Against Resolution: Dialogue, Demonstration, And Dispute Resolution

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I. INTRODUCTION

Protests urging fundamental rethinking of police practices took place throughout the United States in the summer of 2020. The deaths of George Floyd at the hands of police in Minneapolis and of Breonna Taylor in Louisville were the sparks for protests, building upon the steady work of activists within the Movement for Black Lives and related movements over the past several years.[1] These protests operate on two distinct registers: they demand recognition of the lives of the *specific individuals* who have been killed by insisting that we "say their names," and they simultaneously highlight the *structural* nature of racism that puts *every* Black body in our society at risk. The cover image of the June 22, 2020 issue of *The New Yorker* captures this duality well.[2]

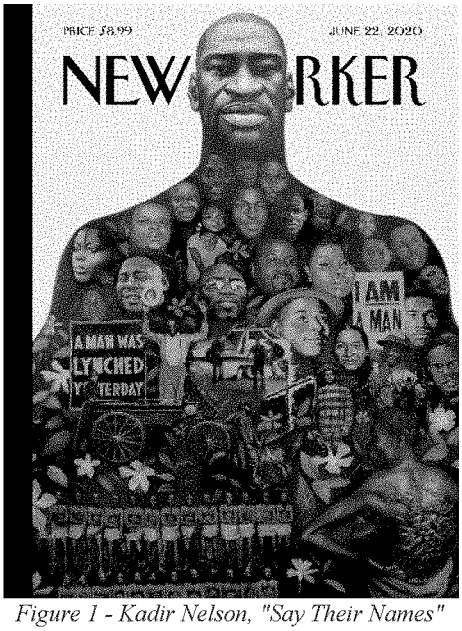

Figure 1 - Kadir Nelson, "Say Their Names"

These two dimensions of the movement—drawing attention to individual killings within specific communities and to systemic racism throughout the country dating back centuries—prompt different kinds of

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[1] *See generally* Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405 (2018).

[2] *Kadir Nelson's "Say Their Names,"* THE NEW YORKER (June 14, 2020), https://www.newyorker.com/culture/cover-story/cover-story-2020-06-22.

responses: trials,[3] investigations,[4] and community dialogues[5] in the first instance, and mass mobilization,[6] public commemoration,[7] and legislation[8] in the second. Given the practical limitations of trials for bringing justice to victims of racial violence, alternative dispute resolution (ADR) could have much to offer in light of its goals of permitting reconciliation and healing and of facilitating negotiated resolutions across deep divisions.[9] But critical race theorists have long asked whether ADR's particularization of discrete disputes neutralizes possibilities for structural change.[10] How can the advantages of ADR—such as its flexibility and informality—responsibly be brought to bear on disputes that implicate deep questions of structural racism?

Both ADR and critical race theory in the United States were born in the late 1970s and early 1980s out of dissatisfaction with the practical ability of the courts to advance justice in America.[11] The two schools of thought have

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[3] *See, e.g.*, Margalynne J. Armstrong, *Are We Nearing the End of Impunity for Taking Black Lives*, 56 SANTA CLARA L. REV. 721, 758–60 (2016).

[4] *See, e.g.*, U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEP'T (2015).

[5] On the dialogues held in the aftermath of the killing of Philando Castile, see *Thanks for Listening: Rebuilding After Crisis: Community Conversations in Falcon Heights, Minnesota*, HARV. NEGOT. & MEDIATION CLINICAL PROGRAM (July 2, 2019) (downloaded from http://hnmcp.law.harvard.edu/hnmcp/podcast/thanks-for-listening-ep3-rebuilding-after-crisis-community-conversations-in-falcon-heights-minnesota/).

[6] *See, e.g.*, Akbar, *supra* note 1.

[7] The reports and memorials produced by the Equal Justice Initiative are exemplary. *See Lynching in America: Confronting the Legacy of Racial Terror*, EQUAL JUSTICE INITIATIVE (2015), https://lynchinginamerica.eji.org/report/; *Reconstruction in America: Racial Violence after the Civil War, 1865-1876*, EQUAL JUSTICE INITIATIVE (2020), https://eji.org/report/reconstruction-in-america/; *The National Memorial for Peace and Justice*, EQUAL JUSTICE INITIATIVE, https://museumandmemorial.eji.org/memorial (last visited Nov. 6, 2020).

[8] *See, e.g.*, Catie Edmondson, *Democrats Unveil Sweeping Bill Targeting Police Misconduct and Racial Bias*, N. Y. TIMES (June 8, 2020), https://www.nytimes.com/2020/06/08/us/politics/democrats-police-misconduct-bill-protests.html.

[9] Restorative justice, in particular, has attracted significant attention. *See, e.g.*, Lode Walgrave, *Investigating the Potentials of Restorative Justice Practice*, 36 WASH. U. J.L. & POL'Y 91, 94 (2011). The principles of negotiation theory have also been applied to community economic development as a means of advancing racial justice. *See, e.g.*, Patience A. Crowder, *(Sub)Urban Poverty and Regional Interest Convergence*, 98 MARQ. L. REV. 763 (2014) [hereinafter Crowder, *Regional Interest Convergence*].

[10] *See* Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359 (1985).

[11] In claiming that contemporary ADR dates to the late 1970s and early 1980s, I refer to the "Big Bang" moment of Frank Sander's 1976 address on the varieties of dispute

evolved in different directions from this shared point of origin. Critical race theory's response to the shortcomings of the law and the legal system was to insist that deep social transformation was a necessary precondition of using the law to advance justice,[12] while ADR's response to the shortcomings of the law and the legal system was to find opportunities to bypass the legal system altogether, all while acknowledging the law's controlling power through the mantra that dispute resolution occurs "in the shadow of the law."[13] In other words (and painting with broad strokes), critical race theory has engaged in a deep critique of legal thought while ADR has designed processes to achieve concrete resolutions of disputes efficiently through informal or private means. The two approaches to legal thought simply seem to operate in different registers. Where these approaches have intersected, critical race theory historically has challenged ADR's supposed political quietude while continuing to defend the possibility of using formal legal processes as modalities for advancing justice.[14] One of the most influential critiques of ADR emerged from Richard Delgado's work in the critical race theory

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processing. Frank E.A. Sander, *Varieties of Dispute Processing*, *in* ADDRESSES DELIVERED AT THE NATIONAL CONFERENCE ON THE CAUSES OF POPULAR DISSATISFACTION WITH THE ADMINISTRATION OF JUSTICE 70 F.R.D. 79, 111 (1976) (describing alternatives to adjudication for resolving disputes). *See also* Michael L. Moffitt, *Before the Big Bang: The Making of an ADR Pioneer*, 22 NEGOT. J. 437 (2006). Other significant works appeared in the early 1980s. *See* ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (Bruce Patton ed., 2d ed. 1981); HOWARD RAIFFA, THE ART AND SCIENCE OF NEGOTIATION (1982). In claiming that critical race theory dates to the same years, I refer to Derrick Bell's seminal works. *See, e.g.*, DERRICK A. BELL, JR., RACE, RACISM AND AMERICAN LAW (2d. ed. 1980); Derrick A. Bell, Jr., *Racial Remediation: An Historical Perspective on Current Conditions*, 52 NOTRE DAME LAW. 5 (1976) [hereinafter Bell, *Racial Remediation*]; Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980) [hereinafter Bell, *Dilemma*]. For more on the origins of critical race theory as an organized academic movement, see Kimberlé Williams Crenshaw, *Twenty Years of Critical Race Theory: Looking Back to Move Forward*, 43 CONN. L. REV. 1253 (2011).

[12] *See* Kimberlé Williams Crenshaw, *A Black Feminist Critique of Antidiscrimination Law and Politics*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 195, 214 n.7 (David Kairys ed., Revised Ed. 1990) (explaining that "[t]he normative stance of critical race theory is that massive social transformation is a necessary precondition of racial justice.").

[13] *See* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1980).

[14] *See, e.g.*, Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668 (1986); Eric K. Yamamoto, *Efficiency's Threat to the Value of Accessible Courts for Minorities*, 25 HARV. C.R.-C.L. L. REV. 341 (1990). Feminist theory provided a parallel source of critique. *See* Lisa G. Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*, 7 HARV. WOMEN'S L.J. 57 (1984); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991).

tradition, arguing that the informal nature of ADR permitted prejudice to be expressed unchecked and permitted the values of dominant groups to drive the outcomes of dispute resolution.[15] The heart of this critique was that the private functioning of ADR permitted it to disengage from the public values that gave meaning to principles of equality in adjudication.[16] Delgado called for the American legal system to advance its highest values, defending courtroom symbols such as the flag and judicial robes as embodying principles of equality and justice, as against critics on the left who argued that such symbolism was a mystification of the operations of state power.[17] Legal scholars argued that the great victories of the Civil Rights Movement happened in the courts, through appeals to deep principles and shared values, and on the basis of solidarity—not by cutting deals.[18] Informal mechanisms might have been able to resolve individual disputes quickly and efficiently, but only the operation of the law could result in systemic and durable change.[19] That, at least, was the story told in the 1980s, in the early years of both critical race theory and ADR.

The landscape looks different today. It is far from clear in our polarized times whether there is a coherent set of shared values at the heart of our society that would constitute an "American creed."[20] Nor is it clear that

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[15] *See* Delgado et al., *supra* note 10.

[16] *Id.* at 1383–89.

[17] *Compare id. with* Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. L. & SOC. CHANGE 369, 399 (1982).

[18] *See, e.g.*, Randall Kennedy, *Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott*, 98 YALE L.J. 999 (1989).

