

The position opposed to mine can be seen in the motivation for and interpretation of the 1964 Civil Rights Act. This act prevents race, sex, national origin, or religion from being used as a criterion for hiring. This act was defended in part on the basis that these attributes are not job qualifications and are thus unrelated to merit.¹ The act has an exception for cases in which these attributes are bona fide occupational qualifications (BFOQs), that is, qualifications that relate to a position's essential functions.² There is a BFOQ exception for race only where it involves authenticity or genuineness, for example, as it relates to actors and actresses.³ The BFOQ case law (and the related case law on business necessity) sets out a number of reasons that will not support sex, national origin, or religion being BFOQs. In particular, a BFOQ cannot rest on business-related concerns such as profit loss and tort liability or on non-business concerns relating to safety of fetuses (and the persons they are or become) and in some cases the privacy of clientele.⁴ More importantly, it rules out customer preferences where these preferences are unrelated to a job's essential function or where they rest on a stereotype.⁵ In addition, the bona fide occupational qualification has been interpreted to require a business necessity test (or something approximating it).⁶ This test sets an imposing standard because it is hard to show that a practice is necessary for a business to remain viable and because it is independent of what the employer knew or should have known of the appropriate standard. This narrow reading of the qualification rule both implicitly and at times explicitly involves the court's asserting that the essence of a job is not solely a function of the employer's preferences. Two cases illustrate this assertion.

In *Diaz v. Pan Am World Airways*, the Fifth Circuit rejected Pan Am's claim that its practice of hiring only female cabin attendants involved a BFOQ exception.⁷ The trial court found that the airline's passengers overwhelmingly preferred to be served by female stewardesses. It also found that the requirement that the attendant be a female was the best available tool for screening out unsatisfactory applicants and thus for improving the average level of performance. In addition, Pan Am introduced psychiatric testimony that the psychological needs of the passengers are better attended to by females. The Fifth Circuit argued that discrimination based on sex is valid only when the essence of the business would be undermined by not hiring one sex. The court then set out the essence of a stewardess position. It asserted that the primary function of an airline is to transport passengers safely from one point to another. It then reasoned that since men are no less able than women to promote this function, being female was not a BFOQ. The Fifth Circuit stated that while women were better able than men to provide the non-mechanical functions of the job relating to a pleasant environment and a desired cosmetic effect, these functions do not relate to the essence of the position.⁸

In *PGA Tour, Inc. v. Martin*, a plaintiff suffering from a degenerative circulatory disorder brought suit against a professional sponsor of golf tournaments (the PGA) for its refusal to allow him to use a golf cart during a professional golf tournament. The suit was brought under the Americans with Disabilities Act of 1990 (ADA).⁹ At issue in part was whether allowing Martin to use a golf cart would change the essential aspect of the competition. While this is not strictly an employment condition, the qualifications for competition in the tournament might be seen as analogous to job qualifications. The Supreme Court held that the use of the cart would not change the essence of the sport of golf. It cited several reasons in support of its conclusion. First, it argued that walking was not part of classic golf and that this was a golf tournament. Second, it argued that the rule was not justified by the value of fairness, since it is impossible to guarantee that all competitors will play under the same conditions or that an individual's ability will be the sole determinant of the outcome. Third, it argued that the fatigue from walking is not significant, hence, Martin's use of a cart would not grant him a significant unfair advantage. The Supreme Court was thus willing to identify the essence of a competition in a way that differed from the tournament sponsor. This is similar to the way in which the Fifth Circuit defined the essence of a job and the related notion of a job qualification in a way that differed from the employer's account.

The question that arises is whether job qualifications (and job essences) can be defined in a way that is independent of employer preferences. The first step in exploring this issue is to investigate the concept of a job qualification.



PART 1
The Job Qualification

THE CONCEPT OF A JOB QUALIFICATION

The concept of a qualification is that of a property that fits a person to a position. In the context of a job qualification, the substantive issues concern the identification of the relevant property. The correct conception of a job qualification (i.e., a substantive account of it) is important because certain normative implications are thought to result from an applicant's being the most qualified. In particular, an applicant's being the most qualified for a job is thought to provide a reason for her to get it and, on some accounts, a claim on her behalf to it. To test these notions, we first need to determine the best conception of a job qualification.

A point about strategy is helpful here. In this part of the chapter I attempt to present an account of the essential conditions of a job, that is, a *metaphysical* claim. My argument will rely in part on *moral* arguments. This seems problematic in that these issues are usually distinct. For example, we often distinguish the issue of what punishment is, a conceptual issue, from the issue of when punishment ought to be imposed, a moral issue. In some cases, however, the essential conditions of something can be understood only after we identify the appropriate conception of it.¹⁰ For instance, whether justice is essential to law rests on arguments for the proper conception of law. These arguments and related intuitions are in part moral, for example, arguments concerning whether the actions of judges *qua* interpreters of law ought to legislate and whether a legal system can regularly fail to publicize the rules it expects the citizenry to obey. A similar thing can be said for other controversial conceptions (e.g., desert and prejudice). The underlying idea is that the essential conditions of a concept can be fully explored only upon the determination of the best substantive account of it.

