

# Derrick Bell's Dilemma

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## INTRODUCTION

The scholarship of Derrick Bell, acclaimed critical race theorist and constitutional law scholar, continues to animate discussions outside and inside of legal academia. Cornel West, for example, recently criticized Ta-Nehisi Coates' pessimism about racial progress, arguing that Coates' approach lacks the appeal to black struggle that is present in Bell's work.<sup>1</sup> Furthermore, many critical race theorists take Bell's interest convergence principle and racial realism thesis as starting points for their scholarship.<sup>2</sup> Law professor Paul Butler, for example, draws on both of Bell's theories to explain the persistence of racism in American policing.<sup>3</sup> Legal scholar Justin Driver, on the other hand, views Bell's theories as problematically pessimistic about the prospect of true racial justice in the United States.<sup>4</sup> I argue that Bell's approach to racial justice is viable and instructive, but that it must be modified if it is to overcome several serious theoretical problems. The interest convergence principle entails that groups are largely amoral, while the racial realism thesis includes the claim that black Americans should act on moral reasons. Thus, the principle and the thesis, taken together, entail a contradiction.

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1. Cornel West, *Ta-Nehisi Coates is the Neoliberal Face of the Black Freedom Struggle*, THE GUARDIAN (Dec. 17, 2017, 5:00 PM), <https://www.theguardian.com/commentisfree/2017/dec/17/ta-nehisi-coates-neoliberal-black-struggle-cornel-west> [<https://perma.cc/5ZEG-QCDP>].

2. See, e.g., Patience A. Crowder, *Interest Convergence as Transaction?*, 75 U. PITT. L. REV. 693 (2014); Tommy J. Curry, *Shut Your Mouth When You're Talking to Me: Silencing the Idealist School of Critical Race Theory through a Cultural Turn in Jurisprudence*, 3 GEO. J. L. & MOD. CRITICAL RACE PERSP. 1 (2011); Richard Delgado, *Law's Violence: Derrick Bell's Next Article*, 75 U. PITT. L. REV. 435 (2014); Lahny R. Silva, *Ring the Bell: The Right to Counsel and the Interest Convergence Dilemma*, 82 MO. L. REV. 132 (2017).

3. PAUL BUTLER, CHOKER HOLD: POLICING BLACK MEN 76, 185 (2017).

4. Justin Driver, *Rethinking the Interest-Convergence Thesis*, 105 NW. U. L. REV. 149, 188 (2011).

Bell first articulated his interest convergence principle in 1980.<sup>5</sup> According to the principle, the interests of black Americans will only be promoted when they either advance or do not impede the interests of white Americans.<sup>6</sup> Perceived racial progress, Bell contends, only occurs when the interests of blacks and whites align.<sup>7</sup> Moreover, Bell holds that racially progressive measures are systematically rolled back when those measures no longer serve the interests of whites.<sup>8</sup>

Further, Bell advances a racial realism thesis. According to the thesis, racism is a permanent feature of American life, such that achieving full racial equality is an unrealistic goal.<sup>9</sup> Bell's thesis parallels legal realism. Legal realism forces us to abandon the idea that legal materials determine legal outcomes and requires us to think about the material and economic conditions that drive legal interpretation. Bell contends that racial realism encourages us to abandon the idea that legal or moral arguments drive racial progress or will bring about racial equality.<sup>10</sup>

Bell encourages those who seek to promote racial justice to embrace both the interest convergence principle and the racial realism thesis. Particularly, Bell believes that accepting the permanence of racism can have a cathartic effect for black Americans.<sup>11</sup> Bell argues that, just as many terminal cancer patients are motivated to live more meaningful lives after their diagnosis, black Americans can find hope and meaning despite the truth of racial realism.<sup>12</sup>

To be sure, Bell does not urge complacency or apathy in the face of racial realism. Rather, he pushes black Americans to find meaning and dignity in fighting against racism. He also argues that black Americans should seek remedies to racial injustices by acknowledging the interest convergence principle.<sup>13</sup> Instead of advocating for racial equality through moral and legal arguments, Bell claims that black Americans should seek to exploit areas of interest convergence to promote their own interests. Bell suggests that those without power must sometimes use deception to get what they want and need.<sup>14</sup>

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5. Derrick Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980) [hereinafter Bell, Brown].

6. *Id.* at 523.

7. *Id.*

8. DERRICK BELL, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM* 69 (2004) [hereinafter BELL, *SILENT COVENANTS*].

9. Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 373, 374 (1992).

10. *Id.*

11. *Id.* at 378.

12. *Id.* at 374. See also *The Permanence of Racism*, THE OPEN MIND, PUB. BROAD. SERV. (June 11, 1992) <https://www.pbs.org/video/the-open-mind-the-permanence-of-racism/> (interview between host Richard Hefner and guest Derrick Bell).

13. See DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* 47–64 (1992) [hereinafter BELL, *FACES*].

14. *Id.* at 193.

He holds that accepting interest convergence and racial realism opens up room for more creative solutions to the problems facing black Americans.<sup>15</sup>

While compelling, Bell's central theoretical claims face several serious problems. First, the interest convergence principle seems to rest on the assumption that groups (as opposed to individuals) act only on their interests, and not on the recognition of moral duties. If this is the case, it follows that black Americans, as a group, are not motivated to act by moral concerns. Bell claims, however, that black Americans should act to preserve their dignity. The preservation of dignity is itself a moral motivation for action. Further, the assumption of group amorality results in the counterintuitive conclusion that black struggles for freedom have *never* been based in morality.

Second, if interest convergence and racial realism animate struggles for racial justice, it is not clear why black Americans, as a group, should refrain from undertaking *undignified* actions to promote their ultimate interests. In fact, Bell's claims may justify a "by any means necessary"<sup>16</sup> approach to struggles for racial justice. If groups are unable to act on moral reasons, then black Americans are unable to act on moral reasons. And if black Americans are unable to act on moral reasons, any appeal to morality in the struggle for racial justice must be seen as a pretense that should be abandoned. But if the struggle for racial justice is to preserve the dignity of black Americans, it cannot also be the case that any and all means are appropriate.

Third, Bell holds the view that black Americans *can* act on moral reasons, but he does not hold out this hope for white Americans. Bell does not afford white Americans, as a group, the characteristics of persons, but instead depicts them more as a force of nature with which black Americans must cope. While Bell does not deny that individual white Americans can and do act on moral reasons—and specifically moral reasons that support racial justice—he does not assume that whites, as a group, will be moved to act on issues of racial justice by moral reasons alone.<sup>17</sup>

This asymmetry, however, stands in need of justification. How could it be the case that black Americans can act on moral reasons, yet white Americans cannot? Bell could appeal to more radical elements in black political thought and take on the thesis that white Americans are evil, selfish, and unable to recognize moral truths. But such an explanation is implausible given that whites and blacks have a common evolutionary history. All attempts to circumvent this problem are either unlikely or inaccurate.

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15. See e.g., *id.* at 47.

16. See MALCOLM X, MALCOLM X SPEAKS: SELECTED SPEECHES AND STATEMENTS 164–65 (Grove Press 1994) (1965) ("[W]e only mean vigorous action in self-defense, and that vigorous action we feel we're justified in initiating by any means necessary.").

17. See Bell, Brown, *supra* note 5, at 525.

Consequently, Bell faces a troubling dilemma. If he holds that both black and white Americans are motivated solely by self-interest, he must abandon the claim that black Americans have or are able to act on moral reasons and he must justify the use of undignified means to promote the end of racial justice. If he holds that white Americans are largely amoral, while black Americans are capable of moral action, his entire theoretical framework rests on a controversial empirical assumption that has yet to be given a plausible or attractive explanation.

