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# Societal Enterprise Liability: A Moral Justification for Affirmative Action

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**Michael O. King, Jr.**

**SOCIETAL ENTERPRISE LIABILITY:**

**A Moral Justification for Affirmative Action**

**Submitted in fulfillment of the King Scholar paper requirement**

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## **I. INTRODUCTION**

Since its inception, affirmative action has been questioned, challenged, and sometimes vilified. Yet through all of this, it has survived in one form or another. But why have affirmative action or any other remedial program that favors one class over another? The Supreme Court of the United States has offered legal justifications for the practice. Those legal justifications, as do many legal justifications that concern hotly debated issues, have an underlying moral justification. However, that underlying moral justification has not been enough to save affirmative action programs in some states.<sup>1</sup> This paper is an attempt to explore some of the issues involving any possible moral justification for affirmative action and to offer a possible theory of moral justification.

As with any moral justification, there are some issues and problems that are presented as the topic is explored. With affirmative action, the two most salient issues for this paper are the problem of moral luck and the role of responsibility, both personal and societal. Before delving into those two thorny issues, however, I will first discuss the evolution of affirmative action in our institutions of higher education as it has progressed through the courts and the states, specifically the response in Michigan. I will then discuss the problem of moral luck. I will next discuss the role of responsibility in shaping both the issues and emotions surrounding affirmative action policies. I will then conclude by offering a possible justification for the continuation of affirmative action policies in higher education by borrowing heavily an idea from tort law.

## **II. HISTORY OF AFFIRMATIVE ACTION IN HIGHER EDUCATION**

Any discussion of the history of affirmative action in higher education must necessarily start with the Supreme Court's landmark decision in *Brown v. Board of*

*Education of Topeka*.<sup>2</sup> *Brown* eliminated the “separate but equal” doctrine that the Court had adopted in an earlier decision<sup>3</sup>, *Plessy v. Ferguson*.<sup>4</sup> *Brown* also stated that “education is perhaps the most important function of state and local governments” and is “the very foundation of good citizenship.”<sup>5</sup> The *Brown* decision forced the government to adopt a race-neutral policy concerning public education.<sup>6</sup> The Kennedy and Johnson Administrations took a stance that went beyond race-neutral and moved the education policies towards a race-conscious approach favoring affirmative action.<sup>7</sup>

The Supreme Court once again weighed in on race-conscious policies in education, specifically higher education, in 1978.<sup>8</sup> In *Regents of the University of California v. Bakke*,<sup>9</sup> the UC-Davis Medical School had created a race-conscious policy whereby sixteen of the one hundred admissions allotments were set aside for minority students.<sup>10</sup> Bakke sued the school on the grounds that its admission policies violated the Equal Protection Clause of the Fourteenth Amendment, Art. I, §21 of the California Constitution, and § 601 of Title VI of the Civil Rights Act of 1964.<sup>11</sup> The Court ruled that Bakke must be admitted to the medical school<sup>12</sup> and that the school was not prohibited from using race-conscious criteria in formulating future admission policies.<sup>13</sup> While this was a much fractured opinion, resulting in six separate opinions,<sup>14</sup> some useful things can be gleaned from the decision. The two most important things are that race-conscious criteria in admissions policies will be subject to strict judicial scrutiny<sup>15</sup> and that some form of race-conscious criteria will be allowed in formulating admissions policies.<sup>16</sup> Both these lessons will play an important role in later cases.

In later cases (not involving higher education), the Supreme Court articulated the policy of using race-conscious criteria for remedial purposes. In *Wygant v. Jackson Bd.*

*Of Educ.*,<sup>17</sup> the Court had to decide if a provision protecting minority teachers from layoffs was constitutional. In a plurality decision, the Court stated that “[T]his Court never has held that societal discrimination alone is sufficient to justify a racial classification. Rather, the Court has insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination.”<sup>18</sup> In *United States v. Paradise*,<sup>19</sup> the Court had to decide if a policy allowing the state police of Alabama to promote one black trooper for every white trooper was constitutional. Once again, a plurality decision stated that the “[G]overnment unquestionably has a compelling interest in remedying past and present discrimination by a state actor.”<sup>20</sup> This idea of narrow remedial action is an integral part of affirmative action. It sets the bounds in which the state actors can use affirmative action. The effects of these plurality decisions<sup>21</sup> required the Court to re-examine the use of race-conscious criteria in admissions policies in two recent and seminal cases: *Gratz v. Bollinger* and *Grutter v. Bollinger*.

*Gratz* challenged the University of Michigan’s undergraduate admissions policy.<sup>22</sup> The policy automatically assigned twenty points to minority applicant.<sup>23</sup> The scale was out of 150 points with a 100 needed to get admittance to the school.<sup>24</sup> Thus, every minority applicant received twenty percent of the needed total just by applying.<sup>25</sup> The Court applied strict scrutiny to the policy.<sup>26</sup> The Court then struck down the policy of awarding twenty points to every minority applicant.<sup>27</sup> The Court did not say, however, that the school’s justification of educational diversity was a compelling state interest needed to pass muster under strict scrutiny.<sup>28</sup> The Court, in dicta, seemed to adopt Justice Powell’s stance in *Bakke*, that race could be used as a “plus factor” in considering the

individualized application.<sup>29</sup> This was a 5-4 decision,<sup>30</sup> so finally the bounds of affirmative action are beginning to take shape.