[19] The title of this Article is indebted to the classic statement by Owen M. Fiss. *See* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

[20] *See* Delgado et al., *supra* note 10, at 1383–84. For more on this argument, see *infra* notes 92–93 and accompanying text. In the face of contemporary political polarization, Nancy Rogers has sought to recover a shared "American spirit" at the heart of our public life. Nancy H. Rogers, *One Idea for Ameliorating Polarization: Reviving Conversations About an American Spirit*, 2018 J. DISP. RESOL. 27, 27–28 (2018). These appeals to a shared set of values at the heart of American life attempt to revive the legal process theories that critical theory rejected. *See* Andrew Mamo, *Three Ways of Looking at Dispute Resolution*, 54 WAKE FOREST L. REV. 1399, 1448–53 (2019). *See also* Aziz Rana & Jedediah Britton-Purdy, *We Need an Insurgent Mass Movement*, DISSENT MAGAZINE (Winter 2020), https://www.dissentmagazine.org/article/we-need-an-insurgent-mass-movement. (Aziz Rana has also questioned the politics of relying on an "American creed" or "American spirit": "Such arguments are built in part on a false image drawn from the Cold War, in which change supposedly came about because all Americans magically agreed on the goodness of the creed. This never happened. Cold War elites and their progeny projected their own consensus politics onto a public that was always far more fractured and conflict-ridden than the view from Washington suggested.")

the legal system would hold a privileged role in giving life to any such core American values; in our present moment of populist movements, descriptions of an "American creed" or "American spirit" are more likely to be understood as manifestations of a *Volksgeist* rather than as appeals to state institutions.[21] Reflecting this lack of faith in the exceptionalism of the judiciary, Richard Delgado has recently questioned whether the courts today provide the same kind of protections to those on the margins that they did in an earlier age.[22] This skepticism toward the privileged role of the courts is accompanied today by renewed interest in using the methodologies of alternative dispute resolution to address systemic injustices.[23]

The contemporary efforts to use the tools of alternative dispute resolution—including negotiation, mediation, arbitration, and restorative justice—to advance racial justice often do so by invoking one of the central pillars of critical race theory: the interest convergence thesis, formulated by Professor Derrick Bell in the late 1970s and early 1980s in order to explain the fitful history of civil rights in America.[24] The thesis argued that legal processes advanced the interests of African Americans only to the extent that the interests of Whites[25] were also being advanced, and that when the interests of White and Black Americans diverged, any new outcome would advantage White Americans to the detriment of Blacks.[26]

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[21] We can see some of this sentiment in contemporary efforts at using dialogue to uncover latent shared values and community wisdom that transcend immediate political differences. *See, e.g.*, Ayesha Cotton et al., *Identifying a Community Spirit* (2019), https://moritzlaw.osu.edu/dividedcommunityproject/wp-content/uploads/sites/101/2019/ 04/Community-Spirit-Fiinal.pdf.

[22] Richard Delgado, *The Unbearable Lightness of Alternative Dispute Resolution: Critical Thoughts on Fairness and Formality*, 70 SMU L. REV. 611, 635–36 (2017). The concerns raised in Delgado's article assume even greater significance in light of the centrality of appointments to the federal judiciary for contemporary politics. *See, e.g.*, Colby Itkowitz, *1 in Every 4 Circuit Court Judges Is Now a Trump Appointee*, WASH. POST (Dec. 21, 2019), https://www.washingtonpost.com/politics/one-in-every-four-circuit-court-judges-is-now-a-trump-appointee/2019/12/21/d6fa1e98-2336-11ea-bed5-880264cc91a9_story.html.

[23] *See* Crowder, *supra* note 9.

[24] For more on contemporary efforts, see *infra* Section II.D.

[25] Throughout this Article, "White" and "Black" will be capitalized except when quoting source material that uses lower-case spellings. At the time of publication, capitalizing "White" is less common than capitalizing "Black," but I am persuaded by Nell Irvin Painter's argument that the use of lower-case "white" alongside a capitalized "Black" perpetuates the notion that "white" is *not* a racial category or a social identity while "Black" is. Nell Irvin Painter, *Why 'White' should be capitalized, too*, WASHINGTON POST (July 22, 2020), https://www.washingtonpost.com/opinions/2020/07/22/why-white-should-be-capitalized/.

[26] Bell, *Racial Remediation*, *supra* note 11, at 22–23, and Bell, *Dilemma*, *supra* note 11, at 523. For a more complete explanation, see *infra* text accompanying notes 41–89.

We err in reading interest convergence as one single argument—its parameters evolved in Bell's writing in dialogue with the changing legal landscape. Interest convergence grew from an explanatory theory into one that was prescriptive: Bell's later scholarship argued that the work of advancing racial justice in a racist society would consist of seizing tactical opportunities to align the interests of White and Black groups—a project he called "forging fortuity."[27]

Contemporary scholars have built upon this approach, taking interest convergence as a prescription for resolving disputes about racial justice on the basis of satisfying the interests of parties.[28] And in order to identify outcomes that satisfy the interests of the parties, scholars have recognized that the practice of interest-based dispute resolution offers a powerful alternative to litigation that is specifically designed to identify the interests of the parties and generate options for satisfying them.[29]

But, in spite of this seeming fit between ends and means, the fundamental tension between the projects of critical race theory and ADR remains; ADR originated as a pragmatic response to certain shortcomings of adjudication while critical race theory called for deep social transformation. In our present moment, approximately forty years after the creation of these approaches to studying the law in the late 1970s, that tension retains its full significance. The persistence of White supremacy as a powerful strand within American thought remains unquestionable[30] and the work of deep social transformation remains necessary.[31] And amidst concerns with the polarization of American society, approaches drawn from the ADR tradition emphasize non-adversarial engagement with those with whom we disagree.[32]

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[27] Derrick Bell, Brown v. Board of Education*: Reliving and Learning from Our Racial History*, 66 U. PITT. L. REV. 21, 31 (2004) [hereinafter Bell, *Racial History*]. *See infra* Section II.C.

[28] *See, e.g.*, Michael Z. Green, *Addressing Race Discrimination Under Title VII After Forty Years: The Promise of ADR as Interest-Convergence*, 48 HOW. L.J. 937 (2005) [hereinafter Green, *Addressing Race*].

[29] *See, e.g.*, Crowder, *Regional Interest Convergence*, *supra* note 9, at 803–05; Patience A. Crowder, *Interest Convergence as Transaction?*, 75 U. PITT. L. REV. 693, 697 (2014) [hereinafter Crowder, *Transaction*]. The key text of interest-based negotiation and dispute resolution remains. *Getting to Yes: Negotiating Agreement Without Giving In*. FISHER & URY, *supra* note 11.

[30] *See, e.g.*, Henry A. Giroux, *White Nationalism, Armed Culture and State Violence in the Age of Donald Trump*, 43 PHIL. & SOC. CRITICISM 887 (2017).

[31] *See, e.g.*, Devon W. Carbado, *States of Continuity or State of Exception? Race, Law and Politics in the Age of Trump*, 34 CONST. COMMENT. 1, 3–5 (2019).

[32] *See, e.g.*, Carrie Menkel-Meadow, *Why We Can't "Just All Get Along": Dysfunction in the Polity and Conflict Resolution and What We Might Do About It*, 2018 J. DISP. RESOL. 5, 9 (2018).

In this moment, as protest movements across the country advocate fundamental change, the fit between the ends of racial justice and the means of ADR seems harder to discern.

This Article suggests that there remains, indeed, a fit between the work of critical race theory and ADR—and that it is *not* to be found in the application of the methods of interest-based dispute resolution to forge interest convergences. Instead, I argue that the contemporary prescriptive program of forging interest convergences misses the *critical* dimension of Bell's work: the conventional accounts of interest convergence miss Bell's deeper jurisprudential argument that the legal principle of equality in American law remained subordinate to the tacit belief among Whites that their superior social position would be maintained.[33] Engaging that element of Bell's work reveals that interest convergences remain fragile in the face of the unspoken assumptions that inform standards of fairness and that skew them to the detriment of people of color and other marginalized groups. Instead of seeking to resolve problems through value creation and relying on party self-interest for enforcement, as the interest-based tradition of ADR would suggest, we can instead confront those deeper differences by drawing upon the lessons of a countercurrent within the field of ADR that emphasizes the value of dialogical encounters[34] rather than the satisfaction of interests. Efforts undertaken in that mode provide opportunities to probe assumptions through the sharing of stories and experiences. Rather than utilizing interest-based dispute resolution as a means to forge interest convergences without challenging implicit normative commitments, informal methods that are informed by critical theories permit us to engage in normative argument. Viewed through a lens of political economy, this transition is about bringing the *political* back into an ADR tradition that has foundations in neoclassical economic theory.[35]

Section II of this Article situates Bell's interest convergence analysis within its jurisprudential context, as a challenge to mid-century legal process theory. This framing shows that interest convergence analysis was fundamentally about the relationship between the law's normative aspirations and the reality of the law's toleration of persistent inequality. This mode of analysis appealed to the interests of the parties out of necessity rather than out of a commitment to principles of efficiency. Section III explains that interest-based dispute resolution theory grew out of commitments to principles of

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[33] *See infra* Section II.A.2.

[34] *See* Andrew W. McThenia & Thomas L. Shaffer, *For Reconciliation*, 94 YALE L.J. 1660 (1985). *See also* Jay Rothman, *Reflexive Dialogue as Transformation*, 13 MEDIATION Q. 345 (1996).

[35] For ways in which a political economy perspective differs from a traditional law and economics approach, see Jedediah Britton-Purdy et al., *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784 (2020).

efficiency. It too challenged the presumptions of mid-century legal process theory, but did so in order to elevate contextual, privatized resolution of disputes over appeals to general normative principles. For critical race theorists, this move proved deeply problematic. Section IV proposes a different vision of alternative dispute resolution as a way to address disputes concerning values and tacit standards of fairness. It draws upon critical theories of law to problematize existing principles of dispute resolution. Protests and demonstrations assume a major role in this vision of dispute resolution as ways of amplifying voices from the margins while generating an impetus to engage in meaningful dialogue.