In this Article, I argue that Bell's dilemma can be avoided if interest convergence and racial realism are understood not as truths about the social world, but as constituting a perspective that can be adopted in certain contexts for pragmatic reasons. There are situations in which persons who seek to combat anti-black racism can, and should, act as if racism is permanent. In other contexts, this perspective can, and should, be dropped. In this Article, I explain when Bell's perspective should be adopted and when it should be abandoned.

Treating Bell's theoretical claims pragmatically allows black Americans to combat anti-black racism without having to posit implausible theories about race and morality or to rethink their own moral status. This pragmatic turn allows scholars who adopt and expand upon Bell's work to theorize with greater consistency. I cast black Americans as the protagonists in this story to remain consistent with the spirit of Bell's work *and* because the dilemma I posit has direct implications for Bell's ideas about black resistance. However, the pragmatic version of Bell's theory is applicable to *all* persons who seek to combat anti-black racism.

In this work, I make three guiding assumptions. First, I assume that there are known and knowable facts about which outcomes and policies best promote racial justice. Second, I assume that there are facts about the moral capacities of groups, yet these facts remain unknown and it is not clear what methods should be used to obtain these facts. Third, I assume that expected utility theory is normative.

In the next two sections, Parts I and II, I further explain and interpret Bell's interest convergence principle and racial realism thesis. In Part III, I explain and justify the claim that Bell's guiding assumptions entail serious theoretical problems. In Part IV, I articulate my pragmatic solution that seeks to preserve many of Bell's insights. In Part V, I employ my solution to address the serious criticisms of the interest convergence principle offered by Justin Driver. Finally, in Part VI, I respond to anticipated concern that my pragmatic suggestion licenses racists to make pragmatic, yet racist assumptions to justify explicitly oppressive policies.

## I. THE INTEREST CONVERGENCE PRINCIPLE

The notion that guides Bell's interest convergence principle is relatively easy to understand. Bell holds that the interests of black Americans will only be advanced when those interests either advance—or *converge* with—or do not impede the interests of white Americans. Bell states the principle succinctly in several pieces of his work.

In *Brown v. Board of Education and the Interest Convergence Dilemma*, for example, Bell articulates interest convergence as a principle that underlies the Court's decision in *Brown v. Board of Education*.<sup>18</sup> He writes:

The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites. However, the fourteenth amendment, standing alone, will not authorize a judicial remedy providing effective racial equality for blacks where the remedy sought threatens the superior societal status of middle and upper class whites.<sup>19</sup>

In a later work, *Silent Covenants*, Bell states the interest convergence principle as two rules:

*Rule 1.* The interest of blacks in achieving racial equality will be accommodated only when that interest converges with the interests of whites in policy-making positions. This convergence is far more important for gaining relief than the degree of harm suffered by blacks or the character of proof offered to prove that harm.

*Rule 2.* Even when interest-convergence results in an effective racial remedy, that remedy will be abrogated at the point that policymakers fear the remedial policy is threatening the superior societal status of whites, particularly those in the middle and upper classes.<sup>20</sup>

For Bell, whites who are in a position to make policy both represent the interests of middle and upper class whites and dictate when the interests of blacks will be advanced.

While relatively straightforward, the interest convergence principle is subject to competing interpretations along at least three dimensions. First, the principle could be read as applying to the American context in particular or as a general theory of group dynamics. Second, it is not clear how the principle understands the relationship between group interest and group motivation. It could be that groups are wholly unmoved by moral considerations and are motivated to act on group interests *exclusively*. On the other hand, Bell could also believe that morality provides groups with a weak, but insufficient motivation to act, such that group action requires a recognition of group interest. Third, the principle could be understood as merely backward-looking, explaining the history of racial progress in the United States, or as additionally forward-

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18. *Id.* See also *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (holding that segregated educational facilities violates the Fourteenth Amendment).

19. Bell, *Brown*, *supra* note 5, at 523.

20. BELL, *SILENT COVENANTS*, *supra* note 8, at 69.

looking, also predicting how and why black interests will be advanced in the future. It is important to understand each interpretive question.

First, while Bell only discusses interest convergence in the American context, and specifically as it applies to black and white Americans, the principle seems to rely on a general understanding of group dynamics, or group action. It would be odd if the motives and actions of black and white Americans were not mirrored by similarly situated groups.<sup>21</sup> Thus, it is reasonable to hold that the interest convergence principle, as articulated by Bell, follows from a more general claim about how groups operate relative to their position in a given society. In fact, law professor Patience Crowder understands interest convergence as a general principle that applies to all groups. She writes: “Broadly stated, the interest convergence theory holds that where there are power dynamics and divergent interests between parties with unequal bargaining power, the subordinate party’s interests will not advance unless that interest does not offend the status quo of the majority party.”<sup>22</sup> Crowder uses this general understanding of interest convergence to think through strategies for promoting economic development and alleviating urban poverty. The interest convergence principle is therefore best interpreted as a general principle because interpreting it otherwise would entail that black and white Americans are somehow radically different from similarly situated groups. A narrow interpretation of the principle would limit its useful application to contexts that Bell does not contemplate.

Second, Bell does not take a strong stand on the issue of group motivation. It could be that he endorses an “inability” interpretation and believes that groups, as opposed to individuals, are largely amoral and unable to recognize moral reasons for action. Alternatively, Bell could endorse an “insufficient motivation” interpretation and hold that while groups can recognize moral reasons for action, such reasons are insufficient to motivate action. In Bell’s clearest statements of interest convergence, he seems to advocate the inability interpretation. He declares that whites will accommodate the interests of blacks *only when* those interests align with their own. Further, Bell claims that measures that aim to promote black interests will be rolled back to the extent that they diverge from white interests. This language seems to suggest that Bell believes that white Americans, at least, are wholly unmoved by moral reasons that support promoting black interests.

Admittedly, Bell does claim that individual whites are capable of acting on moral reasons, while those reasons are “insufficient” to motivate white group action. This language seems to support the insufficient motivation interpretation: that groups are at most partially motivated by moral reasons but will act only on

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21. *But see* CEDRIC J. ROBINSON, BLACK MARXISM: THE MAKING OF THE BLACK RADICAL TRADITION 71–74 (U. of N.C. Press 2000) (1983) (arguing that the history of African Americans and black resistance in western countries must be understood through acknowledgment of Africa and African traditions).

22. Crowder, *supra* note 2, at 693.

reasons of self-interest. However, Bell's treatment of black Americans in relation to the interest convergence principle undermines this interpretation. Bell only mentions black *interests*, and not the moral reasons embraced by black Americans. Bell's ontology, at least in relation to the interest convergence principle, consists only of groups and their interests. Neither black Americans nor white Americans enter this principle as moral actors. Thus, it is most plausible to interpret Bell as claiming that groups are largely amoral, and that they are only motivated by self-interested reasons.

Moreover, adopting the insufficient motivation interpretation may also lead to the conclusion that groups are largely amoral. According to this interpretation, groups are capable of recognizing moral reasons, but they are at most partially motivated to act on those reasons. It is generally understood that moral persons are at least sometimes fully motivated to act by moral reasons. For instance, a moral person can both recognize that lying is wrong and be motivated *by that recognition* to tell the truth. One for whom morality is *never* a sufficient reason to act appears to be morally deficient in some way. This conclusion carries over to groups. A group that is never motivated by the recognition of mass human suffering, for instance, is morally deficient, if not amoral. This inference can be resisted, but as evidenced, the latter interpretation of Bell could plausibly entail the conclusion that groups are largely amoral.