The following decision in *Grutter* was also a 5-4 decision<sup>31</sup> and gives more delineation to the bounds of what is permissible in race-conscious criteria in higher education admissions. *Grutter* was also a University of Michigan decision and involved the admissions policies of the University's law school.<sup>32</sup> The law school used race as a factor, but did so as one of many "'soft' variables" used to ensure a diverse student body.<sup>33</sup> Once again, the Court applied strict scrutiny to the admissions policy,<sup>34</sup> but the Court dispelled the notion that remedying past discrimination is the only governmental purpose that will survive strict scrutiny in an analysis of race-conscious policies.<sup>35</sup> The Court, in very explicit language, held that "the Law School has a compelling interest in attaining a diverse student body."<sup>36</sup> This statement was a judicial thunderbolt hurled into the affirmative action arena.

The combination of these two opinions has worked to create an atmosphere where some form of race-conscious criteria can be considered for admissions into a public university. Now universities can use race as a plus factor to promote diversity. However, diversity can only be a compelling state interest when it seeks to increase the "educational benefits that flow from a diverse student body."<sup>37</sup> Commentators have addressed the effects of *Gratz* and *Grutter*,<sup>38</sup> while others have questioned the use of race as the singled-out factor to increase intellectual diversity.<sup>39</sup> Whatever the merits of the opposing views, one thing is clear—race-conscious admissions policies are allowed under a narrow set of guidelines.

Courts are not the only governmental body to throw its hat into the affirmative action ring. States have increasingly introduced ballot initiatives aimed at eliminating affirmative action. In 1996, California adopted Proposition 209,<sup>40</sup> which was adopted into the California Constitution.<sup>41</sup> This was the first of a number of ballot initiatives aimed at eliminating considerations of “race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.”<sup>42</sup> Washington State followed in 1998<sup>43</sup> and Michigan joined in 2004.<sup>44</sup> These initiatives, now enacted into law, have effectively banned public universities from using race-conscious criteria in their admissions policies. The two questions I want to address in this paper is what are the issues (both legal and otherwise) that are driving states to react in the way that they do and is there a solution that would legitimize the concerns expressed and still allow affirmative action to go forward.

### **III. ROLE OF MORAL LUCK**

The first such driving force is the problem of moral luck. Moral luck is the concept that certain aspects of our lives or certain consequences of our actions are beyond our control and that these aspects or consequences have a significant bearing on our ability to be good (in a character formation sense) or to be held responsible.<sup>45</sup> This can be further broken down into “constitutive moral luck” and “incident moral luck.”<sup>46</sup> Constitutive moral luck is that which affects our ability to develop good characters,<sup>47</sup> while incident moral luck affects our ability to make certain decisions.<sup>48</sup>

#### **A. Constitutive Luck**

Constitutive moral luck relies on the concept that certain circumstances beyond our control (i.e. who are parents are, where we are born, physical & mental handicaps,

and socio-economic status as children) have a profound effect on our character development and thus on our ability to do good.<sup>49</sup> Aristotle argued that our ability to be happy was dependent on how virtuous of a life we lived.<sup>50</sup> But this ability to be virtuous depended on more than our obtaining or perfecting a certain set of virtues.<sup>51</sup> It went deeper than that. Our ability to obtain or perfect the virtues needed to reach eudemonia<sup>52</sup> was in great respect predicated on our moral luck.<sup>53</sup> Our birth and station in life plays a great role in our ability to cultivate the virtues needed to reach eudemonia. This was all an element of circumstances beyond the individual's control.

Constitutive luck manifests itself in various forms in today's society. We see individuals whose abilities are sharply curtailed by where they are born, the circumstances of their birth, and even their gender and race. In a just society, these differences would be irrelevant. An individual's chances for success would be largely governed by what they did with what they were given.

Affirmative action programs in higher education admissions attempt to do just this. The instructions given by the Court in *Grutter*<sup>54</sup> reflects this idea that there is often more to the story than merit. The Court allows for an individualized assessment when the decision is close.<sup>55</sup> While the Court has forbidden wholesale consideration of moral luck in assembling affirmative action programs,<sup>56</sup> the Court has recognized the reality that some individuals are disadvantaged by their circumstances.

## **B. Incident Luck**

Incident moral luck focuses on the role of actions and their subsequent consequences and involves concepts of unintended harm, guilt, and shame.<sup>57</sup> This idea is

less important to the discussion of affirmative action than is constitutive luck. However, incident luck does impact the development of character.<sup>58</sup>

While the circumstances of our birth, gender, race, and ethnicity shape character, the actions of others also greatly impacts the shaping of character. Traumatic events are especially powerful. Some such events can be so powerful as to derail an individual off the path of eudemonia altogether.

An individual who is molested as a child and then molests other children is one such example. Or, as discussed below, the negligent lorry driver who hits and kills a child and then spends the next decade in prison. Both individuals experienced circumstances beyond their control and either acted in a way that was unknown to their nature up until that event (the molested child who subsequently molests) or is punished, partially, because of the actions of another (lorry driver). Neither anticipated the traumatic event nor did they do anything so morally reprehensible as to warrant such an experience. Yet, both are scarred for life and their ability to do good and obtain virtue is sharply curtailed.<sup>59</sup>

Thomas Nagel offers the example of two lorry drivers.<sup>60</sup> Each is driving home in a negligent manner.<sup>61</sup> One makes it home without incident.<sup>62</sup> The other hits and kills a child who unexpectedly darts out in front of his truck.<sup>63</sup> The moral responsibility, from a legal standpoint, of the second driver is forever altered—he killed a child and he will feel responsible for that death—while the moral responsibility of the first remains unchanged.<sup>64</sup> Yet, both acted equally negligent; the only thing that changed in that a child ran out in front of the second driver.<sup>65</sup> His moral responsibility has been altered by the actions of another.<sup>66</sup> This is the classic example of incident moral luck.

Incident luck does play a major role in shaping our character. However, it is not a subject that lends itself to a discussion of affirmative action. Affirmative action cannot address every life choice or incident. To be an effective policy, it must address generalities, not specifics. Thus the discussion will be contained to race and ethnicity in affirmative action.

