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Specific Agreements About Race: A Response to Professor Sunstein

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SPECIFIC AGREEMENTS ABOUT RACE: A RESPONSE TO PROFESSOR SUNSTEIN

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I was delighted when I was asked to comment upon this year's Holmes Devise Lecture. Like most law students, I had been amazed at Holmes' way with words, and as the years go by, I notice how many of those phrases I still remember—and borrow. I have also appreciated Professor Sunstein's work, but have never met him, so the whole prospect was very attractive. Candor, however, requires me to tell you that I was at first surprised at the invitation, as well as pleased. I do not have expertise in broad jurisprudential issues, and my substantive areas of interest do not much overlap with those of Oliver Wendell Holmes. Nevertheless, as Dean Walsh outlined the subject of Professor Sunstein's talk and explained what he hoped I might contribute, I became excited about my part of the project as well as the pleasantness of the invitation. I have been asked to reflect upon Professor Sunstein's paper—and the underlying Holmes aphorism[1]—not in a general way, but as the general proposition does or does not resonate in my own primary area of interest, which is race—in particular, race in the criminal process. I am pleased to be commenting on Professor Sunstein's remarks because to do so has required that I think about what I ordinarily worry about in another, more abstract framework. Frankly, I am even more pleased to have a new audience to think about and respond with a fresh eye to what are my ordinary concerns.

Professor Sunstein has considered two implications of Justice Holmes' sharp reminder that general propositions do not decide concrete cases, linking them with the concept of incomplete theorization, which he argues is both characteristic of our legal system and often desirable.[2] If I had to choose between agreeing or disagreeing with the ramifications of this paper in race cases, I suppose I would have to agree, but my areas of qualms and confidence may surprise Professor Sunstein. I should say now that when I refer to race cases, and the resonance of Professor Sunstein's ideas with race cases, I rarely think first of affirmative action cases. Contrary to the impression that the Court's docket in the last decade or so would suggest, I am convinced that most, and certainly the most *impor-*

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1. A theme of Professor Cass R. Sunstein's Oliver Wendell Holmes Devise Lecture was the aphorism "General propositions do not decide concrete cases." Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

2. Cass R. Sunstein, *General Propositions and Concrete Cases (with Special Reference to Affirmative Action and Free Speech)*, 31 WAKE FOREST L. REV. 369, 374-81 (1996).

tant, legal issues concerning race still concern discrimination against racial minorities.

Professor Sunstein first considers theorization that is incomplete because there is agreement on an abstraction, but not on particular results.[3] He makes two observations about such agreements: first, that incompletely specified agreements have important social uses;[4] and second, that pathological results follow when an incompletely specified abstraction is viewed as deciding a concrete case.[5]

Let me first express some reservations about whether—or when—incompletely specified agreements are socially desirable. With respect to the social uses of incompletely specified agreements, Professor Sunstein points out that a constitution would probably be impossible if it required advance agreement upon disputed specifics.[6] At other points, Professor Sunstein sees advantages and disadvantages, but here he seems to see only advantage. I, however, have some doubts. It would have been better to have tried to hammer out some operationalization of "We hold these truths to be self-evident: that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among them is life, liberty and the pursuit of happiness . . . ."[7] It may be that an attempt to explicitly define what "men" were being talked about would have been unsuccessful. It may be that neither the Declaration of Independence nor the Constitution, with its parallel "We, the people of the United States" language,[8] could have been agreed upon if the question of the humanity and the long-term future of slaves had been directly addressed. Nevertheless, it seems to me that the consensus bought by an incompletely specified agreement was both morally wrong and, in hindsight, pragmatically misguided as well. No matter how much you want to make a baby, there are some people you do not go to bed with; no matter how much you want to make a nation, there are some things you must first resolve. Slavery is one of those things.[9]

The second part of Sunstein's first proposition—that pathological results follow from acting as though incompletely specified agreements determine real cases—is easier for me to applaud.[10] I could continue my reflection about the place of African-Americans and slavery in our Constitution; the *Dred Scott*[11] case is probably the most disastrous example of treating an incompletely specified agreement as dispositive. But that dis-