Consider the following analogy from the philosophy of war. The concept "combatant" is a vague one that depending on the particular conception may or may not include army chaplains, army medics, ordnance officers, civilian armament workers, and recreating soldiers. The essential condition for "combatant" will depend on the preferred conception of it, and this is a function of substantive moral argument. The same is true of the concept "job qualification."

THE CONCEPTION OF A JOB QUALIFICATION

In general terms, a job qualification is one of the set of properties that results in a person being able to perform the tasks constituting a job. The properties may do this with different degrees of mediacy. For instance, for an NFL wide

receiver (i.e., football players who play a position that is valued primarily for the ability to catch passes), running very fast is a job qualification. This is so even though it is a relevant property only insofar as it brings about another mediately valuable property, namely, the ability to run fast on scripted plays. This property in turn leads to the player's ability to contribute to his team's success, a property that constitutes his overall qualification for the position (although this rests on another assumption that will become apparent shortly). The relationship between mediately valuable properties may be causal or conceptual. So the ability to run fast over short distances may either cause or include within it the ability to run fast on scripted plays, depending on how one thinks of the former ability. In this case, the ability is probably causal, since the former ability does not contain a feature of the latter, namely, the understanding of the script. Also, note that this account of a job qualification is very broad in that it includes many trivial properties not often associated with job qualifications (e.g., having a brain).

My usage of "job qualification" is designed to pick out cases where a property is closely but not necessarily related to the set of abilities that is required in order for a person to succeed at a job. This usage is designed to track the ordinary use of the term. Hence, on this account, the connection between mediately valuable qualifications need not be a necessary one. For example, we ordinarily consider speed as a qualification for a wide receiver, even though it is not necessary for success at the position. This is because other property combinations (e.g., craftiness or the ability to run precise routes) might also produce success at this position. If one prefers to use job qualification as a necessary condition, then substitute "property that is causally or conceptually relevant to success at a job" where I have used "job qualification."

In making the conception of a job qualification more specific, there are a number of variables. First, is the ability in question that which is had at the time that the job is to be filled or at some later time? Second, how are the relevant tasks to be determined? In particular, are they job-specific or are they capable of being specified in a more general manner? Third, if the tasks are identified via the preferences of a relevant party, then who is this party?

Factor #1: Ability versus Potentiality

The ability that grounds a person's being qualified or the most qualified is one that need not be present at the time that an applicant is hired. The background idea is that ability is a type of capacity, and that capacity need not be held at the time of the hiring. Instead, in some cases, the most qualified one is the person with the greatest potential to develop these abilities. For example, a large law firm may hire a lawyer who just passed the bar exam and who is unable to perform many of the duties of an associate in that law firm. However, the

young lawyer may be the most qualified in that she will have a sharper learning curve than her competitors. Unless we want to say that such an applicant was not the most qualified, we should say that her relative qualification is a function of her potential (i.e., the likelihood of her acquiring the requisite ability in the future).

There also arises the question as to whether there is an epistemic notion that is a part of the conception of the most qualified applicant. In particular, we want to know whether the most qualified applicant is the person who actually has the greatest potential or who has the greatest potential given the available (or perhaps known) evidence. A similar problem can arise with regard to capacities. I suggest that the concept of the most qualified applicant does not have this condition. The absence of the epistemic condition allows us to be fallible with regard to the most qualified, either because we ignore or discount some relevant evidence or because our evidence of potentiality is imperfect. Consider the case where NFL scouts judge wide receivers primarily on the basis of their speed rather than focusing on their performance in college. We do not think that a scout is mistaken if he were to remark ruefully, "we thought Jones was the most qualified given our team's offensive scheme yet we were sadly mistaken. Our mistake came as a result of our overemphasis on speed."

In addition, an applicant's qualification also rests on her willingness to work hard. On some accounts, this is simply another capacity, that is, a second-order capacity to exercise a capacity or potentiality.¹¹ However, the capacity notion may fail to capture the notion that the willingness indicates that it is likely (under normal conditions) that the agent will exercise her first-order capacities. Also, on a libertarian account of free will, such a grouping is misleading, since the willingness to work hard results from an uncaused decision and willing. In contrast, a similar thing need not be said about the capacities and potentialities that relate to job performance. For clarity I will group the willingness to work hard as a separate type of job qualification, although in so doing I do not mean to take a position on whether it is a capacity.

The willingness to work hard together with the relevant capacity or potentiality constitute an overall propensity to perform the tasks constituting a job to a certain degree. The relative propensity of different applicants can be then used to fill out the notion that one applicant is more qualified than another.