### **C. Selecting Between the Two From a Legal Vantage**

Both conceptions of moral luck provide insights into how society is ordered: incident moral luck provides a framework for analyzing how behavior is assessed, while constitutive moral luck offers a framework for assessing efforts to control behavior. We see both applied in various aspects of the law.<sup>67</sup>

Criminal sentencing is a place where both may be considered.<sup>68</sup> The life of the defendant is often weighed as a mitigating factor; this is especially true in capital cases.<sup>69</sup> Judges also take into account the circumstances that led to a particular act. Incident luck may lead to a defense of self-defense or justification. This especially true where the defendant can show that his actions were the result of his innocently being put into a situation where the act was necessary or justified.

The law often attempts to proscribe behavior. This is done through the passage of all sorts of laws from drunken driving laws to laws affecting types of speech. These laws are aimed at constraining a type of behavior or encouraging a certain type of character. The law wants responsible, orderly individuals who respect others and themselves.

However, constitutive luck is not always amenable to this laudable goal. Individuals are as varied as snowflakes. Some individuals, because of their perceived failures of the law or society, seek to challenge the establishment. Others seek to live

outside the norms. These perceived failures and the subsequent reactions are often a product of the individuals circumstances—their constitutive moral luck. Society is ordered for a certain type of person; individuals who feel alienated from their society because of their circumstances often live lives where their ability to live a virtuous life is stymied.

Affirmative action seeks to mitigate the role that moral luck plays in the ability of many to seek a better life. Affirmative action recognizes that certain sectors of our society have been dealt a disproportionately bad hand. This has often occurred because of the background institutions that affect their lives. Such elements as abject poverty, disproportionate incarceration rates, failing primary and secondary schools, and systemic lower wages have grossly affected individuals' abilities to succeed through the means of higher education. Affirmative education programs recognize these barriers and reward individuals who have succeeded, often less so in absolute terms, but more so comparatively.

The obvious problem with this approach is the problem of drawing the line in the sand. Formulations for determining who would be candidate for an affirmative action program and who would not is a difficult undertaking. The arguments put forth in this paper can be used to justify programs that address economic status, race, or gender. As affirmative action programs have traditionally been limited to addressing the disparities that come about because of past (and present) racial prejudice and disparate treatment, the arguments will be limited to racial disparate treatment.

What is missing from this discussion is the role of responsibility. This is the topic that is addressed next.

## **IV. ROLE OF RESPONSIBILITY**

The legal system places personal responsibility foremost in its conception of justice; there is, however, room for the mitigating influence of moral luck.<sup>70</sup>

Responsibility has many aspects. In the legal sense, we often link responsibility to criminal culpability<sup>71</sup> or to tort liability.<sup>72</sup> However, even these concepts are drawn from the notion that we as rational beings have some responsibility for the actions we take.<sup>73</sup> Life without responsibility would be “nasty, brutish, and short.”<sup>74</sup> However, personal responsibility is only one aspect of responsibility. There is also the concept that government owes some duty or responsibility to its citizenry.

### **A. Personal Responsibility**

Personal responsibility is, first and foremost, internalizing the obligation to care for one’s own welfare.<sup>75</sup> This internalization is compatible with what is commonly referred to as the “puritan work ethic.” Individuals work to support themselves and their families and are in return rewarded for their efforts. The problem with this, as with all idealized stereotypes, is that it neglects the background institutions that affect our ability to exercise personal responsibility.

Individuals are not islands unto themselves. We each interact with each other and with institutions that affect how we are able to function in society. That being said, we each have the ability to think for ourselves and make decisions based on our own rational self-interest. This self-interest has consequences attached. In order to maintain a well-ordered society and allow for a degree of foreseeability in our interactions with each other, we need to hold others accountable for their actions.

This idea of personal responsibility, consequences, and foreseeability is affected by notions of justice, especially notions of fair play and right and wrong. Consider the following example: a man is out for a jog and unexpectedly trips and falls. In his fall, he flails out his arms and knocks over a neighbor, breaking her arm. The jogger would expect that he would be held accountable, to some degree for his actions. He may expect that he will have responsibility for the injury caused. He may expect some other type of consequence to flow from his actions, such as a lawsuit or at the very least an angry and injured neighbor. These expectations are only marginally tied to the law. He would have these expectations regardless of the legal ramifications. If the law did not or could pursue him to punish him, he would expect that there would be resentment, anger, or even revenge from the injured party. He may also feel responsibility to make amends—pay the medical bills, apologize, or make some other form of restitution.

In having these feelings, the jogger is merely expressing his feelings of personal responsibility. But this is not limited to accidental injury among neighbors. These feelings are also tied to feelings of merit. With merit comes the idea of entitlement. Society finds nothing wrong with the fact that the student who scores the highest in all her classes is named valedictorian. In fact, there would be a sense of outrage if it was any other way.

However, these ideals do not translate very well into all aspects of society. As discussed above, moral luck has a profound role in our ability to achieve. We do not find anything wrong with the idea that a graduate from the best university gets the job over another applicant with similar grades from a less prestigious school. However, when it is shown that the prestigious university graduate attended the best prep school, received the

best internship, had the best connections, all because he was born into a situation that was able to offer this, while the other graduate came from a failing, inner-city high school, our attitudes begin to change. Personal responsibility becomes a non-issue. Both candidates exercised their agency to the best of their individual abilities. The only difference is where they were born, their family situation, etc. Fairness has now been implicated. What seems initially fair has now become less so because of the introduction of other factors, namely the background situations of the applicants.

This issue of the interplay of merit and background institutions is at the core of the problem of applying notions of responsibility to affirmative actions in higher education decisions. The scarce resource of higher education requires selectivity. Our notions of personal responsibility and fair play lead to the view that merit is the only fair way to decide. But as was shown above, merit may not tell the whole story. Another way is needed to both combat the disparate effects of the differing situations and address the role that background institutions play in determining individual outcome. Affirmative action attempts to do this.