II. INTEREST CONVERGENCE AS CRITIQUE OF MID-CENTURY LEGAL THEORY

The theoretical foundations of Derrick Bell's interest convergence thesis shed light on the gap between the principles at the heart of interest-based dispute resolution and the critiques raised by critical race theory. The field of modern dispute resolution began as a response to the legal process theory of the mid-20th century.[36] That theoretical grounding permitted informal methods of dispute resolution to advance social values in ways that were consistent with the law, even if those methods did not engage the public reasoning that adjudication was meant to utilize.[37] But critical race theory challenged the link between social values and the law, explaining the fundamental role of race and identity in defining what did or did not count as those basic social values. The interest convergence thesis—and critical race theory more generally—particularized the legal subject by foregrounding identity, showing that legal principles of neutrality assumed whiteness.[38] Interest convergence analysis started from the recognition of liberalism's failures to achieve genuine racial equality.[39] Bell's search for the "neutral principles" of legal analysis that guided the resolution of desegregation cases led him to argue that progress toward equality would remain severely limited due to White refusal to cede

[36] *See* Mamo, *supra* note 20, at 1411–19.

[37] *Id.* at 1415.

[38] By the end of the 1980s, this was further complicated by the recognition by Black women that neither feminism nor race theories could easily recognize their perspectives. *See, e.g.*, Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 141–50 (1989); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990). In spite of ADR's close engagement with feminist theories, those insights simply have not translated into a similarly robust consideration of race.

[39] *Id.*

racial privileges.[40] A principal aim of this Article is to explain how the interest convergence thesis of critical race theory functions as a major critique of legal process and dispute resolution.

A. *Interest Convergence as a Theory of Objectivity and Difference*

The interest convergence thesis is best known for Derrick Bell's argument that the attainment of rights for African Americans is (and has long been) conditional upon the convergence of the interests of Black and White Americans[41]—what I will refer to as its "descriptive argument." Most scholarship concerning the interest convergence thesis has focused on confirming[42] or challenging[43] the validity of this descriptive argument. In many respects this dimension of Bell's argument updated a traditional class-interest analysis by substituting race for class.[44] But Bell says more. The more significant (and underappreciated) element of the interest convergence thesis is what I will refer to as its "critical argument"—the argument that the subordination of Black rights to White interests is so deeply ingrained in American social and legal thought as to constitute a "neutral principle" of legal analysis.[45] The critical argument extends the descriptive claim of *what is* to further explain what American legal thought believes racial remedies *ought to be*. In doing so, it offers an ironic application of the legal process theory's principle that law is directed to given normative ends.[46] Furthermore, it

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[40] *See infra* Section II.A.2.

[41] Bell, *Racial Remediation*, *supra* note 11, at 22–23; and Bell, *Dilemma*, *supra* note 11, at 523.

[42] *See, e.g.*, Richard Delgado, *Explaining the Rise and Fall of African American Fortunes—Interest Convergence and Civil Rights Gains*, 37 HARV. C.R.-C.L. L. REV. 369, 371 (2002).

[43] *See* Justin Driver, *Rethinking the Interest-Convergence Thesis*, 105 NW. U. L. REV. 149 (2011); *see also* Tomiko Brown-Nagin, *Race as Identity Caricature: A Local Legal History Lesson in the Salience of Intraracial Conflict*, 151 U. PA. L. REV. 1913, 1914 (2003).

[44] For a summary of the Beardian interests-based analysis as applied to jurisprudence, see G. Edward White, *Charles Beard & Progressive Legal Historiography*, 29 CONST. COMMENT. 349, 354–55 (2014). For a parallel between Beard's and Bell's forms of analysis, see Gary Peller, *History, Identity, and Alienation*, 43 CONN. L. REV. 1479, 1487, 1494 (2011) (arguing that "[r]acialist theories seek to depict various exercises of power in society as explicable in terms of a straightforward understanding of racial interests, much like a form of 'vulgar Marxism' is traditionally accused of reducing complex social relations to class interests."). For the reliance of critical race theory on materialist analyses, see Richard Delgado, *Crossroads and Blind Alleys: A Critical Examination of Recent Writing About Race*, 82 TEX. L. REV. 121, 123–24 (2003).

[45] For more on the significance of "neutral principles," see Gary Peller, *Neutral Principles in the 1950's*, 21 U. MICH. J.L. REFORM 561 (1988).

[46] Bell's description of the principle of racial hierarchy as "retain[ing] merit in the

explains why programs meant to improve the lot of African Americans have tended to impose significant costs as well.[47]

1. *INTEREST CONVERGENCE'S DESCRIPTIVE ARGUMENT*

Derrick Bell summarized three centuries of history—including the abolition of slavery, the interpretation of the Reconstruction amendments, and the 20th century civil rights movement—in a maxim: "white self-interest will prevail over black rights."[48] In a series of analyses made in the late 1970s, he argued that progress toward securing Black rights depended on satisfying the interests of Whites, that threats to White interests would be resolved at the expense of Black interests, and that the costs of programs intended to advance racial justice would be borne by Blacks even as benefits would accrue disproportionately to Whites.[49]

According to Bell, progress in securing legal rights and political representation for African Americans "resulted from policies which were intended and had the effect of serving the interests and convenience of whites rather than remedying racial injustices against blacks."[50] For example, Bell argued, the key factors contributing to the *Brown v. Board of Education*[51] decision ending segregation were the desire to strengthen American standing abroad by combatting criticism of America's treatment of minorities,[52] the interest in distinguishing the American legal order from that of Nazi Germany by vindicating precepts of equality and freedom,[53] and the interest in

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positivistic sphere" and nevertheless exerting normative force mirrored a key move of the legal process school. Bell, *Dilemma*, *supra* note 11, at 523. *See also* LON L. FULLER, THE LAW IN QUEST OF ITSELF 64 (1940) (arguing that "in the moving world of law, the *is* and the *ought* are inseparably mixed.").

[47] Derrick A. Bell, Jr., Bakke, *Minority Admissions, and the Usual Price of Racial Remedies*, 67 CALIF. L. REV. 3, 12 (1979) [hereinafter Bell, Bakke].

[48] Bell, *Racial Remediation*, *supra* note 11, at 6–11.

[49] *Id.*

[50] *Id.* at 6.

[51] Brown v. Board of Educ., 347 U.S. 483 (1954).

[52] Bell, *Racial Remediation*, *supra* note 11, at 12. This theory was later expanded upon in MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY (2000). *But see* Curtis A. Bradley, *Foreign Affairs and Domestic Reform*, 87 VA. L. REV. 1475 (2001) (questioning the extent of the impact of foreign affairs on domestic civil rights reform).

[53] Bell, *Racial Remediation*, *supra* note 11, at 12. On the parallel with Nazi Germany, Bell quoted Chief Justice Warren's 1972 remarks at Notre Dame: "The segregation and extermination of non-Aryans in Hitler's Germany were shocking for Americans, but they also served as a troublesome analogy. While proclaiming themselves inexorably opposed to Hitler's practices, many Americans were tolerating the segregation and humiliation of

advancing the industrialization and modernization of the economy of the South.[54] In Bell's telling, the civil rights legislation of the mid-1960s owed less to legislators' ideas of justice than to White fears of disorder and racial conflict.[55]

Recognizing that Black and White interests were not monolithic, but were further fragmented along class lines, Bell argued that conflicts among Whites were often settled by further disadvantaging African Americans, such as by creating the Jim Crow order to protect the social status of poor Whites.[56] He also argued that the interests of elite Black lawyers were not necessarily aligned with the interests of the publics they served. Integration could mean something very different to Black professionals, who could easily see themselves as part of an integrated community with their White counterparts, than it did to lower-class Blacks, for whom formal integration would fail to bring about meaningful differences in their daily interactions with Whites.[57] On the basis of local opposition within the Black community to viewing desegregation as the only meaningful remedy for inadequate educational opportunities, Bell asked the controversial question of why the leadership of the civil rights community focused on desegregation to the exclusion of increasing funding for education within segregated systems—to press for the "equal" in "separate but equal."[58] His answer was principally that middle-class and progressive donors to the NAACP identified desegregation as their desired end goal, and that elite lawyers pursued the legal strategies that furthered their interests rather than those of the community.[59]

This style of critical analysis explained that principles of formal equality could, in practice, legitimate new forms of racial discrimination "when interests diverge and the dominant group's desire for integration

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nonwhites within their own borders. The contradiction between the egalitarian rhetoric employed against the Nazis and the presence of racial segregation in America was a painful one." Earl Warren, *Notre Dame Law School Civil Rights Lectures*, 48 NOTRE DAME LAW. 14, 41 (1972). Recent scholarship shows that this was more than a mere "troublesome analogy"—American race laws provided inspiration for the Nazis (and sometimes were seen as too extreme for Germany). *See* JAMES Q. WHITMAN, HITLER'S AMERICAN MODEL: THE UNITED STATES AND THE MAKING OF NAZI RACE LAW (2017).

[54] Bell, *Racial Remediation*, *supra* note 11, at 12; and Bell, *Dilemma*, *supra* note 11, at 524–25.

[55] Bell, *Racial Remediation*, *supra* note 11, at 13.

[56] *Id.* at 15.

[57] Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 476–77 (1976) [hereinafter Bell, *Two Masters*].

[58] *Id.* at 488; *but see* Angela Onwuachi-Willig, *For Whom Does the Bell Toll: The Bell Tolls for* Brown*?*, 103 MICH. L. REV. 1507, 1535 (2005).