When determining the relevant capacity or potentiality, we first need to identify the relevant tasks. It is to this issue that we now turn.

Factor #2: The Nature of the Relevant Tasks

Job-specific tasks. The notion that the tasks are job-specific has an obvious appeal. For example, a firefighter's qualification relates to his ability (or poten-

tial) to perform as part of a team that puts out fires. In addition, certain activities seem to have an internal goal.¹² For example, medical care should be given out on the basis of ill health. Since activities have internal goals, it is argued that it is a necessary truth that the activity should be arranged to best fulfill that goal. Similarly, it is argued that since certain goods (and jobs) have a social meaning, the distribution of them (or the tasks that constitute them) should be in accord with this social meaning.¹³ The social meaning of an activity is the type of good that the activity produces in the life of a particular collection of people. This account is similar to the internal-goal account, except that the tasks constituting a job are specific to a particular society rather than universal. Since the goods are to be distributed in accord with internal goals or social meanings, a job qualification is thus filled out in terms of ability or potentiality to perform actions that promote distribution in accord with the relevant goal or social meaning. For example, the qualifications of a physician are a function of her ability (or potential) to provide medical treatment to those with ill health. This is an essentialist account of jobs, since it views certain parts of the job (e.g., providing health care to the sick) as being essential, whereas other parts (e.g., generating profits) are inessential. The notion that the social-meaning account can be essentialist rests on the idea that the social meaning individuates job types rather than determining its constituent tasks in a particular society. However, if one adopts the latter view, then this account is not essentialist but still capable of identifying in a particular society what tasks constitute a job.

A strength of these essentialist accounts is that they provide a unified account of the particular tasks that constitute a job. A physician's job tasks may include such things as diagnosing disease, investigating family medical history, eliminating bacterial infection, and setting broken bones. On an essentialist account, these tasks are unified by a particular task (e.g., the promotion of health).

Robert Nozick notes that one problem with these essentialist accounts, and ones like them, is that there needs to be a defense of the claim that goods ought to be distributed in accord with their internal goal or social meaning.¹⁴ Yet it is not clear why this should be the case. Could not a person set up a practice that provides medical care, call it "schmoctoring," and emphasize the maximization of profits rather than the provision of medical services to those with ill health? The latter might be the means to the former, but it would be the former that would be the fundamental goal. In addition, Nozick argues that the notion of an internal goal produces absurd results. For example, is it wrong for a barber to provide his services to those who pay him rather than to those who need their hair cut?¹⁵

A second problem is that there are reasons of autonomy that conflict with this essentialist account of goods and of a job. Reasons of autonomy involve a sphere in which a person has no (non-volunteerist) duties owed to others.

That is, she has a Hohfeldian liberty to pursue her own ends. This sphere gives a person the space in which to pursue her desires, projects, and personal relationships, thereby carving out a space by which she is able to shape her life, free from interference by moral claims from others.¹⁶ Yet if the occupation of a job obligates a person to serve others without those others contracting for such services, or without the person promising to provide such services, then the area in which the person can shape her own life is lessened. Hence, assuming rights to autonomy, persons ought to be able to attempt to create jobs that have demands that do not track the internal goals or social meaning often thought to be part of a position. For example, one should be permitted to try to be a schmoozer rather than a doctor.

An objector might still assert that an internal goal or a social meaning determines the tasks that constitute a job but think that there should be a fine-grained individuation of job types. The notion that the social meaning should determine the tasks that constitute a job, but that there should be an almost endless array of different job types for a person to adopt, is nearly indistinguishable from the view that persons can construct the demands that constitute a job. The social-meaning account is misleading, since it fails to draw attention to the control an individual has over the tasks that constitute a job, and for that reason, it should be set aside.

One might wonder whether jobs (and employment contracts) have essential conditions at all, rather than merely having multiple conditions that reflect the deal struck by the contracting parties.¹⁷ However, essential conditions are required in order to identify the nature of a particular job, and such an identification is required in order to assess a person's qualification for it and performance while in it. This is especially true given that employment contracts sometimes have implicit conditions whose importance depends on the nature of the job.

One should view jobs as having constituent tasks that are relative to the purposes for which they are done. The relevance of these tasks results from the idea that a worker does many things, but only some of them are relevant to her job.¹⁸ For example, a rock musician produces music and moves in a way to emphasize that music. She also makes noises as her feet strike the ground. The former features of her actions are relevant to her job, while the latter are mere side effects. As argued above, the purpose (or purposes) for which a job is done does not seem to depend on some internal feature of the job type or on the general communal understanding of it. Rather, the purpose (or purposes) for which it is done seems to be a function of the demands of some party. The idea here is that since there are some tasks that are part of a given job, and since these tasks are mind-dependent, there must be some person (or persons) who determines them. The most likely candidates are the general population, the business's customers, the employee herself, or the employer.