This is especially true now that the Supreme Court has stated that diversity is a compelling state interest.<sup>76</sup> This has the effect of considering more than merit. Merit is only a starting point. Once merit has been accounted for, and thus personal responsibility accounted for, universities are allowed to look beyond merit or at the very least consider how that merit has come about. The universities can take account of how the individual's background institutions affected their merit. This equalizes the playing field. Those that succeed with little or no support because of their background situation are recognized for

doing so. In essence, their merit is greater than that of an individual who has succeeded with all the best support.

When examining the background institutions that affect an individual's ability to succeed, race must necessarily be one of the most important factors. The Supreme Court has recognized this and universities have long used it.<sup>77</sup> Some may object to this on the ground that it gives members of one class an unfair advantage *just because of their race*. However, what fails to enter into the discussion is that whole swaths of society have been long discriminated against *just because of their race*. While the Supreme Court has not allowed this to be a compelling state interest (remedial action for societal discrimination<sup>78</sup>), this in no way lessens the argument that race has an effect on an individual's ability to succeed. Nor does this argument, in any way, lessen the emphasis on merit. It merely casts merit in its proper light: that it is affected by moral luck. Affirmative action programs seek to remedy this problem of moral luck.

## **B. Government Responsibility**

There are two differing conceptions of the role of government and by virtue its corresponding responsibilities—minimalist and the welfare state—both of these conceptions are important in our conceptions of what society should look like and moral luck has something to say about each. An examination of what each of these types of responsibility requires on behalf of the government will be illuminating.

In the minimalist state, the emphasis is on negative liberties or what Robert Nozick refers to as side-constraints.<sup>79</sup> These side-constraints are limitations on the actions of others ensuring that individuals can pursue their own goals. The role of government is to ensure that our rights are not interfered with; its role is not to provide

the means for us to pursue our individual goals. Government “scrupulously must be *neutral* between its citizens.”<sup>80</sup> That does not mean government interference is never warranted; it just must be in accordance with the principles of protecting individuals’ negative rights—enforcing the side-constraints.

A key feature of Nozick’s articulation of side-constraints, and a particularly salient idea for this discussion, is that of how his theory of side-constraints views individuals. For Nozick, individuals are viewed as ends, not means.<sup>81</sup> These side-constraints do not allow the rights of individuals to be sacrificed for the greater societal good because “[S]ide constraints express the inviolability of other persons.”<sup>82</sup>

Nozick does offer one scenario where government has an obligation to interfere with the rights of its citizenry to pursue their individual ends. This is found in his “Entitlement Theory.”<sup>83</sup> Under this theory (which deals primarily with property rights), persons are only entitled to their holdings if they meet the following criteria for a just holding:

1. A person who acquires a holding in accordance with the principle of justice in acquisition is entitled to that holding.
2. A person who acquires a holding in accordance with the principle of justice in transfer, from someone else entitled to the holding, is entitled to the holding.
3. No one is entitled to a holding except by (repeated) applications of 1 and 2.<sup>84</sup>

Under this scheme of property rights, the government would be justified in restoring an individual’s property rights if that individual lost them through a means other than a just acquisition or transfer. This is really just an extension of side-constraints to a particular issue—that of property rights. It illustrates the role that government plays in enforcing these negative rights.

Under Nozick's scheme, we have a responsibility not to interfere with the right of others to pursue their goals. Government may interfere to enforce those side-constraints or to enforce the principles of justice in acquisition and transfer. This scheme has important implications on affirmative action. If accepted in its entirety, then there would be no room for affirmative action. Government would not be treating its citizens neutrally, but would be favoring one over the other and actively interfering with an individual's ability to pursue his goals. This seems to be a predominant issue with opponents of affirmative action. Ronald Dworkin stated that affirmative action is not a program of entitlement with the government preferring one race or ethnicity over another and allowing for set asides, but an attempt to address the national problem of under-representation.<sup>85</sup> This leads into the next concept of responsibility—the welfare state.

John Rawls finds that there are two principles that individuals would agree to if they were ordering society behind a veil of ignorance.<sup>86</sup> These principles are:

First: each person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others.

Second: social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all . . .<sup>87</sup>

Implicit in Rawls theory is that government will need to take a role in ensuring the above-named principles. This is especially apparent when Chief Justice Warren's comment from *Brown* is recalled: "education is perhaps the most important function of state and local governments."<sup>88</sup> But is education a basic liberty such that the state should ensure equal access to everyone? The Supreme Court has held that the liberty of parents to provide for their children's education was both a right and a duty of the parent.<sup>89</sup> However, state provided education is not a right provided for in the Constitution.<sup>90</sup> That

right may be authorized by state constitution<sup>91</sup> and once it is offered the denial of that right to a child triggers strict judicial scrutiny.<sup>92</sup> But legally that right ends well before entrance into college.<sup>93</sup> Any efforts that government makes in furthering educational opportunities beyond high school will not be liberty-based interests, but merely some rational basis interest. Thus, they will often conflict with other, more protected constitutional rights. This is the problem with state implementation of affirmative action—it interferes with the rights of individuals and the responsibility of government does not extend far enough to overcome that interference without narrowly tailored programs.<sup>94</sup>

While this may appear to be a particularly difficult obstacle to overcome, the language in *Grutter* that establishes diversity as a compelling state interest may offer some hope. However, diversity becomes only one of many compelling state interests and must compete with others to balance the alleviation of the disparate effects of past racial discrimination with the liberty-interest of individuals to seek an education in furtherance of the betterment of their lives.