Turning to the third interpretive question, Bell supports his interest convergence principle with numerous historical examples. Bell argues that the abolition of American slavery, the Civil War amendments to the U.S. Constitution, and *Brown* are all instances of interest convergence.<sup>23</sup> Legal scholar Stephen Feldman claims that the principle is "historically descriptive" and should not be taken as a guide for those who wish to think about and strategically promote racial justice in the future.<sup>24</sup> For Feldman, the interest convergence principle does not purport to predict future group behavior.<sup>25</sup>

Feldman's interpretation of Bell is flawed because it both attributes irrationality to Bell and runs counter to Bell's statement of the interest convergence principle. It requires the assumption that Bell rejects a basic principle of induction: all things being equal, the future will resemble the past. If interest convergence explains all historical instances of black progress, and there is no reason to think that the relative power of black and white Americans will radically shift in the foreseeable future, it follows that any future black progress will be the result of interest convergences. At no point does Bell posit that racial dynamics in the United States have changed radically. Therefore, to read interest convergence as a merely historical thesis is to attribute irrationality to Bell.

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23. See BELL, *SILENT COVENANTS*, *supra* note 8, at 50–68.

24. See Stephen Feldman, *Do the Right Thing: Understanding the Interest-Convergence Thesis*, 106 NW. U. L. REV. COLLOQUY 248, 253 (2012).

25. *Id.* at 257.

Further, Bell uses the future tense of the verb “to be” in articulating the interest convergence principle, demonstrating that it is forward-looking as well as backward-looking. Bell claims that the interests of blacks *will* be accommodated only when they converge with the interests of whites, not only that those interests have been accommodated in such past instances. If interest convergence is a true backward-looking and forward-looking principle, persons seeking to promote racial justice would be foolish not to take it into consideration when strategizing.

## II. RACIAL REALISM

In addition to the interest convergence principle, much of Bell’s scholarship turns on the truth of racial realism. Simply put, racial realism is the thesis that racism is a permanent feature of American life. Bell writes:

Black people will never gain full equality in this country. Even those herculean efforts we hail as successful will produce no more than temporary “peaks of progress,” short-lived victories that slide into irrelevance as racial patterns adapt in ways that maintain white dominance. This is a hard-to-accept fact that all history verifies. We must acknowledge it and move on to adopt policies based on what I call: “Racial Realism.”<sup>26</sup>

Bell contends that accepting racial realism allows black Americans to promote their interests without hoping that their efforts will bring about full racial equality. Racial realism, Bell contends, allows black Americans to avoid despair and disappointment.<sup>27</sup>

Racial realism must be understood together with interest convergence. Feldman, however, incorrectly argues that interest convergence and racial realism should be understood as distinct claims.<sup>28</sup> Feldman claims that interest convergence is a historical thesis while racial realism is a “future-oriented” thesis, but this reading of interest convergence is incorrect.<sup>29</sup> Further, racial realism turns on the truth of the interest convergence principle; the two claims, while distinct, must be understood together. This interpretation allows us to understand better both claims and to understand Bell’s scholarship as logically unified.

It is true, however, that racial realism is more explicitly future-oriented than the interest convergence principle. In Bell’s statement that “[b]lack people will never gain full equality in this country,”<sup>30</sup> it is not clear that Bell literally means *never*. It is more reasonable to assume that Bell’s claim is that racism will exist in the United States for the foreseeable future. In *Racial Realism*, Bell cites the

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26. Bell, *Racial Realism*, *supra* note 9, at 373.

27. *Id.* at 374.

28. Feldman, *supra* note 23, at 249.

29. *See id.*; *see also supra* Part II.

30. Bell, *Racial Realism*, *supra* note 9, at 373.



*Regents of the University of California v. Bakke*<sup>31</sup> decision and the appointment of Clarence Thomas to the Supreme Court as evidence of racial realism.<sup>32</sup> The *Bakke* court held that the University of California medical school violated the Fourteenth Amendment by operating a quota-based affirmative action program.<sup>33</sup> Bell argues that the program was struck down not because the Fourteenth Amendment dictated this result, but because such programs threatened the status of whites.<sup>34</sup> Further, Bell argues that the appointment of a black conservative like Clarence Thomas illustrates that black progress, in the form of Justice Thurgood Marshall, can easily be undermined to suit the interests of whites.<sup>35</sup> To Bell, both *Bakke* and Thomas indicate that racism extends to the foreseeable future.

Bell does not provide an explicit argument for racial realism.<sup>36</sup> However, he does offer the materials to construct a simple, straightforward inductive argument for the thesis. This argument can be understood as follows:

1. The interest convergence principle is true.
2. The interests of white and black Americans will diverge in many instances.
3. White Americans will retain superior social and economic power into the foreseeable future.<sup>37</sup>

Racial realism is true.

Because the interest convergence principle is true, and white Americans are likely to retain their power and to have interests that diverge from those of black Americans, it follows that racism is permanent and that black Americans will never gain full equality. Racial realism is therefore much less plausible without interest convergence. If there is reason to believe that white Americans will act altruistically in the future, there is no reason to believe that American anti-black racism is permanent.

Bell's racial realism theory has two noteworthy upshots. First, the theory has a tactical upshot. Bell contends that black Americans should give up hope that legal and moral arguments based on faith in the U.S. Constitution will bring

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31. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

32. Bell, *Racial Realism*, *supra* note 9, at 369–70.

33. *Bakke*, 438 U.S. at 318.

34. Bell, *Racial Realism*, *supra* note 9, at 369.

35. *Id.* at 370.

36. To be sure, Bell claims that history verifies racial realism. However, this contention is not specified in an explicit argument.

37. I remain agnostic about this third premise. It is not clear how persons will identify or how power will be aligned if the United States becomes a majority-minority nation. I only claim that Bell needs a premise of this type to generate an argument for racial realism.

about racial equality. Instead, black Americans should, at least in part, seek to exploit and create areas of interest convergence to achieve their goals.<sup>38</sup>

Second, Bell's racial realism has a moral upshot. Bell takes it that a collective struggle against anti-black racism can add meaning to the lives of black Americans. Bell claims that this struggle is a manifestation of black dignity and humanity.<sup>39</sup> In *Racial Realism*, he writes, "We [black Americans] must realize, as our slave forebears, that the struggle for freedom is, at bottom, a manifestation of our humanity that survives and grows stronger through resistance to oppression, even if that oppression is never overcome."<sup>40</sup> Bell expands on this moral theme in other works. In *Ethical Ambition: Living a Life of Meaning and Worth*, Bell articulates principles necessary to attain professional success without compromising one's moral integrity.<sup>41</sup> In an NPR interview about the book, the host asks Bell about his views on the origins of personal ethics. Echoing the language of *Racial Realism*, Bell responds, "[I] think that you gain it through determination and strengthening. I mean, you can't go into a gym and snatch 300 pounds. You have to go in and start with five pounds. And I think the same thing is true with ethical living."<sup>42</sup>

Bell's moral theme is also present in his book, *Afrolantica Legacies*.<sup>43</sup> The book begins with a retelling of the Afrolantica story first articulated in *Faces at the Bottom of the Well*.<sup>44</sup> The story centers on an island off the coast of South Carolina, where only black Americans can survive. White people are unable to breathe the island's air and are unable to live in its "heavy and oppressive" atmosphere.<sup>45</sup> A group of black Americans plan to emigrate to Afrolantica, but prior to the black emigration, the island disappears into the ocean.<sup>46</sup> Inspired by the island's very existence, the discouraged black Americans articulate a set of principles for black Americans, known as the Afrolantica Legacies.<sup>47</sup> Two principles strike a clear moral tone:

## II.

Service in the cause of truth and justice is no less worthy of praise because it is misunderstood, misused, or condemned.False

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38. See BELL, *FACES*, *supra* note 13, at 47–64 (discussing the fictional Racial Preference Licensing Act that would allow public businesses to discriminate on the basis of race so long as they purchased an expensive license from the federal government).