Whose perspective is it that determines the purpose of a job? The general population's view does not determine the essential features of a job, because it is not clear why the view of persons who are not likely to receive the benefits of the employee's or her employer's services should influence the nature of a job. The people who stand a reasonable chance of occupying or benefiting from the job should determine its relevant contours, and the general population is too broad a category to fill this role.

Perhaps, however, it is the customers whose conception of or preference with regard to a job determines its essential conditions. The notion that it is the view of the customers that determines the tasks that form the essence of a job has a certain plausibility. We think that persons go to a doctor to receive medical treatment, and as a result, the job of the doctor is to provide medical services. We have an analogous view of attorneys, accountants, teachers, etc. This is not a case of a suppressed internal-goal or social-meaning account, since these need not be a function of the customers' view.

One problem with this is the order of explanation. One might think that it is because a doctor's essential task is to provide medical treatment or an attorney's essential task is to provide legal advice and representation that persons go to doctors or attorneys. If this is the case, then it is the nature of the job that determines why customers go to people who occupy them rather than vice versa.

A second problem is that not all persons go into a field to serve the preferences or desires of others. For example, an author might enjoy the process of creating fine literature, with the satisfaction of her fan base being, at most, a distant concern. Or, a gas station owner may seek profits with the satisfaction of his customers being a means to that end. The view of a job as shaped by the view of the customers denies primacy to the person who creates the position, thereby denying him control over his relation with others to whom he does not stand in a special relationship. Such a result conflicts with the existence of above-mentioned reasons of autonomy, in that it does not allow a person options with regard to her relation to others.

This concern for reasons of autonomy does not, however, lead to the employee's views determining the nature of a job. This is because the job involves the employer's property, hence, allowing an employee to shape the employer's relation to others through the use of the employer's property fails to respect his intrinsic value. The underlying idea here is that there is a close relation between a person's property rights and her claims against maltreatment at the hands of other moral agents.

The remaining plausible candidate whose views determine the tasks that constitute a job is the employer. On this account, the person who owns the business determines the tasks that are essential to a job, thereby determining the qualifications of a job. There are several advantages to this account. First, it handles the difference in jobs that seems to accompany the various purposes

of employers. It explains why a partnership designed to maximize profit will have different tasks for junior attorneys than one designed to maximize quality representation available to the inner-city poor (e.g., only the former will be asked to assess the resources of a prospective client). Second, it fits with an emphasis on autonomy. As part of their autonomy, persons can create jobs that focus on different things. In particular, jobs may differ on whether they aim at producing pleasure, promoting the good, or other things that are in our interest, regardless of whether they bring pleasure or are desired (e.g., knowledge). They also differ to the extent to which they involve sensitivity to the emotional life of others, emotional identification among a business's members, etc. On this view of jobs, they are relationships with others that in turn have the intrinsic character assigned to them by the persons who own the property that creates them. Jobs, then, are in effect tools by which an employer can structure his world and pursue various projects. This notion of a job as a tool also applies to self-employment, since the relationships involve not just the employer-employee relationship but also the employee-customer relationship.

On this account, since the tasks that constitute a job relate to the employer's preferences, the relevant tasks are those that satisfy the employer's job-specific preferences. The most qualified applicant, on this account, is the one who maximally satisfies these preferences. This last condition screens out cases where one employee is less effective at work than a second employee but adds more to the satisfaction of the employer's preferences via vigorous lovemaking. However, the condition is quite weak, since it screens out only those goals and the means to those goals that the employer views as not part of her business. The condition is therefore subjective, although this is unsurprising given my view of a job as a tool by which an employer pursues certain projects. This maximization condition allows for prioritization where there are conflicting preferences. Thus the most qualified applicant is the one with a capacity or potentiality to perform in a way that maximally satisfies an employer's preferences and a willingness to exercise the capacity or develop the potentiality.¹⁹

An objector might deny that deontological reasons determine employment conditions. He might assert that the system in which free-market negotiations determine employment conditions is solely justified by the desirable results it brings about. The problem with this objection is that we intuitively distinguish the issue of a person's qualification for a position from the issue of whether better consequences are achieved by giving it to him (and the issue of whether the state should interfere with private employment decisions). For example, imagine that Pan Am is deciding whether to hire Fred or Pam for its last spot on its New York to Tokyo route, and that Pam is more popular among the passengers as well as being safer and more efficient than Fred. However, Fred is a single father without many job options, and better consequences result if he gets the job. It intuitively seems that Pam

is more qualified, even if we think that Fred ought to get the job because he needs it to support his family, and that the state should not interfere with Pan Am's hiring decisions. These intuitions are strong ones and should be rejected only reluctantly, especially since neither the consequentialist project nor conceptual clarity requires it.