### **C. Moral Luck and Responsibility**

Moral luck's role in both these conceptions of responsibility is important. At first blush, moral responsibility obviates personal responsibility. If who we are is largely a result of factors beyond our control, then responsibility would be irrelevant. We don't hold the infant morally responsible for spilling a glass of milk, why then the lorry driver?<sup>95</sup>

The answer lies in our conception of justice and a well-ordered society. There is a greater degree of harm done by the lorry driver than by the child. Also, as a society, we

only allow moral luck to go so far. Personal responsibility must play a part in what we deem just.

Moral luck's relevance is most important with respect to the role of government responsibility. If whole swaths of society are living in a disadvantaged state, then government is not meeting the first prong of Rawl's principles of justice. Thus, if we accept such principle—and for purposes of this paper I do—justice demands that government take corrective action. One author has argued that we, as a society, have become dulled to the “harsh deprivations” many live under and that our society is structured in ways that foster such conditions.<sup>96</sup> If society adheres to Rawl's principles of justice, such a situation is unacceptable and government must take steps to alleviate the problem. Affirmative action is just such a step.

## **V. MORAL JUSTIFICATION FOR AFFIRMATIVE ACTION**

Justification of affirmative action is an important component in making the case to support it either to the courts or to society at large. There are many possible justifications for affirmative action that have been proffered. In the following section three possible justifications are examined.

### **A. Diversity as a Remedy to Societal Discrimination**

The Supreme Court has articulated two possible justifications. The first is both legal and moral in nature. Affirmative action is justified where there is a showing that the institution has a history of discriminatory practice and the program is a remedial response to that discrimination.<sup>97</sup> It is limited in both time and scope. It is moral in that it is an effort to correct past wrongs. However, these wrongs must be something more than general allegations or societal wrongs.<sup>98</sup> The other justification is legal in nature.

Affirmative action programs are allowed to encourage diversity.<sup>99</sup> There is some question as to whether this extends beyond affirmative action in education.

The diversity argument appears to be an end run around *Wygant*. *Wygant* does not allow affirmative action programs to address general societal discrimination.<sup>100</sup> However, an appeal to diversity must necessarily rest on two assumptions. First, there is something of value in having individuals of “different” backgrounds represented. Second, those individuals with the “different” backgrounds are currently underrepresented. The question is why are they underrepresented? The answer necessarily touches on the idea of constitutive moral luck. The individuals are not represented because their circumstances are such that they would not normally qualify under a system that did not promote their “different” backgrounds. The background institutions, which profoundly affects their lives and of which they have little or no control, have limited their ability to succeed, while those individuals with more favorable background institutions do not encounter such limitations.

But can this idea of diversity as a societal discrimination remedy go far enough to morally justify affirmative action? The answer seems no. Apart from the legal answer that diversity is not a remedy for societal discrimination, there is the fact that diversity is not limited to race, legally or otherwise. The Supreme Court has determined that diversity is defined by the educational benefits it brings<sup>101</sup> and by a “robust exchange of ideas.”<sup>102</sup> This seems to end any discussion of societal discrimination remedies. But the effect may be different.

In effect, the Supreme Court has allowed universities to remedy societal discrimination. In order to create diversity, universities must necessarily consider the

background institutions that its applicants come from. Since, background institutions overwhelmingly treat racial minorities unfavorably; those are precisely the individuals who will benefit most. Thus diversity as a compelling state interest may have the exact effect the Supreme Court was seeking to avoid.

### **B. Nozick's Theory of Entitlement**

The second justification involves Nozick's theory of entitlement. Nozick's theory of entitlement, after some tweaking, may offer a more forceful moral justification for the use of affirmative action.

Nozick's theory requires that any holding must have been acquired and/or transferred through the principles of justice. While it fits more exactly in property law and offers a compelling justification for the return of items looted by the Nazis, it offers useful insight into this discussion. However, by applying (and tweaking) Nozick's theories, a justifiable rationale for affirmative action appears.

First, it should be recalled how side-constraints views individuals—as ends, not means. This concept means that we must look to who the individual is as an independent, rational, equal member of society. This applies to all people regardless of race, gender, or ethnicity. This provides a powerful argument for the use of merit only in selecting how to distribute scarce resources.

Second, Nozick's theory of entitlement possesses elements that can be extrapolated and applied to other possessions. The idea that anything earned or gotten should be done so justly is especially salient. Individual who obtain anything should have done so without infringing on anyone else. In other words, moral side-constraints should prohibit one individual interfering with another. The weakness in this assumption

is that in less tangible possessions (i.e. one's intellect, social status, success, etc.) it is unclear when or how interference occurs. That is not a problem for applying this concept to affirmative action. Past discrimination has interfered with a whole sector of society's ability to engage in the full panoply of opportunities within the society.

Lastly, Rawl's first principle of justice, equal opportunity to the same rights and liberties as every one else in society, will tie the previous assumptions together. The underlying assumption here is that moral luck should not affect an individual's ability to succeed, at least moral luck inuring from society's background institutions.

Thus, if individuals are means, then all should be treated equally and merit becomes a just way to separate out individuals. However, because of moral luck, not all merit is equal. Some merit was earned less justly because of the effect unfair background institutions have on disfavored individuals. Those with little or no obstacles in their path to success, while having gained it fairly in their individual situation, have not earned their merit except for unjust institutions that exist for other segments in society. This violates Rawl's principle that all have equal access to the rights and liberties of society.

Affirmative action seeks to do just this that. It treats all individuals as initially equal. It does not operate under the false premise that all people are equal, however. Rather, it accepts the premise that society has been and continues to be structured in such a manner that certain segments start from a disadvantaged starting point. That starting point did not get to be disadvantaged by accident; it is the by-product of an unjust policy of racial discrimination. Thus, the individuals are denied the equal opportunities to access the basic rights and liberties of others in society and this denial was not enacted according to the principles of justice.