39. Bell, *Racial Realism*, *supra* note 9, at 378–79. See also Feldman, *supra* note 23, at 251–52.

40. Bell, *Racial Realism*, *supra* note 9, at 378.

41. DERRICK BELL, *ETHICAL AMBITION: LIVING A LIFE OF MEANING AND WORTH* (2002).

42. Tavis Smiley, *Professor Bell Discusses How to Live an Ethical Life*, in *THE DERRICK BELL READER* 111 (Richard Delgado and Jean Stefancic eds., 2005).

43. DERRICK BELL, *AFROLANTICA LEGACIES* (1998).

44. See BELL, *FACES*, *supra* note 13, at 32.

45. See BELL, *AFROLANTICA LEGACIES*, *supra* note 42, at ix.

46. *Id.* at x.

47. *Id.* at xii.

## VII.

Life seems to favor those in power, while it seldom rewards triumphs with good works. The righteous must rely on their faith and champion justice even in a seemingly lost cause.<sup>48</sup>

Here, Bell relies on the concepts of truth, justice, and righteousness to characterize the ideal black struggle against racial oppression.

In addition to presenting moral themes, Bell also advances moral claims. He not only claims that black Americans should act strategically to advance their interests, but also that they should do so to preserve their dignity and humanity. Bell thus implicitly implies a limiting condition on the actions black Americans can take to advance their interests. If the struggle for racial justice is partly motivated by the need to preserve dignity, then black Americans are prohibited from taking undignified actions to promote racial justice. Bell's claims rule out disgracing one's ancestors, playing into stereotypes, or performing humiliating tasks for financial gain. Bell accordingly attributes moral capacities to black Americans and claims that black Americans must exercise these capacities in fighting against anti-black racism.

## III. BELL'S DILEMMA

There is tension between the interest convergence principle and the moral component of Bell's racial realism. The interest convergence principle accepts that groups are largely amoral, while racial realism encourages black Americans to act on moral reasons. Bell can resolve this tension in two ways. He can either abandon the moral component of racial realism and embrace the claim that groups are largely amoral, or he can hold that while white Americans—and dominant groups generally—are amoral, black Americans and other marginalized groups are capable of moral action. Both options have problematic upshots and thus Bell faces a pressing dilemma.

Consider the first horn of this dilemma, which stems from the assumption that groups are largely amoral. This claim entails that black Americans, as a group, are not able to act on moral reasons. If Bell is to be consistent here, he must hold that any past, purportedly moral action taken by black Americans—for instance, advocating for the abolition of slavery, or for the dismantling of racialized segregation—was really an instance of amoral advocacy for group interests. While this conclusion may be true, it runs afoul of common and intuitive interpretations of black political action. We tend to believe that black people advocated for the abolition of slavery because they recognized that slavery is wrong.<sup>49</sup> This conclusion does not undermine Bell's interest convergence principle, but it is an unfortunate outcome of that principle.

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48. *Id.* at xii–xiii.

49. *See, e.g.,* FREDERICK DOUGLASS, NARRATIVE OF THE LIFE OF FREDERICK DOUGLASS, AN AMERICAN SLAVE 33 (1846) (“Thus is slavery the enemy of both the slave and the

Bell, however, does take his racial realism thesis to have moral upshots. Bell believes that black Americans can and should be motivated to act out of reverence for their ancestors and out of recognition of the independent importance of preserving their dignity and humanity.<sup>50</sup> Combined with interest convergence, this demand for group moral motivation entails a contradiction. If black Americans can only be motivated to act on their interests, they cannot give independent motivational weight to moral reasons.

It is tempting to try to resolve this contradiction by positing that acting to revere one's ancestors or to preserve one's dignity and humanity *is* to act in one's own interest. But this attempted resolution will not work. The contradiction stems from forced accessions by Bell to claims regarding group motivation. It may be that acting to preserve one's dignity is sometimes in one's best interest, but doing so is not distinctly moral unless it was motivated by concern for one's dignity. Further, dignified actions and actions that are in one's best interest can come apart. For instance, it may be in one's best interest to kowtow to a person in power to preserve one's life. The kowtow itself may be undignified, but it serves to prolong one's life. Thus, Bell cannot escape the contradiction by assuming a convergence between moral action and black self-interest.

The assumption that black Americans are largely amoral entails a second, but closely related problem: the interest convergence theory justifies a group's decision to act in an undignified way when group interests diverge from the end of dignity (or some other moral end). According to the interest convergence principle, groups cannot act on moral reasons. Therefore, it cannot be the case that groups ought to act on moral reasons.<sup>51</sup> The preservation of dignity and humanity, and reverence for one's ancestors exists as moral reasons for action. If groups do not have a moral obligation to act on these reasons (because they cannot), then groups are justified in ignoring moral reasons of this type in deciding how to act.

This argument's conclusion means that black Americans can justifiably deny their humanity or intelligence, or publicly insult their ancestors if doing so would promote their ultimate interests. Any appeal to morality, on this view, must be viewed as a mere pretense. El Hajj Malik El-Shabazz (Malcolm X) famously claimed that black Americans should seek to secure their freedom and equality "by any means necessary."<sup>52</sup> But in making this claim, El-Shabazz meant to undermine the idea that violence was an improper means to the end of racial justice. Neither El-Shabazz nor Derrick Bell claim that black Americans

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slaveholder."); Martin Luther King, Jr., *Letter from Birmingham Jail* (Apr. 16, 1963) (appealing to the moral wrongness of unjust laws and racial discrimination).

50. See Bell, *Racial Realism*, *supra* note 9, at 378–79.

51. The argument for undignified actions can be understood in the following way: "Ought" implies "can," so if a person or group ought to do something, they are able to do so.

52. MALCOLM X, BY ANY MEANS NECESSARY: SPEECHES, INTERVIEWS, AND A LETTER 34 (1970).

need to discard all semblance of dignity and morality in their struggle for freedom. The interest convergence principle, however, seems to justify the opposite conclusion.

If Bell assumes that black and white Americans are largely amoral, he must embrace a cynical understanding of past black political action and provide reasons for black Americans to act in undignified ways, so long as doing so would promote their interests. Bell could avoid his horn of the dilemma by embracing the conclusion that white Americans are incapable of acting on moral reasons, while black Americans are so capable.

Indeed, this interpretation stems from the most straightforward reading of the interest convergence principle and racial realism. Bell says explicitly that white policy makers (as representatives of white Americans as a group) act to advance their interests. Specifically, whites act to maintain their superior social position. This is the only motive that Bell attributes to whites as a group. Indeed, Bell vividly illustrates this theme in his story, *The Space Traders*.<sup>53</sup> In the story, an alien race offers white Americans riches and natural resources in exchange for the black American population. After a national debate, white Americans decide to turn black Americans over to the aliens, with no idea how they will fare at the hands of the alien population.<sup>54</sup>

In contrast, Bell encourages black Americans to act out of reverence for their ancestors, and to preserve their dignity and humanity. Instead of advancing the claim that all groups are motivated exclusively by their interests, Bell can easily be read as positing a moral asymmetry between black Americans and white Americans.

This reading would allow Bell to avoid the first two outlined problems. If black Americans are capable of moral motivation, then past black political action can be interpreted morally and black Americans can—and have a reason to—act to preserve their dignity and humanity. Indeed, many black political thinkers have posited a similar asymmetry between black and white Americans. In a 1967 speech, Stokely Carmichael criticized Martin Luther King, Jr.'s method of non-violent resistance. He argues:

Dr. King's policy was that nonviolence would achieve the gains for black people in the United States. His major assumption was that if you are nonviolent, if you suffer, your opponent will see your suffering and will be moved to change his heart. That's very good. He only made one fallacious assumption: In order for nonviolence to work, your opponent must have a conscience. The United States has none.<sup>55</sup>

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53. BELL, *THE SPACE TRADERS* (1992), <https://whgbtc.com/the-space-traders.pdf> [<https://perma.cc/Z2BL-6HTJ>].