TWO OBJECTIONS TO THE EMPLOYER-CENTERED CONCEPTION

Objection #1: My Account Ignores the Autonomy of the Employee

An objector might claim that I have ignored the autonomy of the employee. He might assert that the employee's autonomy ought to be given at least as much respect as that of the employer. He might continue that if I account for the exclusive concern for the employer's autonomy in terms of the assumption that employers have unrestricted private property rights, then my argument is trivial, because it would then amount to the claim that the employers determine the essential properties of jobs because they alone own the means of production.

My account need not assume that persons have unrestricted property rights, since the argument works even if there are restrictions (e.g., a ban on inheritance). Nor does the theory depend on private property rights, since on a collectivist account of rights, job qualifications would be a function of the collective, job-specific preferences. A related concern is how the reasons of autonomy come into play in the context of an artificial entity such as a corporation. The reasons of autonomy for a cooperative enterprise are not mysterious; they relate to the aggregate moral space of the shareholders. The unified corporate project that is protected by the shareholders' autonomy requires that persons be capable of having a shared intent and coordinating their actions in support of the intended goal, and neither seems especially problematic.

Objection #2: The Focus on the Employer's Preferences Is a Trivial Result of a Capitalist Account of Private Property

Still, the objector might assert that the focus on the employer's preferences alone trivially results from the distribution of private property rights. This objection seems to get the order of explanation wrong. It is autonomy that justifies an employer's private property rights rather than vice versa.²⁰ In the sense that warrants protection, autonomy is a state in which a person has adopted, prioritized, and identified with her beliefs and desires, where these beliefs and

desires are coherent and the beliefs are substantially true. Since the autonomy is intimately related to the control and use of external objects, the value of the autonomy justifies private property rights. Focusing on the autonomy of the employee in this context would deprive persons of options to shape their interpersonal relationships through the use of objects. While a focus on employees might increase the autonomy of some, it would as an empirical matter lessen overall autonomy by undermining an invaluable class of options.

Another objection to my theory is that a job qualification must take into account the moral appropriateness of the employer's (or other parties') preferences.²¹ On this view, for example, a female gynecologist is more qualified than her male counterpart who has equivalent medical skills if the employer's (or perhaps the clientele's) preference for the former is morally appropriate. In contrast, the employer's (or perhaps the bar patrons') preference for a white bartender does not result in whiteness being a job qualification, because the preference is morally inappropriate. On this account, the attributes that make a candidate the most qualified depend on the morality of the employer's (or other parties') preferences. The problem with this account is that it commits us to viewing job qualifications as morally appropriate or perhaps morally appropriate given a particular job, when this does not account for many of our intuitions. For example, we speak of the job qualifications for a hit man, a leader of the Ku Klux Klan, and an investigator for a racy tabloid. If this account were to be correct, then such speech would be confused, and it does not seem to be.

Some persons report not having the intuition that there is a job qualification for these positions.²² However, it is not clear what this denial rests on, since these positions intuitively seem to be jobs regardless of whether we think of them as morally appropriate. For example, we might disapprove of an investigative reporter whose role is to photograph the private moments of celebrities, dig through their trash, etc. but still recognize that he holds a job. And persons differ in their propensity to perform these tasks.

Given this account of a job qualification, we are now in a position to determine whether there is a moral reason to hire the best-qualified applicant.



PART 2

The Best Conception of a Job Qualification Yields at Most a Very Weak Reason to Favor a Meritocracy

A number of authors argue for meritocracy (i.e., a system where jobs are assigned to the most qualified persons or applicants) in the economic context and in discussing affirmative action.²³ Here I am equating a duty to hire on meritocratic grounds with the duty to hire the most qualified applicant. The

concern for merit is at the heart of some of the historical arguments for antidiscrimination laws, such as those banning discrimination on the basis of race, national origin, sex, disability, or age.²⁴ It also plays a crucial role in some of the arguments for capitalism. In this section I argue that if the duty to hire the most qualified exists at all, then it is quite weak.

It is worth beginning by noting that information-gathering costs limit what employers can learn of prospective employees. As a result, the most qualified person for a job is not always hired. Still this deviation from the alleged duty does not entail that the duty does not exist, or that it would not be better to satisfy it to a greater degree.