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3. *Id.* at 370.
4. *Id.* at 371.
5. *Id.* at 372.
6. *Id.* at 370.
7. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).
8. U.S. CONST. pmbl.
9. What makes a compromise about slavery different from a compromise about "freedom of speech" is certainly in part its odiousness. I think it may also be the extent to which the compromise reflects the treatment of a disenfranchised group championed by a politically powerful group as opposed to a compromise of the interests of two powerful groups.
10. Sunstein, *supra* note 2, at 372.
11. Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1857).

aster has been thoroughly discussed, and more contemporary problems clamor for attention. It seems to me that the Supreme Court's decisions about racial issues that arise in the criminal justice arena in recent years show exactly the kind of pathology to which Professor Sunstein refers.

Professor Sunstein alludes to the affirmative action cases,[12] and I am guessing that the general propositions that he sees being used to "determine" those cases are the same propositions that are alleged to dispose of several racial issues in the criminal justice sphere. At the most general level, "equality" is said to require that race-conscious efforts to ameliorate the effects of racial discrimination be treated in the same way as discrimination against racial minorities; or in doctrinal terms, that all governmental racial classifications require strict scrutiny. More specifically, it is argued that in the affirmative action context only *the remedying of identifiable discrimination* can meet the strict scrutiny standard, and thus justify the racial classification. This conclusion is said to flow from our agreement about the purposeful discrimination requirement: if the Constitution forbids only purposeful discrimination, then it is only purposeful discrimination—engaged in by government actors or exacerbated by government actors—that can justify a "remedial" use of race. Hence the decision in *City of Richmond v. Croson*[13]: the standard must be strict scrutiny, which the city of Richmond did not meet because it failed to prove that it had, in the past, engaged in wrongful discrimination.

Together, these claims—that "equality" *always* means ignoring which racial group benefits from a racial classification and that the *only* discrimination which can be remedied is identified purposeful discrimination—boil down to a colorblindness as (at least presumptively) the only permissible governmental approach. These same claims plague the criminal justice arena as well. (As I shall turn to at the end of my remarks, there is even less cause and more pathology attendant to this method of decision in the criminal justice arena than there is in the affirmative action sphere.) Let me briefly relate these claims to three concrete decisions made by the Supreme Court in the last ten years and explain why they are pathological in this context.

The first decision I want to address, *McCleskey v. Kemp*,[14] is familiar beyond the ranks of criminal procedure teachers. In *McCleskey*, the Supreme Court held that, even assuming the validity of the proffered Baldus study, the petitioner had failed to prove that the State of Georgia had engaged in race discrimination in the administration of its death penalty.[15] Let me remind you that the Baldus study investigated 230 variables and found that, controlling for all other relevant variables, being

12. Sunstein, *supra* note 2, at 372-73.

13. 488 U.S. 469, 493-94, 509-11 (1989). In *Croson*, Richmond's Minority Business Utilization Plan was challenged under the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 477-86.

14. 481 U.S. 279 (1987).

15. *Id.* at 297-99.

black increased the likelihood of a death sentence by ten percent, and that having a white victim made a defendant more than four times as likely to receive a death sentence.[16] These are pretty drastic discrepancies, but the Court said that the mere existence of these discrepancies did not *prove* that purposeful discrimination had infected the administration of the death penalty.[17] I should say that not only had Baldus investigated those 230 variables which did not eliminate these vast discrepancies, but also that neither the State of Georgia nor the Supreme Court suggested what uninvestigated factor *did or could have* explained the correlations with race.

In this context, to say that the relatively general concept of purposeful discrimination required this result was bizarre. It was bizarre because the size of the disparate effect and the lack of candidates for the true causal relationship made a spurious correlation extremely unlikely. It was bizarre given the history of race and the death penalty in Georgia, where purposeful racial discrimination has a long history. It was bizarre because of what we know about racial prejudice and how it operates in charged situations rife with stereotypes and discretion.