54. *Id.*

55. See *THE BLACK POWER MIXTAPE 1967-1975* (Louvettur Films 2011); see also Karen Bates, *Stokely Carmichael, A Philosopher Behind the Black Power Movement*, NAT'L PUBLIC RADIO (Mar. 10, 2014, 10:00 AM),

Carmichael implicitly expresses a view similar to Bell: that while black Americans are capable of moral motivation, white Americans, as a group, are largely amoral. Similar views have long been expressed by the Nation of Islam (NOI) and other radical black thinkers.<sup>56</sup>

This reading of Bell is problematic because it rests on unproven and indefensible empirical assumptions. The NOI has developed a complex mythology to explain the different moral capacities of white Americans and black Americans. According to myth, a devious scientist created the white race such that all whites would forever be evil and selfish.<sup>57</sup> African-American Studies Professor Leonard Jeffries has argued that white people are largely amoral because they are an “ice people” (meaning that they evolved in colder climates), and that black people are capable of moral action and altruism because they are a “sun people” (meaning that they evolved in warmer climates).<sup>58</sup> Jeffries has neither proven nor published these claims. Further, many evolutionary psychologists hold that altruism helps species, including *homo sapiens*, survive.<sup>59</sup> At this point, Jeffries’ theory is no more plausible than that of the NOI.

If Bell does posit a fundamental asymmetry in the motivational structure of white Americans and black Americans, he must provide a plausible explanation for this controversial thesis. However, Bell’s text could offer a more reasonable explanation; he could explain the asymmetry by positing that societal power corrupts the morality of groups. Accordingly, he could argue that white Americans are not *inherently* amoral, but rather they are amoral because they are powerful and privileged in American society.

This explanation is not wholly implausible, but it also has troubling implications. First, if we assume that power is morally corrupting, we must conclude that the morality of black Americans is highly contingent on circumstance. Persons and groups that have moral capacities are usually seen as retaining these capacities across a variety of circumstances. But, if a shift in power would undermine the moral capacities of black Americans, then black morality would be seen as a mere historical accident and not a robust and

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<https://www.npr.org/sections/codeswitch/2014/03/10/287320160/stokely-carmichael-a-philosopher-behind-the-black-power-movement> [https://perma.cc/9MHR-B4P3].

56. See, e.g., ELIJAH MUHAMMAD, MESSAGE TO THE BLACKMAN IN AMERICA (Secretarius Mems Publ’ns 2006) (1973).

57. *Id.* at 103, 115.

58. See Lance Morrow, *Controversies: The Provocative Professor*, CNN (June 24, 2001), <http://content.time.com/time/magazine/article/0,9171,157721,00.html> [https://perma.cc/AJ46-RYY8].

59. See Christopher Bergland, *The Evolutionary Biology of Altruism*, PSYCHOL. TODAY (Dec. 25, 2012), <https://www.psychologytoday.com/blog/the-athletes-way/201212/the-evolutionary-biology-altruism> [https://perma.cc/J3ZY-YLFD] (discussing scientific studies that show that altruism, compassion, and cooperation are key to human survival).

sustainable feature of black Americans as a group. This solution, then, would require black Americans to reimagine themselves as moral actors.

Further, this explanation seems to entail an inverse correlation between group power and group morality. This correlation would apply to black and white Americans, but also to groups of black Americans. Therefore, the moral capacities of any black subgroup would be diminished in proportion to their economic and social power. This conclusion undermines Bell's call for intragroup solidarity in the face of racial injustice. Powerful black subgroups, on this theory, will only act to benefit less powerful black subgroups when that benefit is in their interests. But anti-black racism, by nature of possibly affecting poorer, less powerful black groups differently than well-off black groups, undermines the possibility of Bell's united, dignity-affirming fight against racism. Thus, positing an inverse correlation between group power and morality has problematic results.

Bell, then, faces a troubling dilemma. If he holds that both black and white Americans are motivated solely by self-interest, he must abandon the claim that black Americans have, or are able to act on, moral reasons. In adopting this horn of the dilemma, he also justifies the use of undignified means to promote the end of racial justice. If he holds that white Americans are largely amoral, while black Americans are capable of moral action, his entire theoretical framework rests on a controversial empirical assumption that has yet to be given a plausible or attractive explanation.

#### IV. A SOLUTION TO BELL'S DILEMMA

Bell's dilemma can be resolved in one of two ways: by abandoning either the interest convergence principle or racial realism (or both), or by developing a framework that preserves Bell's insights while avoiding the theoretical problems. I argue that Bell's framework is valuable and should be preserved. Other scholars like Justin Driver, who has forcefully criticized the interest convergence principle, would take no issue with abandoning the principle altogether. In this Part, I articulate a theoretical framework that avoids Bell's dilemma and I explain how this framework can be used to address Driver's criticisms of the interest convergence principle.

I propose adopting a version of the second horn of the dilemma: the claim that white Americans are unable to act on moral reasons, while black Americans are capable of moral motivation. This claim should not be understood as absolutely true, but as a pragmatic assumption that can be justifiably employed in certain contexts. My proposal is agnostic between the "inability" and the "insufficient motivation" interpretation of group amorality. I claim that persons seeking judicial or legislative remedies to problems facing black Americans should selectively assume Bell's framework. In some contexts, however, neither the interest convergence principle nor racial realism need to be taken as true.

Consequently, Bell's framework can serve as one of many tools in the struggle for racial justice.

The employment of Bell's framework in specific contexts can be justified pragmatically. Three assumptions are needed for this justification. First, there are known and knowable facts about which policies best promote the end of racial justice. For instance, I believe that we know that forced racial segregation in public schools is unjust. Likewise, some forms of racialized affirmative action are both a just and effective means to address racial injustice. Further, there are methods that will allow us to expend our knowledge about racial justice. Law, moral philosophy, and sociology are a few of several fields that are at least partially dedicated to understanding the nature of anti-black racism and extending our conception of racial equality.

Second, I assume that there are facts about the moral capacities of groups, yet these facts remain unknown and it is unclear what methods should be used to obtain these facts. It is either the case that group altruism is possible, or that it is impossible. It is not at all clear, however, how best to determine which option obtains the facts. It may be that further empirical work is needed to answer this question. Or, it may be that the question of group altruism is purely philosophical and interpretive.<sup>60</sup> In short, we do not have knowledge about the metaphysics of group agency or the moral psychology of groups. Obtaining such knowledge is not impossible, but there are not settled opinions about group agency or morality.

Third, I assume that expected utility theory is normative, and not merely descriptive.<sup>61</sup> In the face of uncertainty, according to a normative understanding of expected utility theory, persons *should* act such as to maximize their expected utility.<sup>62</sup> Thus, if one knows that the expected utility of action *A* is higher than that of action *B*, one should perform action *A*, assuming that there are no moral or pragmatic reasons for refraining from action *A*.<sup>63</sup>

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60. See Thomas Nagel, *THE POSSIBILITY OF ALTRUISM* (1979) (arguing that the possibility of individual acts of altruism can be known *a priori* because the possibility of reasoning about one's own interests from a third-person perspective necessarily entails the possibility of reasoning about another's reasoning and thus involves acting altruistically); see also Samuel Bowles & Herbert Gintis, *A COOPERATIVE SPECIES: HUMAN RECIPROCITY AND ITS EVOLUTION* (2013) (taking an empirical, evolutionary approach to the question of human altruism).