Given that the employer is trying to hire someone who is likely to maximally satisfy his preferences, he has a strong incentive to hire the most qualified. This is particularly true given that his preferences may focus on either his own welfare or the welfare of others. An example of the latter occurs where an employer at the Red Cross has preferences that focus on the promotion of the welfare of the poor. However, there are possible cases where out of error, emotion, or for ideological or altruistic reasons an employer hires an applicant who is not the most qualified. For example, a parking garage owner might recognize that a reliable and courteous black employee will likely maximally satisfy his preferences but still have such visceral dislike for black persons that he refuses to hire him. Another example might occur where a partner in a law firm refuses to hire a young lawyer who grew up in an ultra-wealthy family out of a sense of loyalty to his working-class roots. He does so even though he recognizes that his refusal will set back his own interests and do nothing for the working class with whom he identifies. Such cases are similar to weakness-of-the-will cases where a person fails to act upon the outcome of his reasoned deliberation. In the absence of a duty to hire the most qualified candidate, it might still be the case that meritocracy is valuable; however, this need not enter into the deliberation of an employer or a legislator. The plausible arguments for meritocracy focus on rights, desert, fairness, or welfare promotion.

THE RIGHT-BASED ARGUMENT

At least in a private context, the most qualified applicant would not seem to have a right to be hired. A central element in such a right would be a duty owed by the employer to the most qualified applicant. It is hard to see how an applicant could be owed a job based on her having the greatest overall propensity to satisfy the employer's preferences. Nothing about this property suggests that it might ground a duty in another.

This duty may be reflexive, that is, held by and owed to the employer. The idea here is that the employer owes it to himself to hire the most qualified worker, perhaps as a result of a duty to promote his own flourishing.

However, reflexive duties are generally weak or waivable. Thus, for example, one does not consider it a significant wrong to fail to pursue excellence in the employment context, especially where this failure results from the pursuit of hedonic or altruistic goals. The weakness of reflexive duties results from their infringement being a lesser affront to a person's autonomy and dignity than the infringement of interpersonal duties.²⁵ Hence, even if there is a reflexive duty on the employer to hire the most qualified applicant, the duty is a weak one.

There may be a duty to prospective applicants based on the legitimate expectations that they have formed on the basis of representations by the employer. These expectations generate a duty based on the notion that the representation included a promise to hire the most qualified applicant. Job advertisements or other representations generate a duty only if they make a statement promising to hire the applicant with the greatest propensity to satisfy the employer's preferences. A meritocrat might claim that in the absence of an explicit statement to the contrary, this is an implicit condition. As an empirical matter, I suspect that this is usually not the case, but if I am wrong, then such a duty will rest on the promise implicit in the employer's offer.²⁶ In any case, the duty will be a promissory one, and thus one that is capable of being eliminated in future cases by an explicit statement to the contrary.

A concern with my account is that it seems to apply only to the type of business where a single person owns the firm and does the hiring. In the corporate world, there seems to be an argument for hiring the most qualified: many people who do the hiring in modern capitalist market economies are acting as agents for others to whom they have contractual duties. Those duties include the duty to hire the person who has the greatest propensity to promote the shareholders' interests. This seems correct but not in conflict with the above arguments, since nothing in this chapter suggests that there are not widespread contractual (or promissory) obligations to hire the most qualified applicant.

THE DESERT-BASED ARGUMENT

The hiring of the most qualified might be justified by the applicant's desert. The idea would be that the most qualified applicant usually is the one who worked the hardest to develop her skills. The background notion is that it is intrinsically valuable to give a person what she deserves and that there is often, if not always, a reason to bring about intrinsically valuable states of affairs. On this account, the connection between being the most qualified and the most deserving is contingent and admits of exceptions due to genetic and environmental factors that result in the most qualified not always being the person

who has worked the hardest to develop her or his qualifications. The underlying ideas here are that in the economic realm, moral desert tracks hard work, sacrifice, contribution, or some combination of these, and that in the context of a person who has yet to work for an employer, the hard work element is the likely ground for desert.

An objection to this account is that there is no argument as to why in the economic realm a person's deserving something grounds a duty in another.²⁷ Unless there is a general duty to bring about intrinsically valuable states of affairs, the fact that a person deserves something will not by itself give rise to a duty in others to bring about that state. Such a general duty conflicts with the existence of a sphere of discretion created by reasons of autonomy. Where, for instance, two quarterbacks of approximately equal ability compete for a starting position on an NFL team, but one has far greater desert than the other, it intuitively seems that the owner does not wrong the more deserving candidate if he decides not to consider his relative desert. However, if justice in the employment context does track moral desert, and if the most qualified candidate is on average the most deserving, then the case for meritocracy becomes stronger.

George Sher puts forth an argument in favor of the notion that the most qualified has a desert-based claim to a position. This duty in others rests on the general duty to treat all persons as rational agents and the notion that the ability reflects the exercise of an agent's agency, especially her practical reasoning.²⁸ Sher's assumptions are that practical reason encompasses the decision and resulting acts to develop one's skills, and that respecting a person's practical reasoning abilities involves respecting the exercise of practical reason. This duty conflicts with the moral space that is grounded by a person's autonomy, since the duty would not allow him to structure his workplace relationship with others as he sees fit. Since Sher's hypothesized duty seems to be grounded by autonomy, I suspect that it does not exist.