The counter argument is that either affirmative action has accomplished its goals—individuals are judged because of their merit, not their race—or favoring one class of people over another is just discrimination in sheep’s clothing. As to the first argument, merit cannot be measured without considering the background institutions that affected it. Those institutions put a certain class of people at a substantial disadvantage, merely because of what race they are. Thus, the effects of past discrimination still linger. As to the second argument, it is a form of discrimination. But its need is justified and its effects on others outside the now-benefited class are marginal. A better justification for affirmative action is offered below.

### **C. Application of Enterprise Strict Liability to Affirmative Action**

Professor Gregory Keating of the University of Southern California, Gould School of Law, offers a compelling examination of enterprise strict liability (hereinafter “enterprise liability”) and how it mitigates moral luck.<sup>103</sup> After explaining Professor Keating’s position and its effect on moral luck, I’ll offer my own application of enterprise liability and how it might offer the most powerful moral justification for affirmative action yet.

Keating differentiates between negligence and strict liability.<sup>104</sup> The difference is that “negligence liability criticizes conduct, whereas strict liability criticizes merely the failure to make reparation for harm done.”<sup>105</sup> He further states that strict liability does not condemn the conduct responsible for the infliction of injury, “it only condemns the failure to pay for the harm done by the inflicted injury.”<sup>106</sup>

Keating then addresses moral luck as it affects strict liability.<sup>107</sup> Accidents happen when individuals carry out legal activities that are beneficial to all the parties

involved.<sup>108</sup> This will not be a problem if the injurers are also the injured.<sup>109</sup> Their risks will be shared and will have been contemplated as part and parcel of the activity. Each member of the community will bear risks and those risks will be off-set by enhanced benefits.<sup>110</sup> This is the norm in society. No fault insurance is an illustration of this principle. Liability has been removed from the picture and lawsuits reduced (risks), but certain benefits are guaranteed to every party (benefits).

In this scenario, there is no place for moral luck. Moral luck often operates to burden one party with the risks through no fault of their own. Or it may bestow unequal benefits. If both parties bear the same risks and the same burdens, moral luck has no place. However, this is not often the case.

The problem comes when the party doing the injuring is not the one being injured. In such a case, one party is bearing all the risk while another reaps the benefits. Both negligence liability and strict liability can and do deal with such problems. However, negligence liability must first condemn the conduct and then seek restitution. What if the conduct is not reprehensible such that it can be condemned? Such is the case with “accidental harm.”<sup>111</sup>

Keating gives the example of producing Coke bottles.<sup>112</sup> If you produce enough, some are likely to rupture and cause injury through no fault of the producer.<sup>113</sup> It would be unjust to condemn the producer of the bottle for the rupture if there was nothing wrong with the process or inspection, especially if the rupture was a matter of probability. The harm occurred because of a number of possibilities all outside the control of the producer, yet they have a direct effect on him. How does he compensate the harm when no condemnable conduct occurred on his part?

Enterprise liability offers a possible solution. It relies on the idea that strict liability does not condemn a conduct, just the failure to compensate.<sup>114</sup> Enterprise liability also incorporates two other assumptions: “(1) that accident costs should be internalized by the activity responsible for them; and (2) that accident costs should be both dispersed—not concentrated—and distributed among the participants in the activity responsible for them.”<sup>115</sup> Thus, the parties most likely to suffer from costs related to “accidental harm” should internalize those costs shared among the participating parties. This removes the element of moral luck from the equation. The ruptured Coke bottle will be accounted for in the initial equation and the harm compensated when the time comes.

This theoretical model offers an excellent vehicle for morally justifying the use of affirmative action. I call the model “societal enterprise liability.” It addresses the emotional arguments made against affirmative action, offers a legal justification for accepting affirmative action, and involves all the parties affected by societal discrimination.

By adopting the idea of strict liability, emotional charges of racism and favoritism can be reduced.<sup>116</sup> By moving the conversation away from the condemnation of the conduct, both past and present, this will allow for efforts to reconcile to move forward. It will also allow for the focus to be on fixing the underlying problems instead of finger-pointing. Societal enterprise liability will assuage the fears of those that bear the risks of discrimination that any movement away from conduct will result in failure to address the remedies. By focusing on the repairing the harm and not on who or what caused the harmed, societal enterprise liability will ensure that harm will be compensated. There

will be some who will contest the harm. This theory does not address that, nor does it seek to.

Societal enterprise liability would also internalize the costs of discrimination. Discrimination, past and present, forces one class of individuals to bear the costs—lower wages, less access to education, under-representation in government, higher instances of crime and drug and alcohol abuse—while another class of society reaps the benefits. By recognizing that such disparities exist, society can internalize the costs of the risks. Such internalization would more fairly distribute the risks and the benefits. It would also reduce the effects of moral luck. No longer would individuals' race, gender, circumstances of birth, etc. be a determinative factor of the level of benefits they are able to enjoy.

The background institutions that have benefited and encouraged discrimination would need to internalize those benefits. Such internalization could take the form of race-conscious policies to combat the inordinate risk that certain sectors of our society have been forced to bear. Affirmative action would be one such program.

The obvious problem with this model is that the Supreme Court has stated that it cannot happen. Remedial programs to alleviate societal discrimination are not allowed under strict scrutiny. However, strict scrutiny requires two things: (1) a compelling government interest and (2) a narrowly tailored approach to meeting that compelling interest.<sup>117</sup> Thus, the Court would need to be convinced that alleviating societal discrimination **is** a compelling interest and that affirmative action, limited to those that can show they have disproportionately borne the burden of discrimination, is narrowly tailored. The other option is to convince the Court that those institutions that have

engaged in behavior that have caused “accidental harm” (i.e. discrimination) should have to internalize those costs. This argument would need to be made in such a way that the constitutional issues are not implicated; a task I’ll leave to a better attorney than myself.