61. See WILLIAM FELLER, *AN INTRODUCTION TO PROBABILITY THEORY AND ITS APPLICATIONS* (Wiley, 3d ed. 1968) (arguing that expected utility theory makes for better policy in the long run). See also Lyle Zynda, *Representation Theorems and Realism about Degrees of Belief*, 67 PHIL. SCI. 45 (2000) (reasoning that if a person fails to act in order to maximize expected utility, that person fails to uphold at least one axiom of rational preference).

62. Rachael Briggs, *Normative Theories of Rational Choice: Expected Utility*, STAN. ENCYCLOPEDIA PHIL. (Edward N. Zalta ed., 4th ed. 2017), <https://plato.stanford.edu/archives/spr2017/entries/rationality-normative-utility> [<https://perma.cc/8U9A-FC5S>].

63. An example will help to explain this normative conception of expected utility. Consider the decision of whether to give up eating meat in favor of a vegetarian diet. Assume that with respect to any specific individual, it is not possible to know the relative health outcomes associated with a vegetarian diet versus a meat-based diet. Also assume that there is a 40% chance,



Turning to Bell, I assume that we know which policies will best promote racial justice and do not know whether groups are capable of acting on moral reasons. Expected utility theory can provide guidance to which theory choice is rational given these two assumptions. First, assume that the majority of policy makers are white Americans, such that arguments for just policy outcomes must be addressed to persons from this demographic. Those advocating for racial justice can assume that white Americans either will or will not act on moral reasons to adopt racially just policies. For this example, presuppose that the former assumption will lead racial justice advocates to provide moral arguments to policymakers. Likewise, presuppose that the latter assumption will lead advocates to provide prudential, interest-based arguments to policymakers. This latter assumption need not entail further assumptions about *why* white Americans will remain unmoved by moral arguments.

Assume further that there is a 50% chance that white Americans will act on moral reasons in the relevant context. Because it is clear which policy outcomes are just, one can assign positive and negative utility to particular outcomes. The possible choices and outcomes in this example can be represented as follows:

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given what is generally known, that a meat-based diet will lead to heart disease and a 0% chance that a vegetarian diet will lead to heart disease. Persons who enjoy meat, and hate vegetables, will suffer some disutility in opting for a vegetarian diet, and all persons will suffer disutility from developing heart disease. Expected utility theory provides a mechanism for making rational choices in the face of uncertainty at the individual level. Assume an individual who loves meat and hates vegetables. The possible choices and outcomes in this example can be represented as follows:

|                               | <b>State 1: No Heart disease</b>  | <b>State 2: Heart Disease</b>    |
|-------------------------------|-----------------------------------|----------------------------------|
| <b>Act 1: Meat-based Diet</b> | Probability: 60%<br>Utility: +10  | Probability: 40%<br>Utility: -50 |
| <b>Act 2: Vegetarian Diet</b> | Probability: 100%<br>Utility: -10 | Probability: 0%<br>Utility: -50  |

The utility assignments are arbitrary, and I ignore other factors that may determine the likelihood that a person may develop heart disease, but the illustration will still be useful. Expected utility theory allows us to calculate the value of each choice. The expected utilities of the meat-based diet and the vegetarian diet are represented by the following equations:

$$\text{Expected utility of a meat-based diet} = (10 \times .6) + (-50 \times .4) = -14$$

$$\text{Expected utility of a vegetarian diet} = (-10 \times 1) + (-50 \times 0) = -10$$

The expected utility of the vegetarian diet, then, is higher than that of the meat-based diet. According to expected utility theory, rationality demands that one choose the vegetarian diet, all other things being equal.

|               |   | <i>State 1:</i>                            | <i>State 2:</i>                                       |
|---------------|---|--|---|
|               |   | White Americans will act on moral reasons. | White Americans <i>will not</i> act on moral reasons. |
|               |   | Probability: 50%                           | Probability: 50%                                      |
| <i>Act 1:</i> | Assume that white Americans will act on moral reasons.            | Utility: 10                                | Utility: -10  |
| <i>Act 2:</i> | Assume that white Americans <i>will not</i> act on moral reasons. | Utility: 10                                | Utility: 10   |

The following equations represent the relative utility of assuming that white Americans will act on moral reasons versus assuming the opposite.

Expected utility of assumption that white Americans will act on moral reasons= $(10 \times .5) + (-10 \times .5) = 0$

Expected utility of assumption that white Americans *will not* act on moral reasons= $(10 \times .5) + (10 \times .5) = 10$

The utility of the latter assumption is higher than that of the former and, thus, according to expected utility theory, persons advocating for racial justice should assume that white Americans will not act on moral reasons.

Notice that this argument for taking on the interest convergence principle does not rest on the principle’s truth. Even if the principle is false, it is most rational to act *as if* it is true. In practical terms, this means that advocates for racial justice should frame their policy arguments in terms of the interests of middle and upper class white Americans. This pragmatic move allows racial justice advocates to avoid controversial claims about the motivations of white Americans and group motivation generally.

Moreover, merely assuming the interest convergence principle for pragmatic reasons does not require racial justice advocates to assume that black Americans are largely amoral. If interest convergence is merely a pragmatic assumption, and not a candidate for truth or falsity, it cannot entail *any* conclusion. If the assumption cannot entail any conclusion, it cannot entail the conclusion that black Americans are incapable of moral action. Thus, black Americans who advocate for policies that promote racial justice can self-consciously do so in a way that preserves their dignity and sense of morality. Indeed, on this suggestion, the moral capacities of black Americans need not be taken on as a pragmatic assumption, but can be held as *true*.

A parallel case may help to make these points clear. Assume that Jennifer, a petite, thirty-year-old woman, is walking down a dark alleyway. She sees what she deems to be a suspicious-looking man enter the alley at the opposite end. She

reaches into her purse and grips her pepper spray, preparing for a possible attack. She assumes that if the man intends to attack her, only the spray will thwart him. In this situation, Jennifer can be interpreted as assuming that only force will thwart would-be attackers. That is, she assumes that moral arguments will not work on attackers. She need not, however, take herself to be also committed to a general theory of human nature. She does not know whether this attacker, any attacker, or any person, will be moved by moral reasons. She simply assumes the opposite for pragmatic reasons. Whether the attacker can be dissuaded by morality or not, she knows that the pepper spray will be effective. In this way, she can preserve her sense of morality while staying safe.

Bell can avoid theoretical problems by taking a similar stance concerning black Americans and their struggle for racial justice. If black Americans use the interest convergence principle and racial realism as pragmatic tools that can be used to confront the evils of racial injustice, they can aim to promote racial justice while also preserving their sense of dignity and moral responsibility. Otherwise, persons sympathetic to Bell's theoretical framework face a difficult conceptual dilemma.

Additionally, if interest convergence and racial realism are understood as pragmatic tools, they need not be utilized in every context. As several political philosophers argue, democracy is, at least in part, justified by its reliance on open and honest public conversation about political morality.<sup>64</sup> Philosopher David Estlund, for example, argues that just as reliance on a jury vote in a criminal trial is justified, at least in part, because jurors are allowed to conduct open and honest conversations about the defendant's guilt, reliance on the outcome of a democratic election is justified because citizens in a democracy are permitted to have open and honest conversations about public policy.<sup>65</sup>

If this is correct, persons who advocate for racial justice have reason to abandon the interest convergence principle and racial realism when they seek to address the American public about racial justice. In a context in which racial justice advocates do not seek to gain support for a specific policy, but to address the public about the nuances of white supremacy, for instance, Bell's framework can be reasonably put to the side. In this context, persons should seek to speak the truth, in part, to further democratic values. Further, embracing Bell's framework in this context would militate against speaking the truth. If racial justice advocates assume that white Americans would remain unmoved by moral reasons and that racism is permanent, then articulating moral arguments against racist principles would be irrational.