[59] *See* Bell, *Two Masters*, *supra* note 57, at 489–93.

supersedes the victim group's demand for relief."[60] Keeping integration subject to informal quotas meant that integration would not unduly threaten White interests, while simultaneously rationalizing the denial of assistance to African Americans as furthering the general goal of integration.[61]

The costs and benefits of programs were determined from the perspective of the dominant groups, reflecting their lived experiences.[62] In the context of the 1978 *Regents of the University of California v. Bakke*[63] decision, Bell noted that debates regarding affirmative action had not been framed in terms of defining appropriate remedies for the harms caused by centuries of slavery, segregation, and discrimination; rather they had been framed in terms of the costs to be borne by Whites for remedying those harms.[64] The criteria used to assess the costs of programs used metrics that were established by White stakeholders, drawing a clear connection between the terms on which the issue was debated and the values and identities of the participants. Accordingly, programs intended to be remedial for Blacks were designed to minimize consequences for Whites—in some cases going so far as to have the costs of such programs borne by Blacks.[65] What mattered was how the problem was framed. As Bell understood policies regarding school admissions, changes made at the urging of minority groups, using their labor and political capital, ended up primarily benefitting Whites.[66] Programs that appeared to secure gains for minorities at the expense of working-class Whites would provoke resentment and be short-lived.[67] Bell identified the key difficulties of designing solutions that would meet the interests of dominant groups as well as subordinate ones, suggesting that any such settlements would ultimately create further opportunities to harm minorities.

2. *INTEREST CONVERGENCE'S CRITICAL ARGUMENT*

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[60] Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1075 (1978).

[61] *Id.* at 1076.

[62] This has remained true to this day. *See* Mario L. Barnes et al., *Judging Opportunity Lost: Assessing the Viability of Race-Based Affirmative Action After* Fisher v. University of Texas, 62 UCLA L. REV. 271, 288 (2015) (explaining that "the Court essentially defined the experiences of Whites in the United States as the normative standard by which all college and university applicants, and thus all affirmative action programs, should be evaluated.").

[63] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

[64] Bell, Bakke, *supra* note 47, at 3.

[65] *Id.* at 7.

[66] *Id.* at 15–16.

[67] *Id.* at 18–19.

The descriptive argument explained how racial inequality in the United States persisted through Reconstruction and the civil rights movement, but the critical argument went further. The persistence of inequality was not a vestige of the past or an unintended consequence of trying to remedy complex social problems; it was built into the law's normative foundation. In Bell's interpretation of legal process theory, legal reasoning had, as one of its goals, the continued maintenance of racial hierarchy; appeals to antiracist values, by virtue of requiring Whites to cede race-based privileges, were seen by leading legal theorists as differentially *disadvantaging* Whites as a group rather than as valid neutral principles of law.[68] In time, Bell's critique of legal process theory's inherent normativity would mature into an overtly positivistic realism.

Bell's critical argument can be found principally in his 1980 response to Herbert Wechsler's influential claim that the *Brown* opinion was not properly based upon a "neutral principle" of law.[69] For Wechsler, the legitimacy of judicial review depended on it being "framed and tested as an exercise of reason and not merely as an act of willfulness or will."[70] He contrasted the obligation of the courts to decide cases "on grounds of adequate neutrality and generality, tested not only by the instant application but by others that the principles imply"[71] against the political use of "principles that are largely instrumental…in relation to results that a controlling sentiment demands at any given time."[72] According to the logic of Wechsler's approach, in the absence of a neutral legal principle to decide the issue, the *Brown* Court should have left the political decision with the legislature on the basis of institutional competency.[73] Of course, this was not the only way to understand *Brown*. Charles Black had famously pointed out that the obvious neutral principle at play in *Brown* was simply that of racial equality, and White interests in maintaining segregation would need to yield in order to advance

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[68] Bell, *Dilemma*, *supra* note 11, at 522–23. Bell's language is significant. In claiming that "[w]hites *simply cannot envision* the personal responsibility and the potential sacrifice [of ceding racial privilege]" (emphasis added), he argued that opposition to antiracist principles existed on a pre-rational level because the implications of those principles were simply not intelligible or cognizable for many Whites.

[69] Bell, *Dilemma*, *supra* note 11. Bell's article responds to Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

[70] Wechsler, *supra* note 69, at 11.

[71] *Id.* at 15.

[72] *Id.* at 14. Within this framework, resolving disputes on the basis of interests was a species of *political* thought, as contrasted with *legal* thought. *See* Anders Walker, *"Neutral" Principles: Rethinking the Legal History of Civil Rights, 1934–1964*, 40 LOY. U. CHI. L.J. 385, 405 (2009). *See also* Fiss, *supra* note 19 (explaining the significance for Wechsler of courts following majoritarian sentiment).

[73] *See* Peller, *supra* note 45, at 607.

that principle.[74]

Bell believed that Black was normatively correct to justify the *Brown* decision on the basis of equality, although he also believed that, as a descriptive matter, Wechsler correctly read the pulse of the White public in believing that the decision was not justified due to the absence of a neutral principle regarding associational rights.[75] Neutral principles of law had to be consistent with values held by the public, even if there were compelling normative reasons for selecting a different principle—and "the public" in this moment meant the White public.[76]

The key to the critical argument of the interest convergence thesis was therefore in Bell's attempt to provide a descriptively accurate principle of general application to justify the *Brown* decision: "[t]he interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites."[77] On that basis, the law would temper the remedies available to Black litigants in desegregation cases by giving decisive weight to the interests of middle and upper class Whites.[78] In doing so, even as this principle explicitly distinguished between the force of Black and White interests, this principle would be accepted as having a "neutral" application.[79]

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[74] Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 429 (1960).

[75] Bell, *Dilemma*, *supra* note 11, at 523.

[76] Wechsler's later reflections on *Brown* make it clear that his reluctance to embrace the principle of ending invidious discrimination was based on the existence of public support for associational rights that would permit segregation. Norman Silber & Geoffrey Miller, *Toward "Neutral Principles" in the Law: Selections from the Oral History of Herbert Wechsler*, 93 COLUM. L. REV. 854, 865–66 (1993). *See also* Walker, *supra* note 72, at 405.

[77] Bell, *Dilemma*, *supra* note 11, at 523. For more on how Bell's argument responds to Wechsler's challenge, see Will Rhee, *Using the Master's Tools to Dismantle His House: Derrick Bell, Herbert Wechsler, and Critical Legal Process*, 3 CONCORDIA L. REV. 1, 18 (2018). According to Rhee, "[w]hereas Wechsler essentially criticized *Brown* for placing *ends* over *means*, Bell criticized *Brown* because it reinforced the false belief that the rule of law or any other *means* could ever change the United States' permanently racist *ends*." *Id.* at 11. Given the legal process school's insistence on a fusion of fact and value in legal analysis, Bell's description of the interest convergence thesis as descriptively correct *and* reflective of American legal values met Wechsler on the legal process school's terms. *See* Geoffrey C. Shaw, *H. L. A. Hart's Lost Essay: Discretion and the Legal Process School*, 127 HARV. L. REV. 666, 687 (2013). *See also supra* text accompanying note 46.For an argument that critical race theory draws on the analyses of the legal process school as part of its pragmatic orientation, see Edward L. Rubin, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393, 1407–09 (1996).

[78] Bell, *Dilemma*, *supra* note 11, at 523.

[79] *Id.*

Bell used this principle to explain *Brown* and subsequent desegregation cases, which signaled to him "a substantial and growing divergence in the interests of whites and blacks" that could undermine further efforts at desegregation.[80] Recent cases vindicate this view.[81]

The force of the interest convergence thesis is therefore not only the descriptive statement that racial progress is conditioned upon the interests of the majority—a racial analogue to the antiquated Beardian class interest analysis that Wechsler had scorned.[82] If that were all that Bell had said, it would still be a valuable extension of that class interest analysis to foreground race. Rather, the real force of the interest convergence thesis is in its critical argument: its recognition that "neutral principles"—the normative foundations of the law in mid-century legal theory—reflected a deep, internalized, public acceptance of racial inequality; that the explicit subordination of Black *rights* to White *interests* could be understood as a *neutral* explanatory principle of general application within centuries of American legal thought[83] while an appeal to end invidious discrimination on the basis of race was seen, within

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[80] *Id.* at 528.

[81] *See* Robin West, *Tragic Rights: The Rights Critique in the Age of Obama*, 53 WM. & MARY L. REV. 713, 725–26 (2011). *See also* Barnes et al., *supra* note 62; Jedidiah Purdy, *Neoliberal Constitutionalism: Lochnerism for a New Economy*, 77 LAW & CONTEMP. PROBS. 195, 212 (2014) (arguing that "[i]f there is a neoliberal approach to race, this is it: respectful of a certain kind of individual choice, wary of government attempts to engineer the system, and mainly blind to the ways that inequality persists and makes race real in practice, even as the Supreme Court works to make it irrelevant in principle.").

[82] *See* Wechsler, *supra* note 69, at 14. For more on the parallels with class interest analysis, see *supra* note 44.

[83] Richard Delgado helpfully described this as creating homeostasis: continually adjusting legal protections for minorities to hit the sweet spot between the majority ceding their privileges and minorities suffering enough harm to protest. *See* Richard Delgado, *Derrick Bell and the Ideology of Racial Reform: Will We Ever Be Saved?*, 97 YALE L.J. 923, 923–24 (1988). Given the specific context in which Bell defined the interest convergence dilemma—as a response to Wechsler's argument that *Brown* had no basis in neutral principles—the linkage between White interests and Black rights is crucial. As Bell argued, the argument "suggests a deeper truth about the subordination of law to interest-group politics with a racial configuration." *See* Bell, *Dilemma*, *supra* note 11, at 523. Consequently, while the concept of "interests" remains largely undefined in Bell's work, and the notion of a singular set of "Black interests" is at odds with his analysis of intraracial conflicts in *Serving Two Masters* (*see* Driver, *supra* note 43, at 165), the interest convergence thesis, as I read it, speaks to the general relationship of interests, rights, and power within a racial hierarchy rather than to the precise nature of what it means for "White interests" and "Black interests" to converge. For Bell, the subordination of law to politics when race was involved required strengthening the law in the first instance, not turning to politics and alternative bases for dispute resolution. For more on the concept of interests in ADR theory as compared with interest convergence analysis, see *infra* text accompanying notes 156–181.

mid-century American law, to fail the test of neutrality.[84] Rather than simply stating that racial interests trump ideals, Bell's critical argument shows how racial hierarchies had become so naturalized as to operate normatively as neutral principles of law.[85*]

Based on these analyses, Bell advanced two propositions: that a democratic political process would not protect African-Americans and that African-Americans should continue to fight for legal rights without being dependent upon them.[86] This was a moment in which school integration through busing began to stall[87] and the gradual expansion of rights to marginalized groups was being curtailed.[88] Bell was fully attuned to the possibility of resegregation.