That there really had been a choice was obvious from the Court's very different approach to the jury venire selection cases. As in the venire selection cases, the Court could have said that *in this context*, disparate effect amounted to a prima facie case which the state would have to rebut. Years later, Justice Powell, the fifth vote, as much as said that there had been a choice, and that the Court made the wrong choice;[18] but by then it was too late.

The Court has had several opportunities to contextualize its approach to racial issues in the second area I want to mention: the peremptory challenge cases. You might think that I would be happy with the peremptory challenge cases, and I readily admit that *Batson v. Kentucky*[19] is the only bright light in the last ten years in the race and criminal procedure area. In *Batson*, the Supreme Court held that a prosecutor could not strike African-American jurors because of their race or on the assumption that African-American jurors as a group would be unable to impartially consider the State's case against a black defendant.[20] The language of *Batson* sweeps broadly, encompassing the interest of the black defendant in a fair trial, the interest of the juror in not being struck based upon her race, and the interest of the community in public confidence in the courts. But the subsequent cases that elaborate on *Batson* suffer from one of the same pathologies that afflicts the affirmative action cases.

If the prosecution cannot use its peremptory challenge to eliminate all black jurors from a black defendant's jury, does that *require* the con-

16. *Id.* at 286-87.
17. *Id.* at 299.
18. JOHN C. JEFFRIES, JUSTICE LEWIS F. POWELL, JR. 451-52 (1994).
19. 476 U.S. 79 (1986).
20. *Id.* at 89.

clusion that a black defendant cannot use his peremptory challenges in order to increase the likelihood that *one* black juror will sit on his jury? I would not have thought so, but that is the path to which the Court now seems completely committed. In *Powers v. Ohio*,[21] the court decided that a white defendant, *just like a black defendant*, must be able to complain about the exclusion of black jurors. This first step in parallel treatment may be not a bad thing, but by the time the Court decided *Georgia v. McCollum*,[22] the parallelism was brought one step further. In *McCollum*, the question was whether a white *defendant* could use his peremptory challenges to try to eliminate African-American jurors from his jury. The NAACP saw what could be next: the African-American defendant attempting to use peremptory challenges to get *some* minority representation on the jury. It filed an amicus brief arguing that the Court should not go so far: a minority race defendant who is attempting to include some jurors of his own race on the panel should be analyzed differently than a prosecutor or white defendant who is trying to eliminate all minorities from the jury.[23]

The Court did not see it that way. Both the dissent and the majority treated the question of the white defendant who wishes to remove all black jurors as requiring the same judicial response as the black defendant who wishes to strike some white jurors in order to get a single black juror on the jury.[24] The two dissents (ironically, from Justices O'Connor and Thomas) used the NAACP's arguments to bolster their claim that no defendant should be bound by equal protection constraints.[25] The majority refused to even *acknowledge* the racially specific argument, but said in race neutral terms:

> We recognize, of course, that a defendant has the right to an impartial jury that can view him without racial animus, which so long has distorted our system of criminal justice. We have, accordingly, held that there should be a mechanism for removing those on the venire whom the defendant has specific reason to believe would be incapable of confronting and suppressing their racism.[26]

Thus an African-American defendant must be content to face an all-white jury armed only with voir dire, and must not use his peremptory challenges to *include* members of his race. This is what *Batson requires?* This is what the equal protection clause *requires*? It is, of course, what the intermediate proposition that drives the affirmative action cases requires—it is race- and motive- and context-neutral.[27]

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21. 499 U.S. 400 (1991).

22. 505 U.S. 42 (1992).

23. Brief for NAACP Legal Defense and Educational Fund, Inc. at 9-10, Georgia v. McCollum, 505 U.S. 42 (1992) (No. 91-342).

24. *McCollum*, 505 U.S. at 68-69 (O'Connor, J., dissenting).

25. *Id.*; *see also id.* at 62 n.2 (Thomas, J., concurring).