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64. See JOHN RAWLS, *POLITICAL LIBERALISM* 212–19 (3d ed. 2005); see also Joshua Cohen, *Truth and Public Reason*, in *TRUTH AND DEMOCRACY* 217, 217–19 (Jeremy Elkins & Andrew Norris ed., 2012).

65. David Estlund, *The Truth in Political Liberalism*, in *TRUTH AND DEMOCRACY* 251, 266–71 (Jeremy Elkins & Andrew Norris ed., 2012).

Consider again the case of Jennifer, the petite, thirty-year-old woman who arms herself with pepper spray. Anticipating an attack, Jennifer reasonably assumes that all would-be attackers will not be persuaded by moral arguments. Thus, she readies her pepper spray. In another context, however, Jennifer can reasonably give up this assumption. If she intends to address a general audience about the horrors of sexual assault, she should employ moral arguments even if she assumes that some would-be attackers are in the crowd. This context demands an appeal to morality. Because her previous assumptions about would-be attackers are justified pragmatically, she can abandon those assumptions in a different context, without contradiction. Like the pragmatic justification of Jennifer's assumptions, the expected utility justification of Bell's framework allows for flexibility and for rational planning regarding the formulation and promotion of public policy.

This Article's proposal, then, relies on the assumption that expected utility theory is normative. In contexts in which persons seek to advance arguments in favor of specific policies aimed at promoting racial justice, those advocates should assume Bell's interest convergence principle. Because this assumption is justified pragmatically, it need not entail any conclusions about the moral capacities of white or black Americans. As a result, this proposal allows black Americans to preserve their sense of moral integrity while not taking on controversial assumptions about the moral capacities of white Americans.

## V. DRIVER ON THE INTEREST CONVERGENCE PRINCIPLE

On the other hand, Driver suggests that the interest convergence principle should be abandoned altogether. He provides four arguments for this conclusion. He argues that the interest convergence principle posits: 1) an oversimplified understanding of black and white interests,<sup>66</sup> 2) denies substantial racial progress,<sup>67</sup> 3) denies agency to black activists and liberal white judges,<sup>68</sup> and 4) is problematically unfalsifiable.<sup>69</sup> My pragmatic approach to Bell's theories addresses each of Driver's arguments, particularly his charge of unfalsifiability, which is the most serious and the most challenging with which to contend.

First, Driver argues that the interest convergence principle posits an oversimplified understanding of black and white interests.<sup>70</sup> Driver claims that for both black and white Americans, there is much intragroup disagreement about which policies best promote their interests.<sup>71</sup> Further, Driver contends that individuals are motivated by moral concerns as well as self-interest, and so the

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66. Driver, *supra* note 4, at 165.

67. *Id.* at 171.

68. *Id.* at 175.

69. *Id.* at 181.

70. *Id.* at 165.

71. *Id.* at 166.

interest convergence principle presents an oversimplified understanding of human motivation.<sup>72</sup>

As Feldman correctly points out, Bell acknowledges that individuals can be motivated by morality.<sup>73</sup> Bell's only contention is that *groups* are motivated by self-interest. Driver is correct that there can be intragroup disagreements about which policies best promote their interests, but this fact does not undermine interest convergence theory so long as there exists a rough notion of group interest. Black Americans, for instance, do not desire *less* congressional representation, economic power, or access to higher education. Driver bolsters his argument by pointing to black, intragroup controversies over the creation of majority-minority congressional districts, school integration, affirmative action, and the policing of black communities. Driver, however, only illustrates that groups sometimes disagree about the best means to promote their interests, not what their interests are.

Further, a pragmatic orientation toward interest convergence allows advocates for racial justice to posit plausible group interests without worrying about whether their assumptions about the interests of the white majority are *true*. The pragmatic stance justifies experimentation. If an interest convergence strategy fails to work in a particular situation, persons can reevaluate their understandings of the majority's interests. If the interest convergence stance is justified pragmatically, as opposed to empirically, then the failure of a specific interest convergence strategy need not constitute a reason to abandon the principle. However, repeated and sustained failures would constitute such a reason.

Driver's second claim against Bell is that the interest convergence principle wrongly holds that the relative status of black Americans and white Americans has remained largely unchanged throughout American history. Driver argues that as black Americans have been afforded increasing social recognition and protection by the law, the value and status of whiteness has decreased.<sup>74</sup> As Feldman correctly points out, however, the pessimistic conclusion that there has been no progress in the fight for racial justice does not stem from the interest convergence principle.<sup>75</sup> Feldman claims that the principle tells us "why and when racial justice is possible" and presupposes that racial progress is an option.<sup>76</sup> Interest convergence does not assume that the relative status of white and black Americans will remain unchanged. Rather, it suggests that any progress on racial justice issues will occur only when whites believe that such progress is in their interest.

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72. *Id.* at 169.

73. See Feldman, *supra* note 23, at 256 (citing DERRICK BELL, RACE, RACISM AND AMERICAN LAW § 1.12, at 39 (2d ed. 1980)).

74. Driver, *supra* note 4, at 174.

75. Feldman, *supra* note 23, at 255.

76. *Id.*

Racial realism, on the other hand, does seem to entail Driver's pessimistic conclusion. Bell claims that any seeming racial progress will "slide into irrelevance," as whites reinscribe patterns of racial subordination to promote their own dominance.<sup>77</sup> Indeed, Michelle Alexander confirms this thesis in *The New Jim Crow*, arguing that the modern American prison system oppresses black Americans in much the same way as did Jim Crow laws.<sup>78</sup> Racial realism has a moral upshot, but it is also deeply pessimistic about the prospects for racial progress.

While racial realism seems to contradict Driver's claim that the value of whiteness has diminished, it does not. Read strictly, the thesis only sets forth that black Americans will not attain *full* equality.<sup>79</sup> Relative racial progress is consistent with racial inequality. Alexander, for instance, does not need to conclude that the livelihood of black Americans has not improved since the end of Jim Crow segregation. She simply claims that the same patterns of subordination have reemerged in the context of American prisons. Consequently, Driver's second criticism of Bell is inconsistent with Bell's thesis.

Driver's third criticism of the interest convergence principle involves the concept of agency. Driver claims that interest convergence problematically denies agency to black activists and progressive white judges.<sup>80</sup> Driver believes that much racial progress resulted from actions of individuals dedicated to improving the lives of black Americans. But he claims that if interest convergence is true, the actions of individual racial justice heroes must be viewed as either irrelevant, in the case of black activists, or motivated by self-interest, in the case of progressive white judges.<sup>81</sup> In the former case, Driver contends that interest convergence holds that black activists will only be efficacious when their demands align with white interests.<sup>82</sup> In the latter case, Driver argues that interest convergence holds that progressive white judges are unwitting tools of white supremacy.<sup>83</sup>

Driver's criticism is based on a misreading of Bell. The interest convergence principle applies to groups and not individuals. Bell does not need to hold that black individuals never effectively advocate for racial justice. In fact, he holds the exact opposite position, arguing that black activists should actively seek out areas of interest convergence and creatively advocate for change.<sup>84</sup> Further, since interest convergence is not a principle that applies to individuals, Bell does not need to conclude that progressive judges are not motivated by

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77. Bell, *Racial Realism*, *supra* note 9, at 373.

78. Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (2010).

79. Driver, *supra* note 4, at 164.

80. *Id.* at 175.

81. *Id.* at 177.

82. *Id.* at 176–79.

83. *Id.* at 179–81.

