

September 8, 1994

Professor Susan P. Sturm
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Dear Susan:

Reading your commentary on my article reminded me of a line of dialogue from *Cool Hand Luke*, a 1967 movie where Paul Newman played a prisoner in a Southern chain gang; as I recall the line, in the midst of one punishment after another inflicted on him by various guards and fellow-prisoners, Newman exclaims, "What we have here is a failure of communication." You and I too, I think, have a failure of communication.

For most of your commentary, I don't recognize the article that I had written. You repeatedly say, in particular, that I claim scientists "can empirically demonstrate our fundamental commonality"¹ and that this demonstration is "not about values [but] about truth,"² whereas you maintain to the contrary that this is "a moral and political judgment, not an empirical one."³ But there is no disagreement between us on this issue. I make this same observation several times in my article: for instance, I say,

The proper question for the behavioral scientists was not whether these differences [between mentally disabled and other people] existed, but whether they should be underscored. . . .

From a strictly scientific perspective, there was no clearly correct answer to this question. . . . [C]ommonalities are not necessarily more fundamental . . . [but] neither is the existence of the differences the scientifically more fundamental characteristic.⁴

Again, in my conclusion, I say, "The choice in these matters . . . is not between truth and falsehood in behavioral science Scientists can justify accentuating the differences among people as well as emphasizing human commonalities."⁵

¹ Susan P. Sturm, *Sameness and Subordination: The Dangers of a Universal Solution*, 143 U. PA. L. REV. 201, 203 (1994).

² *Id.* at 211.

³ *Id.* at 206.

⁴ Robert A. Burt, *Judges, Behavioral Scientists, and the Demands of Humanity*, 143 U. PA. L. REV. 179, 187 (1994).

⁵ *Id.* at 192.

It may be that you were misled by my statement early in the article, when I was describing Judge Bazelon's and the *Brown* Justices' conjunctive use of moral beliefs and behavioral science, that the scientific descriptive claim that "all human beings are fundamentally alike" was "a logically correct proposition."⁶ I can see how the word "correct" here might mislead you. I did not mean to say, however, that this was an empirically "true" position; I meant that it was a logically *coherent* position—not that it was right but that it was not demonstrably wrong, not illogical, to take this position. I do think that the *Law Review* editors should change this one word of mine from "logically correct" to "logically coherent" in order to forestall any misunderstanding of my position. But if this change is made, doesn't that remove any basis that you might have had for reading my article as you did? Shouldn't you then revise your account correspondingly?

You also misconstrue my views about the desirability of openly avowed conflict in social relations. You claim that I believe we should "avoid open acknowledgment and confrontation of . . . differences" and that "conflict is bad, irreconcilable, and to be avoided [because if] we acknowledge difference, conflict will inevitably lead to a Hobbesian resolution."⁷ You draw this characterization not so much from what I say explicitly in the article as from your reading of the underlying implications of what I say. Perhaps there is some basis in my article, of which I was unaware, that supports this reading; but I do know that in other recent writings, I have espoused exactly the opposite view from the position you ascribe to me here. (See, in particular, my book *The Constitution in Conflict* whose overarching theme is to criticize the Supreme Court for suppressing open conflict among polarized or potentially polarized adversaries).⁸

But though I do not believe—as you characterized my views—that all "conflict is bad, irreconcilable, and to be avoided," I do believe that all irreconcilable conflict is bad: bad for the combatants, bad for the society in which these combatants live, bad for the possibility of assuring a regime of mutual respect for the equal moral status of these irreconcilably hostile adversaries. In this article, as well as in

⁶ *Id.* at 183.

⁷ Susan P. Sturm, *Sameness and Difference: The Dangers of a Universal Solution* 16 (Aug. 18, 1994) (unpublished manuscript, on file with the *University of Pennsylvania Law Review*).

⁸ See generally ROBERT A. BURT, *THE CONSTITUTION IN CONFLICT* (1992).

my recent book, I maintain that the proper goal for all governance institutions, and for the judiciary in particular, is not to suppress conflict but to encourage and guide the combatants to see one another as potentially reconcilable. In other words, governance institutions should work generally to promote mutual recognition among adversaries of the commonalities that might unite them, notwithstanding the hostility that is dividing them.