26. *Id.* at 58.

27. For a more detailed exposition of the author's views on the recent peremptory challenge cases, see Sheri Lynn Johnson, *The Language and Culture (Not to Say Race) of*

The other pathological part of this conclusion lies in its reliance on voir dire to weed out the prejudiced, given what the Court has held about the right to voir dire. If you do not teach criminal procedure, you probably are not familiar with *Ristaino v. Ross*[28] or its affirmation in *Turner v. Murray*.[29] In *Ross*, the Supreme Court held a black defendant (Ross) charged with the murder of a white man was not entitled to *even a single question* on racial prejudice during voir dire.[30] It is hard to see how concerns about racial bias can be answered by voir dire if there is no right to voir dire about racial bias.

Why did the Court hold that Ross was not entitled to question jurors about their racial prejudice? The due process standard for whether the defendant is entitled to ask a specific question during voir dire depends on the existence of a significant likelihood that prejudice relating to that factor will infect trial; the Court held that an interracial crime, without more, "did not suggest a significant likelihood that racial prejudice might infect [a] trial."[31] Although the shape of the voir dire doctrine does not resonate with Sunstein's observations about incompletely specified propositions, the way that doctrine is applied in these cases fits his theory. Ross did not make a sufficiently *specific* showing that racial prejudice was likely to be at work—hence he deserved no remedy. As in *Croson*, there was no showing, no right to action based on race. We presume colorblindness, even under the most ridiculous circumstances.

Interestingly enough, *Ross*—and to a lesser extent *McCleskey* and the peremptory challenge cases—could have been seen in the Sunstein scheme as cases in which we should be able to agree upon a result even though we cannot agree upon a broader principle. We are (mostly) agreed upon equality, but that does not mandate colorblindness as the only road to equality. Indeed, I think these cases, as well as the affirmative action cases, argue that we are not agreed upon whether it is generally the right road. But at a yet more specific level—if we ignore the correctness of the colorblind approach as a whole—couldn't we agree that in the criminal justice arena, sometimes colorblindness is simply blindness? Don't we really agree that a black person accused of a violent crime against a white person should get to ask whether his jury is racially biased? Couldn't we also agree that it is reasonable—advisable—for a black defendant to have at least one black person on his jury? Even further, couldn't we really agree that race inevitably is part of what happens in capital punishment cases? I'm not sure that everyone could agree about all three of these outcomes, but I think most of the American public acknowledges the importance of race in many—not all, but many—determinations of guilt and culpability. So I think the race and criminal procedure cases suffer from

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Peremptory Challenges, 35 WM. & MARY L. REV. 21 (1993).

28. 424 U.S. 589 (1976).

29. 476 U.S. 28 (1986). *Turner* qualifies *Ross* by invalidating the death sentence—but not the conviction—when voir dire on racial prejudice has been denied.

30. *Ross*, 424 U.S. at 598.

31. *Id.*

both the pathology of claims that an unspecified theory determines an outcome *and* an unwillingness to proceed simply on the basis of agreed upon outcomes for fear that too much is implied about a more general proposition.

When I read Professor Sunstein's statement that "General principles do not determine concrete cases" is Holmes greatest aphorism, another comparison came to mind. I thought, I hope without blasphemy: "And a second is like it . . . ."[32] And the second aphorism that is like the general principles aphorism is: "The life of the law has not been logic: it has been experience."[33] In the criminal arena, the overwhelming experience has been racial discrimination. Surely Holmes would not have thought we should trump that experience with the logic of colorblindness. Surely he would not have been afraid that we could not contain cases that acknowledge racial difference from swamping all equal protection doctrine, at least "[n]ot while this Court sits."[34]

32. *Matthew* 22:39.

33. OLIVER W. HOLMES, JR., THE COMMON LAW 1 (Dover Publications, Inc. 1991) (1881).

34. Panhandle Oil Co. v. Mississippi *ex rel.* Knox, 277 U.S. 218, 223 (1927) (Holmes, J., dissenting).