84. See Bell, Brown, *supra* note 5.

morality. Again, he instead holds the exact opposite position, contending that for some whites the recognition of racial injustice is sufficient motivation.<sup>85</sup>

Driver's fourth, and most powerful, criticism of interest convergence is that the principle appears problematically unfalsifiable. Driver brings out this point by discussing Bell's concept of "contradiction-closing cases."<sup>86</sup> A contradiction-closing case is one that appears to remedy a racial injustice, but actually advances white interests by promoting the myth that America is racially just. Bell contends that such cases are largely symbolic, but strategically serve to quell black unrest. Bell uses this concept to accommodate cases that would seemingly undermine the interest convergence principle. Driver worries that Bell's use of contradiction-closing cases makes it that no amount of evidence could undermine the principle.<sup>87</sup> He also accuses Bell of ignoring cases that would similarly undercut the principle. As a result, Driver believes that the interest convergence principle should be rejected because it is unfalsifiable, a concept first popularized by philosopher of science Karl Popper who used the theory to demarcate scientific theories from unscientific ones.<sup>88</sup> Popper articulated that scientific theories are ones that can be falsified by empirical evidence, whereas unscientific theories are impervious to critique because they have no empirical upshots.<sup>89</sup>

Driver does not necessarily argue that Bell's principle should be rejected because it is unscientific. Instead, Driver appears to argue that Bell's principle is problematic because while it purports to characterize and predict empirical phenomena, such as legislation and judicial decisions, it is not responsive to those phenomena. Essentially, Bell claims that his theory is empirical, but Driver claims that the principle functions like a conceptual truth. Similarly, for example, the principle that all events have a cause may appear to be empirical, but it functions like a conceptual truth in empirical science. Scientists presuppose that all events have a cause prior to conducting experiments and forming theories. This presupposition is not problematic because it is often explicitly conceptual, and thus non-empirical. Turning to Bell, Driver contends that interest convergence is flawed because Bell posits the principle as empirical—and thus responsive to evidence—but actually treats the principle like a conceptual truth.

Feldman argues that Driver's charge against Bell is mistaken because it rests on a confusion between interest convergence and racial realism.<sup>90</sup> Feldman believes that interest convergence is a backward-looking principle, while racial realism is forward-looking.<sup>91</sup> As a historical thesis, Feldman claims that interest

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85. *Id.* at 525.

86. Driver, *supra* note 4, at 182.

87. *Id.* at 184–85.

88. See generally KARL POPPER, THE LOGIC OF SCIENTIFIC DISCOVERY 57–61 (Routledge 2002) (1935).

89. *Id.* at 57–61.

90. Feldman, *supra* note 23, at 249.

91. See *supra* Parts II–III.

convergence need not be falsifiable because it does not predict future outcomes, but explains past events.<sup>92</sup> For Feldman, because the conditions of historical events cannot be repeated, a historical thesis does not need to be falsifiable.

Feldman's critique of Driver is problematic for two reasons. First, the interest convergence principle does make predictions about the future and would be lacking if it did not. Second, even if the principle did not make predictions about the future, it should be genuinely responsive to new and seemingly contradictory historical evidence. Driver claims that the contradiction-closing cases doctrine entails that Bell's interest convergence principle could not be revised in light of new evidence. Ultimately, Feldman fails to address this critique in an adequate manner.

Driver's fourth critique presents a serious problem for Bell's framework, but also provides a reason to accept this Article's revision of that framework. If interest convergence is taken to be a pragmatic presupposition that is justified in a limited number of contexts, it cannot be criticized for being unfalsifiable. Under my proposal, interest convergence does not purport to be *true*. When faced with the threat of institutional racism, black activists should conduct their activism *under the assumption* that the interest convergence principle is true. Indeed, many cases and policies speak against the truth of the assumption, but it is rational to persist with the assumption even in the presence of contrary evidence. We do not know whether groups are capable of acting on morality, but we do know that they act on self-interest.

The interest convergence assumption should only be abandoned when it ceases to garner results. This is a *type* of falsifiability—pragmatic falsifiability. If activists determine that assuming interest convergence is unhelpful either because policymakers are aware of the assumption or because groups are actually motivated by moral reasons, the assumption can and should be dropped. Facts on the ground can undermine the pragmatic version of interest convergence, and thus this Article's version of the principle not unresponsive to empirical evidence.

This proposal is much like Oliver Wendell Holmes's "bad man" theory. Holmes argues that if we are to understand the content of the law, we must view the law from the perspective of the bad man.<sup>93</sup> The bad man is a fictive person who is motivated solely by self-interest and seeks to exploit the letter of legal rules rather than abide by the spirit of the law.<sup>94</sup> Holmes argues that when we view the law from the perspective of the bad man, we see exactly what the law allows and what it prohibits. In making this claim, Holmes does not put forth a theory of human nature. His pragmatism allows him to be indifferent to the

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92. *Id.* at 257.

93. OLIVER WENDELL HOLMES, JR., *THE PATH OF THE LAW* 6–7 (Floating Press 2009) (1897).

94. *Id.*



question of human nature, while providing a coherent theory of legal content. In the same way, a pragmatic proposal for Bell allows activists to fight rationally for racial justice without being tied to controversial claims about the nature of group action.

## VI. A CHALLENGE

I claim that, for pragmatic reasons, the interest convergence principle should be presupposed in certain contexts. The version of the principle that I advocate also entails that while black Americans are capable of robust moral motivation, white Americans will not act on moral reasons. Given these two claims, it is natural to ask whether the proposal also justifies a pragmatic version of anti-black racism. For instance, if black activists can justify assuming a motivational asymmetry between black Americans and white Americans, it seems to follow that white racists may justify assuming an asymmetry between black Americans and white Americans in order to advance their agenda. Here, the white racist could acknowledge the contradictions of anti-black racism,<sup>95</sup> yet treat anti-black racism as a pragmatic assumption that advances white supremacy. Thus, my proposal must respond to the following question: If pragmatism is good for Derrick Bell and civil rights activists, why is it not also good for David Duke and the Ku Klux Klan?

This objection, while seemingly powerful, is very weak. In this work, I have justifiably presupposed both that there are facts about racial justice and that we have access to at least some of those facts. The presumption that no racially discriminatory policies are just is built into the modern U.S. Constitution.<sup>96</sup> And most social theorists and biologists agree that race is a social construct.<sup>97</sup> Pragmatism is justified with respect to Bell's framework because Bell and advocates of racial justice have an objectively worthwhile aim. My proposal allows black activists to more rationally pursue the end of racial justice. But the pragmatic shift would not be justified in certain instances, like for example, if black activists sought to suppress the vote of women.

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95. For instance, consider the assumption that all persons are created equal, coupled with the existence of racially discriminatory laws, or the belief that blacks are subhuman, coupled with the desire to have sexual relations with them.

96. See U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

97. See, e.g., Anthony Appiah, *The Uncompleted Argument: Du Bois and the Illusion of Race*, in "RACE," WRITING, AND DIFFERENCE 23 (Henry Louis Gates, Jr., ed. 1986) ("We have moved, then, away from the 'scientific'—that is, biological and anthropological—conception of race to a sociohistorical notion."); MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES* 106 (3d ed. 2015) (discussing race as a social construction and tracing racial formation throughout American history); Michael Yudell et al., *Taking Race Out of Human Genetics*, 351 *SCI.* 564, 564–65 (2016) (arguing that use of biological conceptions of race in human genetic research is harmful because race is a social concept).

If we start with the presupposition that there are facts about group motivation and facts about racial justice—the former unknown and the latter largely known—the white racist is barred from assuming racist beliefs in order to promote racist policies. I argue that the ultimate ends that Derrick Bell sought to promote justify the pragmatic shift. The dilemma facing those who wish to adopt Bell’s framework is troubling, and I hope, with this proposal, to strike a balance between grasping the truth about white supremacy in America and combating racism on the ground.