Despite these limitations to the protections afforded by legal rights when Black interests were threatened, Bell nevertheless argued that it was vital to strengthen those rights—while also never taking the robustness of those rights for granted. Rights provided possible criteria that were independent of community values and political settlements.[89] The widespread acceptance of racial hierarchy implied that addressing social questions without the invocation of formal rights would simply give free play to prejudice.[90] Rights offered the possibility of resolving disputes objectively, even if the critical argument of interest convergence revealed the fundamentally subjective basis of those rights.[91]

B. *Explaining Interest Convergence's Critical Argument: Unconscious Racism and Prejudiced Standards*

Formal rights and formal legal processes, problematic though they

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[84] Silber & Miller, *supra* note 76, at 865.

[85] Bell's insistence that racial hierarchy is a central element of the architecture of American legal thought gestures toward what would become the concept of racism as structural, rather than simply being a matter of conscious intention to subordinate. *See* john a. powell, *Structural Racism: Building Upon the Insights of John Calmore*, 86 N.C. L. REV. 791, 795–800 (2008).

* john a. powell does not capitalize his name.

[86] Bell, *Racial Remediation*, *supra* note 11, at 26.

[87] *See* Derrick A. Bell, Jr., *Running and Busing in Twentieth-Century America*, 4 J.L. & EDUC. 214 (1975).

[88] *See generally* JOHN D. SKRENTNY, THE MINORITY RIGHTS REVOLUTION (2002).

[89] Rights seemed to offer a basis for objectively resolving disputes. Wechsler later responded to one line of critique of his article by stating that "we should strive to be objective and we should be as objective as we can be. It is not true that objectivity is impossible, and it is not true, unfortunately, that it is ever perfectly attained." Silber & Miller, *supra* note 76, at 930.

[90] Bell, *Racial Remediation*, *supra* note 11, at 26.

[91] *Id.*

may be, at least had the possibility of appealing to higher values, such as the belief in equality; privatized and informal processes instead had the potential of giving room for bias to be expressed. This made informal dispute resolution suspect to some critical race theorists. Richard Delgado invoked the sociologist Gunnar Myrdal's concept of the "American creed"—a shared belief in individual liberty and equal opportunity—to explain that the solemn atmosphere of the courtroom and its appeals to the American civil religion would permit the American creed to reduce the role of prejudice in the operations of the legal system.[92] The power of the American creed was precisely that it did *not* rely on local, community norms; it provided a set of shared objective criteria that recognized the depth of the prejudice that subordinated Blacks in America. Delgado's appeal to the American creed denied that these higher values would operate without the intermediation of the legal system. Accordingly, Delgado suggested that litigation would protect the interests of people of color better than would alternative forms of dispute resolution.[93]

Much of the energy behind expanding alternative forms of dispute resolution was due to its ability to efficiently resolve disputes. This efficiency required, as a background condition, that the applicable law was settled; these were not procedures for raising novel questions of law with implications for the public.[94] And they were also not effective procedures for generating complex factual findings about deeply-rooted social problems.[95] Indeed, to critics, even if informal dispute resolution had the potential to provide better outcomes for individual disputants, the efficient resolution of individual disputes potentially froze out the possibility of identifying collective problems and prevented aggrieved parties from coming together to demand action.[96] On the basis of the interest convergence thesis, one of the general principles informing the law—and which alternative dispute resolution, by its nature, left unaddressed—was the belief in racial inequality. By not engaging the level of higher social values, dispute resolution extended racist principles by default.

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[92] Delgado et al., *supra* note 10, at 1367–89. The concept of the "American creed" is explored in GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY (1944).

[93] Delgado et al., *supra* note 10, at 1383–89. *But see* Charles B. Craver, *Do Alternative Dispute Resolution Procedures Disadvantage Women and Minorities?*, 70 SMU L. REV. 891 (2017) (arguing that minorities are no more disadvantaged in ADR processes than they are in adjudication). Delgado has recently argued that even formal processes no longer offer these kinds of protections to disempowered litigants, given lack of support for those higher values. *See* Delgado, *Unbearable Lightness*, *supra* note 22, at 635–36.

[94] *See* Yamamoto, *supra* note 14, at 345–46.

[95] *Id.*

[96] Richard Delgado, *ADR and the Dispossessed: Recent Books About the Deformalization Movement*, 13 LAW & SOC. INQUIRY 145, 150 (1988).

As Bell had explained, claims of neutrality could mask widely-held prejudices.[97] When coupled with a belief that law provides a neutral extension of shared values, this meant that the values defined as universal or as objective were simply those of the dominant groups.[98] More generally, critical legal analyses of the concept of hegemony explained that law could so structure thought and rights as to make the subordinated believe that it is in their interest to maintain larger systems of oppression; from this perspective, the logic of achieving efficient outcomes affirmatively perpetuated a pernicious hierarchy.[99] It could do so without any bad intent on the part of those whose interests were served by the maintenance of that structure.[100] This created a vicious cycle: social exclusion and inequality generated biased standards that in turn further entrenched exclusion and inequality.

A key insight from critical race theory was that power and identity mutually constitute each other.[101] Social standards of fairness and normality presumed a default identity devoid of race or gender, and that default identity without reference to race or gender meant, in effect, one that was White, male, straight, etc. Accordingly, from the perspective of dominant groups, to name race or gender would be to automatically abandon neutrality precisely because the invocation of race or gender denied the fiction of the raceless, genderless abstract subject at the law's heart.

Individualism and autonomy were part of what has constituted Whiteness; the supposed absence of "racial" characteristics left the category of Whiteness as a void.[102] The equation of Whiteness with the absence of race meant that only those individuals recognized as White could exist within the polity as individual subjects, while those marked in other racial terms would be recognized first and foremost as members of their particular racial community, and consequently denied the possibility of speaking "objectively."[103] A self unmarked by race was White, a self unmarked by gender was male, etc., while non-White selves were defined at least in part by their race, and so forth. Accordingly, to take a reflexive view of race—that is,

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[97] *See supra* text accompanying note 83.

[98] Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 385 (1987).

[99] *Id.* at 326.

[100] *Id.* at 331–44.

[101] *See, e.g.*, PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 10 (1991) (writing "I felt myself slip in and out of shadow, as I became nonblack for purposes of inclusion and black for purposes of exclusion; I felt the boundaries of my very body manipulated, casually inscribed by definitional demarcations that did not refer to me.").

[102] john a. powell, *Dreaming of a Self Beyond Whiteness and Isolation*, 18 WASH. U. J.L. & POL'Y 13, 36–37 (2005).

[103] *Id.*

to stop treating Whiteness as a *neutral* background, as the negation of race—would be to abandon the particular view of selfhood that understood race as merely a supplement to an unraced core identity.[104]

This implicit association of full personhood within the community with Whiteness[105] was the mechanism by which racial hierarchy could become naturalized and by which White perspectives could be seen as objective, and liberal analyses of antidiscrimination law failed to account for the ways in which the very concept of selfhood as essentially White functioned as a hegemonic tool to legitimate an unequal order.[106] Ending formal laws of White supremacy and articulating formal equal rights had not ended the principle that Whiteness was the default; racial hierarchy persisted in spite of formal race-neutrality.[107] It is through the operation of this hegemonic ideal of the White subject as a "legal subject unmodified"[108] that Bell's interest convergence thesis could be understood as a "neutral principle" within American jurisprudence.[109] And yet, in spite of the limitations Bell saw on the ability of individual rights to protect the interests of African Americans, the expansion of formal equal rights nevertheless could give some basis for decoupling membership in the community from background assumptions of racial hierarchy.

The structural application of the dominant groups' perspectives as universal and objective extended to micro-level interactions. The pervasive structure of racism meant that *everyone* acted in accordance with racist principles, to some extent.[110] There simply was no escaping that atmosphere. Within a context of White supremacy, the appeal to objectivity *necessarily* privileged White interests. The only recourse was to appeal to higher ideals, particularly where they challenged the self-interest of dominant groups.[111]

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[104] *Id.* at 40. If Whiteness was not understood to be an identity category, then what was it? One answer was that it was a recognizable property interest possessed by (and thereby confirming the subjectivity of) Whites. *See* Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993).

[105] *See* powell, *supra* note 102. Feminist theory raised a parallel critique, arguing that the conceptualization of personhood as founded in separation implied that "women are not human beings." *See* Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 3 (1988).

[106] Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1360 (1988).

[107] *Id.* at 1378–79. *See also* Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1 (1991).

[108] *Compare* CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 36 (1987) (discussing male dominance through purportedly neutral standards).

[109] *See supra* text accompanying note 83.

[110] Lawrence, *supra* note 98, at 330.

[111] Delgado et al., *supra* note 10, at 1384–85.

In spite of decades of scholarship, this equation of neutrality with Whiteness persists, bolstered by the belief that there exists a neutral position beyond the reach of race or gender.[112] This dimension of the American creed proved powerful in combatting formal structures of oppression, such as Jim Crow, but the covert default position of Whiteness continues to tilt the deck in informal processes by associating objectivity with the standards of the dominant culture.[113] The persistence of this belief constitutes a key obstacle to advancing justice.