THE FAIRNESS ARGUMENT

A claim of fairness, like the concern about universality, is a formal notion in that it is parasitic upon either other values such as rights and desert or other factors such as contribution and sacrifice. For example, a claim that a mechanic in a body shop is unfairly paid is usually filled out in terms of his deserving more pay given his hard work or his meriting more pay given his contribution to the business. I have already argued that rights and desert cannot support meritocracy. Nor is there a close enough linkage between being the most qualified applicant and either contribution or sacrifice to ground a fairness-based claim. Hence, fairness does not provide a reason to hire on merit-based grounds.

THE WELFARE ARGUMENT

On some accounts, consequentialist arguments provide support for a duty to hire the most qualified person. These consequentialist arguments may, depending on the account one adopts, involve such factors as desert satisfaction, right fulfillment, or the collective welfare of persons. Meritocracy is sometimes thought to maximize this last type of value.²⁹ In a macro-job assignment, the overall assignment of persons to jobs is done in a way that best achieves a system-wide goal (e.g., welfare maximization). For example, a system in which racial minorities are assigned jobs over more qualified applicants may be justified on utilitarian grounds.

If one accepts consequentialism, then there is a strong reason to accept a duty to engage in macro-job assignments. Even on a nonconsequentialist account, some value may be placed on efficiency or beneficence, at least to the extent that they are not undermined or overridden by reasons of autonomy, hence, a case in support of a macro-job assignment can be made. However, even if these arguments are sound, they do not support a meritocracy, since this need not track a macro-job assignment. The strength of the consequentialist argument increases considerably, however, with regard to jobs that are directly connected to the safety of other persons (e.g., airline pilots, heart surgeons, and bridge designers).³⁰

Since these are the most plausible accounts of the duty to hire the most qualified applicant, and since these accounts do not succeed, there is probably no such duty. If this is correct, then significant implications follow with regard to antidiscrimination laws.



PART 3

Antidiscrimination Laws Cannot Be Justified by Meritocratic Concerns

Antidiscrimination laws are often justified on the basis of fairness. Fairness is then filled out via the notion that hiring ought to be based on traditional views of merit. The discrimination need not reflect the employer's attitudes. For example, a law firm might refuse to hire a black or a Puerto Rican applicant not because of the prejudice on behalf of the law firm's partners but rather because the firm's clients refuse to have their work handled by members of these groups.³¹

Such laws are often thought to promote fair hiring practices in a way that does not put any particular business at a competitive disadvantage. Other rationales are also put forth in support of such laws, although I leave them aside, since they are outside the scope of this chapter.

To the extent that antidiscrimination laws prevent businesses from hiring persons who maximize the satisfaction of the employer's job-related prefer-

ences, such laws block merit-based hiring. For example, consider the case where a security firm (e.g., it provides night watchmen) is composed of partners whose foremost concern in forming the partnership was and is to maximize profits. Antidiscrimination laws force the firm to hire a black man who, because of racist clients, prevents profit maximization. The firm is thus forced to hire persons other than the most qualified applicants.

This fact holds true regardless of whether these laws are universally enforced, because given the racist preferences of the clientele, the firm is at a competitive disadvantage relative to firms for whom the most qualified applicant happens by chance not to be a black person.

Race can also be a qualification for a job. Consider an example where a counseling business is hired by the U.S. government to set up centers for domestic abuse victims on reservations and where Native American women find it much easier to talk to a Native American therapist about such matters. Being Native American is a qualification, because it is a property that enables a person to satisfy more effectively the employer's goals (i.e., providing psychological counseling to a specific group of vulnerable women). That it does so by producing another property (i.e., being easier for Native American women to talk to) does not prevent it from being a qualification.

The nature of a job qualification requires different reasoning in the civil rights cases. It requires that the laws be interpreted as overriding the employer's choice for the person who is probably the most qualified applicant. It also requires in the context of BFOQs that the courts avoid reasoning about the essence of a job in a way that is independent of the employer's preferences. For example, the *Diaz* court's attempt to define the essence of a cabin flight attendant should be seen for what it is: a policy- or principle-based plan to force the airline to hire, on average, less-qualified employees. That is not to say that the law and the federal courts' interpretation of it are unjustified, but rather that we should be clear about what is being done.

In this chapter, I have focused on private employers. In the context of state employment, the conception of merit is the same. The range of morally permissible preferences is more restricted than in the private field, although whether the moral restrictions affect the actual qualifications for a job (as opposed to what ought to be the qualifications for it) is a tricky issue that I discuss in the next chapter.



PART 4

Qualifications for Educational Institutions

A student in an educational program in some ways resembles a business customer because she or a third party pays the educational institution to receive

goods and services rather than being paid to provide them. And it is not clear that there is a most qualified customer. At the same time, we have a clear sense in which some applicants for an educational position are more qualified than their competitors. For example, a student who applies to a premier engineering school (e.g., Massachusetts Institute of Technology) and who excels at math, physics, and computer science intuitively seems more qualified than a student who is similar except for his having difficulty in those areas.