I agree with you that the insistence by one side (or by a supposedly neutral third-party judge) on the existence of commonalities can easily reflect nothing more than continued subordination of one side by the other. This was the unacknowledged meaning of the "lily-white" version of the assimilationism that, as you point out, both of us criticize. But once again you misconstrue my position when you say that, although I "recognize the 'internal contradiction'" in this version of assimilationism, I "embrace the sameness solution nonetheless."⁹ To the contrary, this form of "sameness"—that blacks and whites are really the same only if blacks would act like, and think of themselves as, whites—is a mockery of the pursuit of true commonality based on mutual respect, of the democratic ideal of equality.

The fact that this kind of deception frequently arises as an obstacle toward the pursuit of the mutuality ideal does not support the conclusion that the ideal itself is flawed; this recurrent difficulty leads me to conclude that the impulse to subordination is a stubborn element in social relations, and is not easily tamed by eliminating the most obvious forms of oppression—what you call "first-generation forms of exclusion."¹⁰ As an abstract principle, I would say that the ideal progression in the elimination of oppressive exclusion of pariah groups should come in two stages: first an acknowledgment by the oppressors that they are fundamentally not superior to, and in this sense no different from, their victims; and then appreciation of and respect for non-hierarchically conceived differences. As I understand your position, I believe you would agree with this statement; this, I think, is what you mean in differentiating first- and second-generation forms of oppression. But I believe that the first-generation forms are exceedingly difficult to dislodge in relations between oppressors and oppressed and that unless and until these forms are expunged—unless and until the

⁹ Sturm, *supra* note 7, at 7 n.14.

¹⁰ Sturm, *supra* note 1, at 207.

oppressors fully admit to themselves and acknowledge to their previous victims that neither group is inherently superior, that their moral status as human beings is identical and undifferentiated—this second step of mutual respect for acknowledged differences cannot be reliably achieved.

It is a complex business to translate this abstract formulation into practical, concrete strategies for transforming oppressive social relations. This formulation does not lead me, for example, to the glib conclusion that some people have reached about the inherent wrongfulness of race- or gender-based affirmative action. Eliminating affirmative action has the surface appeal of proclaiming everyone's fundamental sameness; but so long as our social arrangements patently belie this abstract proclamation—so long as most African-Americans or women remain in positions of visibly subordinated economic and social statuses—the “first-generation” oppressions have not been reliably undone but have only been disguised and reiterated. But nonetheless—and here is the complexity, as I see it—the race- or gender-based differences expressed by affirmative action programs must be clearly and insistently understood only to be instrumental goals toward thoroughgoing mutual acknowledgment of undifferentiated moral status, rather than recognition of inherent, intrinsically valued differences as such.

In this sense I am espousing a hierarchy of values, with mutually acknowledged commonality ranking above mutually acknowledged respect for differences—not as a matter of empirical truth but as a moral proposition. You were quite correct to insist that this universalist position can readily become an instrument of oppression—an empirically observable truth that I failed to acknowledge in my article. Perhaps my failure arose from a generational difference between us—from the fact that my attention was focused on the assumptions of the 1950s, when the politically powerful reformers were themselves inclined to this same failure. Perhaps it also arose from our differences in gender or other aspects of our personal histories that might lead you to be more alert than I to the deceptions and self-deceptions in protestations of common interests from “superiors” toward their long-suffering subordinates. But I would hope that your justifiable suspicions do not lead you to abandon or subordinate the ideal of mutually acknowledged commonality, only because of the ease with which this ideal can be distorted in practice. I hope you would see how insistence on the intrinsic value of human differences can itself easily, too easily, escalate into mutual incomprehension and irreconcilable conflict

that feed the stubborn impulse toward social relations based on subordination and oppression.

I mentioned earlier in this letter the possibility that one sentence in my original article might be changed in order to eliminate what seemed to me a source of misunderstanding between us. Perhaps, however, it would be more useful for our readers if we were to leave the original sentence as it was, and publish this letter instead as an appendix to your commentary—as a small demonstration of the way that although differences can become magnified, corrective understandings do come in a relationship based on mutual respect. What do you think?

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