C. *Bell's Realist Turn and the Prescriptive Project of Interest Convergence*

The critical argument of Bell's interest convergence thesis explained that legal process theory's commitment to law's normativity included a covert acceptance of White supremacy. Bell subsequently took an explicitly positivist turn by invoking the legal realist[114] strand of American jurisprudence in what he called "racial realism."[115] Using the critical methodology of the legal realists, he argued that "precedent, rights theory, and objectivity … serve a covert purpose" and would "never vindicate the legal rights of black Americans."[116] Legal criteria of fairness were inherently skewed due to the persistence of racism. On this basis, he believed that Black people in America would never gain full equality—racial hierarchy and inequality were simply facts to be dealt with, even as advocates could (and should) continue to fight for equality and against subordination.[117] More than that, recalling the

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[112] *See* powell, *supra* note 102.

[113] *See, e.g.*, Dana Raigrodski, *Reasonableness and Objectivity: A Feminist Discourse of the Fourth Amendment*, 17 TEX. J. WOMEN & L. 153, 186 (2008).

[114] The legal realist strand of American jurisprudence, which peaked in influence in the first half of the twentieth century, focused on understanding law in terms of judicial behavior, rather than in terms of systems of formal concepts. There is an extensive literature on the legal realist movement; *see generally* LAURA KALMAN, LEGAL REALISM AT YALE: 1927–1960 (1986); *see also* JOHN HENRY SCHLEGEL, AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE (1995).

[115] Derrick A. Bell, Jr., *Racial Realism*, 24 CONN. L. REV. 363, 373 (1992). *See also* DERRICK A. BELL, JR., FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM 99 (1992) (arguing that "racial realism is to race relations what legal realism is to jurisprudential thought."). I understand the concept of racial realism to be a corollary of Bell's interest convergence thesis, rather than viewing one as historically-oriented and one as future-oriented. *Cf.* Stephen M. Feldman, *Do the Right Thing: Understanding the Interest-Convergence Thesis*, 106 NW. U. L. REV. COLLOQUY 248, 252 (2012).

[116] Bell, *Racial Realism*, *supra* note 115, at 376.

[117] *Id.* at 373. Bell denied that this was defeatist; in his view it would permit more realistic strategies rather than false optimism. Realistic strategies would be oppositional,

descriptive claim that conflicts among Whites were settled by sacrificing Black rights, he argued that racial hierarchy was the glue that held together a nation built upon popular democracy within a free-market economy.[118]

Bell's concept of racial realism severed the connection between the positive and the normative at the heart of his earlier interest convergence analysis: interest convergence's engagement with legal process theory revealed the tacit "ought" that accompanied the "is" of continued racial injustice, revealing the perversion of the law's normativity, while racial realism urged those concerned with racial justice to accept the reality of actually existing racism without conceding any normative value to it, thereby denying outright that the functioning of the legal process has a normative dimension. In so doing, Bell's racial realism provides a foundation for action—what he described as "forging fortuity," or creating the conditions in which White interests could be brought into alignment with Black interests.[119] In doing so, it abandoned the faith that the protection of rights could eventually bring outsiders into the heart of the community and instead presumed that Black people would forever be outsiders in the American legal system.[120]

Bell shifted to focus on what actions could be taken within a system of lasting racism. The permanence of racism meant that the beliefs that he exposed in the critical argument of the interest convergence thesis were here to stay. Instead of trying in vain to establish a new normative foundation based on equality and vindicating the "American creed"—which would be a foundation for a system of rights that would advance Black interests—he

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refusing to cede any normative authority to a system of subordination, rather than optimistically seeking opportunities for rapprochement. *Id.* at 377–379. For responses, *see* Richard Delgado, *Derrick Bell's* Racial Realism*: A Comment on White Optimism and Black Despair*, 24 CONN. L. REV. 527 (1992); *see also* john a. powell, *Racial Realism or Racial Despair?*, 24 CONN. L. REV. 533 (1992).

[118] Bell, *Racial History*, *supra* note 27, at 30.

[119] *Id.* at 31 (arguing that "[u]nderstanding should lead to new approaches rather than despair. Racial justice advocates, rather than await the accidental benefits of policy-making, can forge fortuity.").

[120] This approach reflected Bell's deep engagement with the work of Albert Camus and makes clear that the achievement of concrete resolution mattered less than the act of taking a stand. As Bell put it, "the protester hopes that assertive action may bring about reform. Such hopes, though, supplement rather than fuel the main creative urge: expression of self through a medium … that communicates a view of 'what is' against a background of *what might be*. … [C]ommitment to change must be combined with readiness to confront authority. Not because you will always win, not because you will always be right, but because your faith in what you believe is right must be a living, working faith …" DERRICK BELL, CONFRONTING AUTHORITY: REFLECTIONS OF AN ARDENT PROTESTER 162 (1994) [hereinafter BELL, CONFRONTING AUTHORITY]. For more on the influence of Camus on Bell, see George H. Taylor, *Racism as "The Nation's Crucial Sin": Theology and Derrick Bell*, 9 MICH. J. RACE & L. 269 (2004).

instead looked for tactical opportunities where he could find them.[121] This is the approach taken by recent efforts to use interest convergence in a reformist mode—for programs of building diverse coalitions that can succeed in majoritarian politics[122] and for organizing on the local and regional levels.[123]

D. *The Project of Interest Convergence Today*

Scholars have generalized the interest convergence thesis from a specific set of arguments about the foundational character of racism as a general principle in American law into a theory about how to achieve social change by identifying and creating points of shared interests between subordinated groups and dominant ones.[124] This strategy is a manifestation of Bell's principle of forging fortuity within the context of racial realism. For example, according to Steven Ramirez:

> real and durable reform in America requires the consent and support of the vested interests and political actors with specific political and economic power over any prospective reform. In short, convergence theory not only signals when reformers can seize opportunities, but it also counsels how to proceed: build coalitions of convenience and apply pressure atomistically.[125]

Ramirez's strategy generalizes Bell's descriptive argument from race to any context in which a subordinate group seeks to advance its interests, and then, rather than seeking to confront head-on the conditions that, according to interest convergence's critical argument, make this descriptive argument true, it acts within the parameters of this hierarchical condition—Bell's "racial realist" move.

Recent scholarship in critical race theory has turned interest convergence from a tool for the critical analysis of law into a guide for strategic action in law reform that extends beyond litigation contexts into coalition-building and alternative forms of dispute resolution.[126] The focus on

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[121] Bell, *Racial History*, *supra* note 27, at 31.

[122] Sheryll D. Cashin, *Shall We Overcome? Transcending Race, Class, and Ideology Through Interest Convergence*, 79 ST. JOHN'S L. REV. 253, 274 (2005).

[123] Crowder, *Transaction*, *supra* note 29.

[124] *See, e.g.*, Driver, *supra* note 43, at 154–55.

[125] Steven A. Ramirez, *Games CEOs Play and Interest Convergence Theory: Why Diversity Lags in America's Boardrooms and What to Do About It*, 61 WASH. & LEE L. REV. 1583, 1587 (2004). For more on interest convergence as coalition-building, see Cashin, *supra* note 122, at 274–77.

[126] *See* Cashin, *supra* note 122.

how to advance the interests of people of color has led to a new enthusiasm for using interest-based dispute resolution as a mechanism to find creative ways of aligning the interests of dominant groups with those of subordinate groups in order to create value and advance the interests of those subordinate groups.[127] Writing within the ADR tradition, Michael Green also considers that interest-based principles have the potential to create the kinds of interest convergences that Bell described.[128] From this angle, however, interest convergence emerges almost organically as a consequence of effectively considering party interests—inconsistent with Bell's key insight that dominant groups tend not to perceive it to be in their interest to cede their privilege, and that they will not do so unless they stand to gain in some other way.[129] It is surely the case that appeals to racial justice are compelling for many individual members of advantaged groups[130]—but that is far from being universally true. And even when it is true, there may be limits on what dominant groups will agree to.

But there is a problem. Interest convergence theorized fundamental limitations on achieving progress on the basis of the convergence of the interests of dominated and subordinated groups.[131] Reform obtained on the basis of those convergences, Bell had argued, would generate Pyrrhic victories, or, at best, only partial gains;[132] deeper social transformation was necessary because relying on a fragile alignment of interests with dominant groups was a dangerous proposition. To divorce interest convergence from its engagement with legal process theory is to miss Bell's argument that the law's tolerance of racial inequality was built upon the widespread acceptance among Whites that equality should not threaten their privileged social positions.[133] Bell described his racial realism as an optimistic strategy because it took a clear-eyed view of the permanence of inequality.[134] It was a strategy based on the necessity of continued protest and standing up for what he believed to be

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[127] For example, Patience Crowder sees negotiations in transactional contexts as "providing for the opportunity to identify the true interests of the relevant parties in a context that encourages a more permanent alignment of those interests because of the collaborative nature of transactional practice." Crowder, *Transaction*, *supra* note 29, at 697.

[128] Michael Z. Green, *Reconsidering Prejudice in Alternative Dispute Resolution for Black Work Matters*, 70 SMU L. REV. 639, 674 (2017). *See also* Green, *Addressing Race*, *supra* note 28.

[129] Bell, *Dilemma*, *supra* note 11, at 523.

[130] *See id.* (acknowledging that interests in achieving racial justice may well be components of the interest convergence).

[131] *See supra* notes 83–85 and accompanying text.

[132] *See supra* notes 77–80 and accompanying text.

[133] *Supra* note 58.

[134] Bell, *Racial Realism*, *supra* note 115, at 378.

right despite the consequences.[135] It emphatically was not a strategy of building consensus with actors holding economic and political power.