## **V. CONCLUSION**

Moral justification for affirmative action need not rest on condemning conduct. Nor does personal responsibility need to be the clarion call of those that oppose affirmative action. Nor do individuals need to be held hostage to the background institutions that create obstacles for upward mobility, especially as it relates to education.

In order to do this, society must realize certain realities: (1) society has background institutions that keep individuals from reaching their full potential; (2) while personal responsibility is a worthy goal, it must be tempered by the realization that not all seemingly equal merit is truly equal; (3) government has a responsibility to create equal opportunities for all its citizens to access basic rights and liberties, including education; and (4) society should internalize the costs of past and present societal discrimination and move past condemning the conduct and work towards equalizing the benefits and burdens.

If this can be accomplished, not only will we be better off economically (we’ll have a more educated workforce and less dependency on government) and more secure (less individuals in prison and lower crime rates), but we’ll be a better society morally. We will have addressed one of our biggest moral failures—the quashing of the spirits and opportunities of a whole sector of society.

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<sup>1</sup> Cal. Const. Art. 1, §31; Mich. Const. Art. I, §26; Rev. Code Wash. (ARCW) §49.60.400.

<sup>2</sup> *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

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- <sup>3</sup> *Id.* at 495.
- <sup>4</sup> *Plessy v. Ferguson*, 163 U.S. 537 (1896).
- <sup>5</sup> *Brown*, 347 U.S. at 493.
- <sup>6</sup> Engoren, Margaret, *Affirmative Action in Higher Education and Secondary Schools*, 7 *Geo. J. Gender & L.* 883, 884 (2006).
- <sup>7</sup> Engoren, *supra* note 6, at 883-884.
- <sup>8</sup> Engoren, *supra* note 6, at 884.
- <sup>9</sup> *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).
- <sup>10</sup> *Id.* at 278.
- <sup>11</sup> *Id.*
- <sup>12</sup> *Id.* at 320.
- <sup>13</sup> *Id.* at 297.
- <sup>14</sup> *Id.* at 265.
- <sup>15</sup> *Id.* at 291.
- <sup>16</sup> *Id.* at 297.
- <sup>17</sup> *Wygant v. Jackson Bd. Of Educ.*, 476 U.S. 267 (1986).
- <sup>18</sup> *Id.* at 274.
- <sup>19</sup> *United States v. Paradise*, 480 U.S. 149 (1987).
- <sup>20</sup> *Id.* at 167.
- <sup>21</sup> One such example is *Hopwood v. Texas*, 236 F.3d 256 (5<sup>th</sup> Cir. 2000). The Fifth Circuit ruled that the University of Texas could not use racial preferences to remedy discrimination in other parts of the Texas education system. The Fifth Circuit also ruled that the Constitution does not allow the use of racial preferences to bring about diversity in the student body.
- <sup>22</sup> *Gratz*, 539 at 249.
- <sup>23</sup> *Id.* at 255.
- <sup>24</sup> *Id.*
- <sup>25</sup> *Id.*
- <sup>26</sup> *Id.* at 270.
- <sup>27</sup> *Id.*
- <sup>28</sup> *Id.*
- <sup>29</sup> *Id.* at 270-271.
- <sup>30</sup> *Id.* at 249.
- <sup>31</sup> *Grutter*, 539 at 311.
- <sup>32</sup> *Id.*
- <sup>33</sup> *Id.* at 315-316.
- <sup>34</sup> *Id.* at 326.
- <sup>35</sup> *Id.* at 327.
- <sup>36</sup> *Id.* at 328.
- <sup>37</sup> *Id.* at 328 (quoting Brief for Respondent Bollinger et al. i.)
- <sup>38</sup> Eckes, Suzanne E., *Race-Conscious Admissions Programs: Where do Universities Go from Gratz and Grutter?*, 33 *J.L. & Educ.* 21 (2004).
- <sup>39</sup> Westmoreland, Robert, *A New and Improved Affirmative Action?*, 72 *U. Cin. L. Rev.* 909, 923 (2004).
- <sup>40</sup> Sally Pipes, *Prop 209, 10 years later*, *San Francisco Examiner*, January 18, 2006.
- <sup>41</sup> *Cal. Const. Art. 1, §31.*
- <sup>42</sup> *Id.*
- <sup>43</sup> “Anti-affirmative action proposal approved in Washington state,” at <http://www.cnn.com/ALLPOLITICS/stories/1998/11/03/election/ballots/affirmative.action/index.html>.
- <sup>44</sup> Kofi Myler, Ji Qi, and John W. Fleming, *Proposal 2 Finds Support Across State*, *Detroit Free Press*, November 9, 2006, at A1.
- <sup>45</sup> Claudia Card, *The Unnatural Lottery 2*, (Temple University Press) (1976); B.A.O. Williams, *Moral Luck: Philosophical Papers, 1973-1980* 20-21, (Cambridge University Press) (1981).
- <sup>46</sup> Card, *supra* note 45, at 2.
- <sup>47</sup> Card, *supra* note 45, at 2.
- <sup>48</sup> Card, *supra* note 45, at 2.
- <sup>49</sup> Card, *supra* note 45, at 2.