If an educational institution is viewed as a tool by which an owner tries to promote certain goals, then an applicant's qualification can be filled out in terms of her propensity to satisfy these goals. An applicant's propensity is a function of her willingness to work hard together with the relevant capacity or potentiality.³² On this account, the notion of a qualification for an educational institution is similar to that for a job. If an applicant's qualification is a function of the owner's goals, then the propensity to learn, play football, or help minority communities is a qualification to the extent that it promotes the owner's goal or goals. Where the owner is a collection of persons (e.g., a state's citizenry), the goal is restricted to the common goal had for it by the collection (or at least a substantial portion of it). Thus where citizens of a state support a university as a means by which to promote knowledge in areas important to self-understanding and citizenship, this goal is the one by which to judge an applicant's qualifications. Other valuable traits on this account (e.g., the ability to play football or contribute to racial diversity) are not qualifications.

The argument here, like the argument with regard to job qualifications, is that this account of a qualification coheres with the concept of a job qualification, an emphasis on the autonomy of the owners, and our intuitions with regard to particular cases. This picture has great intuitive appeal. It explains why the most qualified applicant for a premier science school (e.g., California Institute of Technology) might not be the most qualified applicant for a premier military academy (e.g., West Point) or a religious college (e.g., Bob Jones University).

State and private educational institutions probably do not have as their fundamental goals such things as football victories, the promotion of alumni families, the creation of wealthy individuals, or the promotion of diversity or equal opportunity. This can be seen by considering what the owners consider these institutions' fundamental goal and the conditions under which they would withdraw consent to them (i.e., the goals that if frustrated would lead to the withdrawal of consent). Evidence in favor of my empirical claim includes the stated fundamental goals of state colleges and universities and the widespread view that they are designed to promote certain types of knowledge. Other goals may still be viewed as the means by which the more fundamental goals are achieved. However, unless they are part of the owners' (i.e., citizens') consciously adopted means by which

to achieve the fundamental goals, it is an empirical question whether they actually are the most effective means (or part of the most effective means) by which the larger goal is achieved. Here I will assert but not defend the notion that the lowered learning potentiality that characterizes beneficiaries of strong affirmative action hinders rather than promotes the conveyance of the relevant types of knowledge to students. This is in part because the beneficiaries of strong affirmative action are, on average, less able to grasp important concepts and arguments, more likely to drop out, and more likely to slow down the rate of learning in other students than do non-beneficiaries.³³ I have no clear sense as to whether the same can be said of close relations between alumni and a university or of a high-visibility football program.

An objector might assert that educational institutions, unlike employment ones, include diversity and equal opportunity among their fundamental goals. He might note that the colleges and universities mention them as goals. This objection fails if the goals of diversity and equal opportunity are mere enhancements to the university's fundamental mission. The fundamental goals of colleges and universities are to produce knowledge, the ability to think about different issues, or the results of such states, for example, increased well-being. The same colleges and universities existed before diversity and equal-opportunity goals were added, which suggests that the latter are not part of the institution's defining purpose or purposes. The institutions' owners probably understand these more recent goals as having a loose connection to the institutions' defining purpose or purposes. This last point rests on the psychological claim that the institutions' owners would probably think that under changed conditions the institutions are worth preserving, even where they become unable to promote diversity or equal opportunity.³⁴ This is analogous to the way in which the citizenry would probably think that the police are worth preserving, even where this cannot be done in a way that promotes diversity and equal opportunity. If this is correct, then diversity is not a fundamental or even a mid-level goal for colleges and universities but at most a consideration that guides the pursuit of these goals. And it is not true even if such concerns were adopted in an attempt to ward off lawsuits based on federal law rather than on the basis of the citizenry's preference.

Thus the most qualified applicant for an educational institution is that student with the propensity to maximally satisfy the institution owners' preferences. A student's contribution to diversity is in general not one of these capacities or potentialities. Hence, it seems that even with my inclusive criterion for qualifications, a student's contribution to campus diversity is probably not an educational qualification.



PART 5
Conclusion

The most qualified applicant is the one who has the propensity to maximally satisfy the employer's preferences. An applicant's propensity is a function of her willingness to work hard together with the relevant capacity or potentiality to do the tasks constituting a job. Given this account of the most qualified applicant, there is only a weak duty, if any, to hire persons on the basis of their being the most qualified. Such a duty is not justified by reference to rights, desert, fairness, or the maximization of welfare. However, such a duty may come about via promises made by the employer or the employee who does the hiring. These results suggest that antidiscrimination laws cannot be justified on the basis of merit, although other justifications might still be available.