Not all scholars have shared Bell's optimism. Powell, for example, has described Bell's argument regarding the permanence of racism as unduly pessimistic for ignoring the real possibilities of progress that fall short of perfect equality.[136] The reformist project of forging interest convergence looks for those possibilities for achieving progress. But, in doing so, this project forgets the dangers at the heart of interest convergence analysis: that racial otherness meant that informality was likely to lead to domination; that the criteria used to define fair outcomes reinforced the values of dominant groups; that the lack of formal procedures permitted the free expression of prejudice; and that, to the extent that informal mechanisms permitted reaching agreement on discrete issues while avoiding contact with deeper divisions, they left those divisions to calcify. Ultimately, the problem with informality was that it left outsiders at the mercy of those within the dominant community, and even if it universalized the community to include outsiders, the meaning of community membership would remain defined by those at its center. If reformists accept Bell's argument that interest convergences will eventually diverge in ways that harm Black people, their focus on forging convergences without challenging the values supporting racial inequality suggests that the problems that Bell identified will continue to hold true. Instead, this Article suggests that engagement must happen at the level of foundational values—a task beyond finding outcomes that satisfy party interests.

III. II. ALTERNATIVE DISPUTE RESOLUTION AS CRITIQUE OF MID-CENTURY LEGAL THEORY

In striving to achieve outcomes that meet the interests of both dominant and subordinate groups, it has not escaped the notice of contemporary critical race theorists that there exists a well-developed method that is designed precisely to accomplish just that: interest-based dispute resolution. The two theories share a common point of origin—Derrick Bell developed the interest convergence thesis at the same time and place that his Harvard colleague and friend, Roger Fisher, was developing the method of interest-based dispute resolution.[137] Interest-based dispute resolution was

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[135] *See supra* note 120 and accompanying text.

[136] *See* powell, *supra* note 117, at 544.

[137] There has not been much formal cross-pollination between interest convergence analysis and interest-based dispute resolution theory, in spite of the friendship between Derrick Bell and Roger Fisher at Harvard Law School. *See* BELL, CONFRONTING AUTHORITY, *supra* note 120, at 68, 91.

predicated on the belief that disputes could be resolved efficiently by addressing the interests of the parties rather than by appealing to a system of rights or through contests of power.[138] The methodology has been described as an element of neoliberal rationality[139]—and with good reason. Howard Raiffa's basic text in negotiation analysis explicitly identified the interest-based method as being grounded in the logic of neoclassical microeconomic theory, as a set of prescriptions that permit psychologically complex people, with all of their irrationalities and biases, to reach the kinds of efficient outcomes available to the *homo economicus* of economic theory.[140] It provided a bridge with which to utilize psychological studies of behavior to achieve economic standards of efficiency.

But the broader dispute resolution movement of the 1970s and 1980s built upon other foundations as well, some of which challenged the economistic foundations of the interest-based method. Carrie Menkel-Meadow, for example, emphasized the ways that alternative forms of dispute resolution could transcend the adversarialism inherent in the litigation process.[141] Dispute resolution could avoid the binary outcomes of litigation by creating opportunities for joint problem-solving, and could thereby advance justice.[142] Menkel-Meadow's approach was grounded in feminist theory: in particular, the ethic of care described by Carol Gilligan.[143] From this perspective, problem-solving was less a specific methodology in order to achieve economically efficient outcomes, than it was a way of relating to others in a non-adversarial way.[144] These two ways of approaching dispute

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[138] This point is made most explicitly in WILLIAM L. URY, ET AL., GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT (1988).

[139] *See, e.g.*, Amy J. Cohen, *Dispute Systems Design, Neoliberalism, and the Problem of Scale*, 14 HARV. NEGOT. L. REV. 51, 53–54 (2009); *see also* Mamo, *supra* note 20, at 1423–26.

[140] HOWARD RAIFFA, ET AL., NEGOTIATION ANALYSIS (2007).

[141] Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 763 (1984).

[142] Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5 (1996).

[143] *See, e.g.*, Carrie Menkel-Meadow, *Feminist Legal Theory, Critical Legal Studies, and Legal Education or "The Fem-Crits Go to Law School,"* 38 J. LEGAL EDUC. 61 (1988); *see also* Carrie Menkel-Meadow, *Women in Dispute Resolution: Parties, Lawyers and Dispute Resolvers—What Difference does Gender Difference Make?*, 18 DISP. RESOL. MAG. 4 (2012).

[144] This dichotomy should not be read too strictly. Roger Fisher was also deeply engaged with the mid-century social theory that sought a rational basis for decision-making. As a scholar concerned with international disputes, Fisher was very interested in the mid-century scholarship that sought to ground international relations in mathematical models and the description of interests. And yet, Fisher was unwilling to concede

resolution framed the task quite differently: dispute resolution could be seen as fundamentally about efficiency and secondarily about forging authentic human relationships, or it could be seen as fundamentally about relationships and secondarily about efficiency.[145] In spite of this basic difference in orientation, both of these approaches favored the private resolution of disputes over the use of adjudication, thereby inverting the mid-century legal process orthodoxy.[146] Because that predominant view of legal theory from the middle of the twentieth century had argued that the operation of legal thought involved public argumentation and reasoning about shared values, the private resolution of disputes had become a marginal element of legal theory.[147]

A. *Privileging Interests*

The interest-based method of dispute resolution has been the predominant theoretical basis of dispute resolution for decades.[148] The principles of interest-based dispute resolution are grounded in the logic of microeconomic theory, integrated with the insights of behavioral economics and psychology.[149] The theory recognizes that actual human decision-making differs in fundamental ways from the pure rationality of *homo economicus*, due to imperfect information, cognitive biases, and other psychological factors.[150] And yet, neoclassical microeconomic theory explained how rational actors might reach outcomes that maximized value by approaching the Pareto frontier of the immediate dispute.[151] While actually existing disputants do not

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everything to these models in which decisionmaking reflected calculations of interest. He recognized that these models took an excessively narrow view of human behavior and that the structure of the model, as a normative framework, influenced how participants in a dispute understood the available choices and how to value those choices. *See* Amy J. Cohen, *Negotiation as Law's Shadow: On the Jurisprudence of Roger Fisher*, *in* THE NEGOTIATOR'S DESK REFERENCE 79 (Chris Honeyman & Andrea Kupfer Schneider eds., 2017); *see also* Andrew Mamo, *Getting to Peace: Roger Fisher's Scholarship in International Law and the Social Sciences*, 29 LEIDEN J. INT'L L. 1061 (2016).

[145] *See* Mamo, *supra* note 20, at 1440–42.

[146] *See* Mamo, *supra* notes 36–37 and accompanying text.

[147] Even so, forms of ADR warranted attention as processes that fit particular circumstances. *See, e.g.*, Lon L. Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305 (1971).

[148] *See* Mamo, *supra* note 20, at 1404.

[149] On the early support given to behavioral economists, see Max H. Bazerman, *Prescriptions Based on a Realistic View of Human Behavior*, 33 NEGOT. J. 309, 310 (2017). On the continuities between behavioral economics and mid-century economic theory, see Michael Millner, *Homo Probabilis, Behavioral Economics, and the Emotional Life of Neoliberalism*, 29 POSTMODERN CULTURE 1 (2019).

[150] RAIFFA ET AL., *supra* note 140, at 1.

[151] *Id.* at 81–96.

resemble the fictions of economic theory, the models of rational action defined what outcomes *should* be reached.[152] Interest-based dispute resolution would create the practices and principles by which psychologically complex individuals, with all of their biases and irrationalities, might begin to act in ways that approached the efficiency of rational action.[153]

By designing practices through which irrational people can come to behave more like rational actors, while managing emotional concerns in order to facilitate settlement, interest-based dispute resolution remains a fundamentally neoliberal project.[154] It privileges calculations of private interest over argumentation of rights and privileges the fragmentation of conflict into private disputes of manageable size rather than aggregating disputes into social conflicts.[155]

This neoliberal framework has explanatory power. The remainder of this section outlines how the principles of interest-based dispute resolution function in the context of forging interest convergences, and how critical race theory should cause us to question that explanation and its underlying economic reasoning. Engaging with the critiques posed by critical race theory reveals the possibility of re-orienting the elements of interest-based dispute resolution theory in order to challenge and deepen our understandings of

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[152] *Id.* at 1.

[153] This is particularly true of the "seven elements" model, which locates the core elements of the theory within a "circle of value" and directly ties them to economic principles. "Interests" define how the parties to a dispute measure utility, including weighing the various interests such that comparisons between outcomes can be made along a consistent scale. "Options" represent discrete points plotted with reference to their utilities for the parties, with some options being Pareto superior to others. "Criteria" provide the bases for selecting an outcome from the set of Pareto optimal options. The elements of "Relationship" and "Communication" permit the parties to engage in a free and truthful exchange of information to share interests, options, and criteria. A party's "Best Alternative to a Negotiated Agreement" determines the utility threshold that a negotiated option must surpass in order to be viable to them, while the element of "Commitment" translates a theoretical agreement into practical actions. *See generally* Bruce Patton, *Negotiation*, *in* THE HANDBOOK OF DISPUTE RESOLUTION 279 (Michael L. Moffitt & Robert C. Bordone eds., 2005).

[154] *See* John McMahon, *Behavioral Economics as Neoliberalism: Producing and Governing Homo Economicus*, 14 CONTEMP. POL. THEORY 137, 149–50 (explaining that: [behavioral economists] claim that the economic agent is the one who deems certain ends best, but it is a certain market that generates particular agents with a specific set of ends that trains, manages and subjectivizes these actors in the first place. They are still the selves and ends of *homo economicus*, only this time *homo economicus*, as an economic subjectivity, has to be produced, through apparatuses such as behavioral economics.).

On the management of affect as an element of neoliberalism, see Millner, *supra* note 149.

[155] Roger Fisher, *Fractionating Conflict*, *in* INTERNATIONAL CONFLICT AND BEHAVIORAL SCIENCE: THE CRAIGVILLE PAPERS 91, 91–92 (Roger Fisher ed., 1964).

conflict—and potentially understand them from competing perspectives—rather than to resolve them in the short-term in ways that reinforce the status quo.