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- <sup>50</sup> Aristotle, *Ethics* 76-77, (J.A.K. Thomson trans., Penguin Books 3d ed. 1976).
- <sup>51</sup> Card, *supra* note 45, at 3.
- <sup>52</sup> Aristotle, *supra* note 50, at 77.
- <sup>53</sup> Card, *supra* note 45, at 3.
- <sup>54</sup> *Grutter*, 539 U.S. 306.
- <sup>55</sup> *Id.* at 336.
- <sup>56</sup> *Wygant*, 476 U.S. at 274. “This Court never has held that societal discrimination alone is sufficient to justify a racial classification.”
- <sup>57</sup> Kessler, Kimberly D., *The Role of Luck in the Criminal Law*, 142 U. Pa. L. Rev. 2183, 2188 (1994).
- <sup>58</sup> Card, *supra* note 45, at 3.
- <sup>59</sup> I will not discuss the idea of redemption. Needless to say that even given the idea of redemption, there has been lost time and thus their ability to do good during that time or because of the event has been shortened or eliminated altogether.
- <sup>60</sup> Thomas Nagel, Thomas, *Moral Luck*, *Mortal Questions* 24-38, (Cambridge) (1979).
- <sup>61</sup> Nagel, *supra* note 60.
- <sup>62</sup> Nagel, *supra* note 60.
- <sup>63</sup> Nagel, *supra* note 60.
- <sup>64</sup> Nagel, *supra* note 60.
- <sup>65</sup> Nagel, *supra* note 60.
- <sup>66</sup> Nagel, *supra* note 60.
- <sup>67</sup> Levine, Samuel J., *Playing God: An Essay on Law, Philosophy, and American Capital Punishment*, 31 N.M.L. Rev. 277, 286 (2001).
- <sup>68</sup> Levine, *supra* note 67, at 283-285.
- <sup>69</sup> Levine, *supra* note 67, at 283-285.
- <sup>70</sup> Brennan, Michael B., *The Lodestar of Personal Responsibility*, 88 Marq. L. Rev. 365, 368-369 (2004).
- <sup>71</sup> Brennan, *supra* note 70, at 365.
- <sup>72</sup> Keating, Gregory C., *Strict Liability and the Mitigation of Moral Luck*, 2 Journal of Ethics & Social Philosophy 1 (2006).
- <sup>73</sup> Brennan, *supra* note 70, at 365.
- <sup>74</sup> Thomas Hobbes, *Leviathan*, *Morality and Moral Controversies* 14, (John Arthur ed., 6<sup>th</sup> ed.) (2002).
- <sup>75</sup> David Schidtz, *Social Welfare and Individual Responsibility* 8, (Cambridge) (1998).
- <sup>76</sup> *Grutter*, 539 U.S. at 329.
- <sup>77</sup> *Id.*
- <sup>78</sup> *Wygant*, 476 U.S. 274.
- <sup>79</sup> Robert Nozick, *Anarchy, State, and Utopia* 30, (BasicBooks) (1974).
- <sup>80</sup> Nozick, *supra* note 79, at 33.
- <sup>81</sup> Nozick, *supra* note 79, at 33.
- <sup>82</sup> Nozick, *supra* note 79, at 32.
- <sup>83</sup> Nozick, *supra* note 79, at 150-151.
- <sup>84</sup> Nozick, *supra* note 79, at 151.
- <sup>85</sup> Ronald Dworkin, *Affirmative Action: An Exchange*, in *Readings in the Philosophy of Law* 639, (John Arthur & William H. Shaw eds. 3d ed.) (2001).
- <sup>86</sup> John Rawls, *A Theory of Justice*, *Morality and Moral Controversies* 289, (John Arthur ed., 6<sup>th</sup> ed.) (2002).
- <sup>87</sup> Dworkin, *supra* note 85, at 639.
- <sup>88</sup> *Brown*, 347 U.S. at 493.
- <sup>89</sup> *Lehr v. Robertson*, 463 U.S. 248, 257 (1983).
- <sup>90</sup> *Plyler v. Doe*, 457 U.S. 202 221 (1982).
- <sup>91</sup> Mich. Const. Art. VIII, §2.
- <sup>92</sup> *Plyler*, 457 U.S. at 209.
- <sup>93</sup> Mich. Const. Art. VIII, §2; *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972)(upholding Wisconsin’s law providing for compulsory education as long as it does not interfere with more fundamental liberties; here, the law interfered with the respondent’s free exercise of religion and the natural right to raise their child, so it was not applied to the respondents).
- <sup>94</sup> *Grutter*, 539 U.S. at 326.
- <sup>95</sup> Nagel, *supra* note 60, at 24-38.

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<sup>96</sup> Thomas Nagel, Equality and Partiality 64, (OUP) (1991).

<sup>97</sup> *Paradise* 480 U.S. at 167.

<sup>98</sup> *Wygant*, 476 U.S. at 274.

<sup>99</sup> *Grutter*, 539 U.S. at 329.

<sup>100</sup> *Wygant*, 476 U.S. at 274.

<sup>101</sup> *Grutter*, 539 at 333.

<sup>102</sup> *Id.*

<sup>103</sup> Keating, *supra* note 72.

<sup>104</sup> Keating, *supra* note 72, at 13.

<sup>105</sup> Keating, *supra* note 72, at 13.

<sup>106</sup> Keating, *supra* note 72, at 13.

<sup>107</sup> Keating, *supra* note 72, at 13-14.

<sup>108</sup> Keating, *supra* note 72, at 13-14.

<sup>109</sup> Keating, *supra* note 72, at 15.

<sup>110</sup> Keating, *supra* note 72, at 15.

<sup>111</sup> Keating, *supra* note 72, at 20.

<sup>112</sup> Keating, *supra* note 72, at 20.

<sup>113</sup> Keating, *supra* note 72, at 20.

<sup>114</sup> Keating, *supra* note 72, at 13.

<sup>115</sup> Keating, *supra* note 72, at 18.

<sup>116</sup> While the author believes that this *should* eliminate such behavior, he realizes that in reality these emotions are deep-seeded and not amenable to rational arguments.

<sup>117</sup> *Grutter*, 539 U.S. at 326.