The concept of interests is at the heart of both interest-based dispute resolution and interest convergence analysis, though the concept takes slightly different forms in each. In interest convergence analysis, consistent with early–mid-20th century scholarship, interests were defined with reference to social groups drawn along class– and race–based lines.[156] For example, in the context of an interest convergence analysis of school desegregation, Bell described multiple sets of interests that were held by African-Americans of different classes.[157] One interest, shared by all, was to improve the quality of education available to Black children.[158] As Bell noted, that interest could be met in several different ways, of which integrating schools was but one.[159] Equalizing the resources available to segregated White and Black schools was a different option that could potentially have advanced that interest in improving education.[160] The interest in tearing down the walls erected by segregation was distinct from the interest in improving education, and it was one that was held more strongly by middle-class Black people, whose professional and social circles intersected more frequently with White society than did the circles of working-class Blacks.[161] The interest in supporting the positions of middle-class Black teachers and school administrators was also distinct from the interest in improving the quality of education, and the project of integrating schools potentially threatened that interest.[162]

There were also multiple interests at play within White society in the context of school integration. Elite Whites, concerned with the geopolitical contests of the Cold War, had an interest in winning the support of newly decolonized countries in Africa and Asia—and desegregation was one way of making African diplomats feel welcomed while demonstrating America's commitment to fundamental rights.[163] Elite Whites also saw desegregation as a means of increasing the economic productivity of the United States, though working-class Whites saw desegregation as a challenge to their economic and

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[156] *See supra* note 44 and accompanying text.

[157] *See generally* Bell, *Two Masters*, *supra* note 57. *See also supra* note 83 and accompanying text.

[158] Bell, *Two Masters*, *supra* note 57, at 513.

[159] *Id.* at 471.

[160] *Id.* at 488. *But see* Onwuachi-Willig, *supra* note 58, at 1535.

[161] Bell, *Two Masters*, *supra* note 57, at 489.

[162] *Id.* at 513 n.138.

[163] Bell, *Dilemma*, *supra* note 11, at 524.

social positions.[164] Furthermore, the class positions of elite Whites were not threatened by making public spaces and opportunities available to Blacks. Desegregation therefore advanced the interests of both White and Black Americans—but did so principally for the elite groups of each.[165] According to Bell's interest convergence thesis, school integration happened when it did because it advanced the interests of both groups in ways that other options did not.[166]

Justin Driver has recently questioned Bell's analysis by challenging his characterization of group interests.[167] This is an important challenge, suggesting that the identification of a consistent set of group interests on the basis of race would be essentializing, mapping interests onto class and racial identities too neatly.[168] Bell didn't define his concept of interests, and dispute resolution theory can fill that gap using concepts drawn from economics.

Within the theory of ADR, interests are the deeper needs or desires of parties to disputes, which they hope to advance by engaging in a negotiation or other process.[169] The interests of a party, and the weights given to those interests, define the scale of utility with which a party measures its satisfaction with a given outcome.[170] One principal lesson of interest-based dispute resolution is to distinguish interests from positions.[171] A position is a specific outcome that a party proposes in order to advance its interests.[172] The crucial idea of the interest-based dispute resolution method is that parties actually care about advancing their interests rather than achieving any particular position, and that there are often *many* possible options[173] that will advance a given party's interests—some of which will also advance the interests of the counterparties and may therefore be mutually acceptable in ways that the parties' original positions are not.[174] Some outcomes may even be better for a

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[164] *Id.* at 525–26. The conventional framing of the interests of poor Whites in the South is not the only way of describing their possible interests. *See infra* note 181.

[165] Bell, *Dilemma*, *supra* note 11, at 523–26.

[166] *Id.* at 524.

[167] *See* Driver, *supra* note 43.

[168] While Bell's work in *Two Masters* shows fissures within the Black community on the basis of class, that doesn't necessarily refute the charge of essentialization; one could, after all, essentialize with more fine-grained categories. Driver's critique is similar to that raised against the earlier class-interests analysis. For more on that form of analysis, see White, *supra* note 44.

[169] *See* Patton, *supra* note 153, at 280–81.

[170] RAIFFA ET AL., *supra* note 140, at 198.

[171] FISHER & URY, *supra* note 11, at 40–55.

[172] *Id.* at 4.

[173] Options are the vehicles through which interests are met. The interest-based negotiation theory requires the parties to create options that satisfy their interests while also meeting those of the other side. *See* Patton, *supra* note 153, at 283–84.

[174] FISHER & URY, *supra* note 11, at 70–80.

given party than that party's initial position.[175]

Returning to the context of school integration, Bell contrasted the interests of groups defined in terms of class and race with the interests of those who purported to represent and serve them—a traditional principal-agent tension.[176] Agents representing the group may have distinct interests in maintaining their roles as representatives of the larger community, distinct from specific class identities and interests.[177] Agents may diligently work to advance the interests of those who they purport to represent, even as their understandings of those interests may differ from the interests that community members themselves might articulate.[178] Or agents may take on a harder line than the parties otherwise. And when the interests of principals and agents differ, there is the potential for an agent to advocate *against* the interests of his or her principals—whether or not the agent recognizes the existence of a gap between the interests of principal and agent.

While the economic focus of interest-based dispute resolution theory has brought principal-agent tensions into view, critical theoretical scholarship's focus on questions of solidarity has made important contributions in distinguishing the interests of *individuals* from *collective* interests; the basic critique of ADR has been that it individualizes disputes and treats systemic issues on a case-by-case basis that may benefit individual disputants at the expense of advancing societal interests.[179] For example, in the school integration context, reaching private agreements on a district-by-district basis would have failed to advance the interest in publicly striking down the principle of segregation, even if such agreements may have worked well for individual schools.

Interests are foundational to the theories because they define the scales of utility with which the parties evaluate their outcomes; interest-based dispute resolution builds a theoretical edifice from the concept of interests, while materialistic conceptions of interest convergence assume that interests explain the causes of class or racial conflict. But there is a danger in treating interests as fixed and failing to recognize that parties may define their interests in varying—and self-contradictory—ways.[180] The received wisdom that lower-class Whites opposed integration because of economic competition with

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[175] *Id.*

[176] *See* ROBERT H. MNOOKIN, SCOTT R. PEPPET & ANDREW S. TULUMELLO, BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES 69–91 (2000).

[177] *Id.* at 75–76.

[178] *Id.*

[179] Delgado et al., *supra* note 10, at 1359–60; Fiss, *supra* note 19.

[180] Rebecca Hollander-Blumoff, *Law and the Stable Self*, 54 ST. LOUIS U. L.J. 1173 (2010).

Blacks may simply reflect the failure to focus attention on a possible alignment of interests between lower-class Whites and Blacks as against elite Whites.[181] "Interests" may not provide the stable analytical foundation that the interest-based theory requires and that interest convergence analysis assumes. An alternative vision might consider interests as sites of contested meaning rather than as metrics for calculations of utility.

The next step of the interest-based dispute resolution method is to generate options for meeting the interests of the parties.[182] Different dispute resolution mechanisms permit different options to be created, and the principal advantage of interest-based dispute resolution is that it gives the parties flexibility to craft options that meet a variety of interests with relatively few formal constraints.[183]

The outcome of a nonbinding process will only be acceptable to a party to the extent that the party finds it superior to their existing alternatives (such as litigating a dispute or taking no action), as measured with respect to their own subjective scale of utility.[184] As a general matter, a party should only agree to a negotiated or mediated outcome if it is superior to that party's best alternative—what it can do outside of the ADR process.[185] The analysis of alternatives is inseparable from a consideration of power; a party in a voluntary process with strong alternatives away from the table can afford to hold firm, while a party with weak alternatives may be willing to accept a broader array of outcomes.[186]

The utility-based understanding of power in the dispute resolution literature can enrich Bell's interest convergence thesis: advancing the interests of Black people requires also advancing the interests of White people because, in a system in which the organs of the state are controlled by Whites, outsider groups have had to find solutions that advanced the interests of the dominant group in order to secure their agreement for projects that advanced their

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[181] Nancy Ehrenreich, *Subordination and Symbiosis: Mechanisms of Mutual Support between Subordinating Systems*, 71 UMKC L. REV. 251, 276–77 (2002). This is not to deny, however, that race would continue to differentiate the experiences of poor Whites and Blacks; *see generally* Khiara M. Bridges, *White Privilege and White Disadvantage*, 105 VA. L. REV. 449 (2019).

[182] FISHER & URY, *supra* note 11, at 55–80. For ways in which the distinction between generating options to create value and distributing that value operationalizes neoliberal principles, see Mamo, *supra* note 20, at 1423–25.

[183] Crowder, *supra* note 9, at 804.

[184] FISHER & URY, *supra* note 11, at 97–100. *See* also Patton, *supra* note 153, at 283.

[185] *Id.*

[186] FISHER & URY, *supra* note 11, at 102–06. For more on the relationship between power and alternatives, see Robert S. Adler & Elliot M. Silverstein, *When David Meets Goliath: Dealing with Power Differentials in Negotiations*, 5 HARV. NEGOT. L. REV. 1 (2000); Russell Korobkin, *On Bargaining Power*, *in* THE NEGOTIATOR'S FIELDBOOK 251 (Andrea Kupfer Schneider and Christopher Honeyman eds., 2006).

interests, while the dominant group has not needed the consent of marginalized groups in order to advance its own interests.[187] This asymmetry is at the core of the descriptive argument of Bell's interest convergence thesis. And, as he recognized in his later turn towards realism, one way of bringing dominant groups to the table was by worsening their alternatives.[188] An ADR process had to be understood with reference to what happens outside of it.

Ultimately, power in a dispute resolution process is determined largely by factors external to the process, including what resources the parties have access to. A party is strengthened by being able either to advance its counterpart's interests through a settlement (based on the resources available to it), or to harm their interests away from the table (worsening their baseline utility).[189] And the interest convergence argument recognizes this fundamental fact. More subtly, a party is also strengthened by being able to draw upon the criteria of fairness advanced by its counterpart.[190] Power relates not only to one's ability to walk away from the table or to give or withhold value, but also on one's ability to establish the boundaries of what can reasonably be discussed at the table.[191] It isn't just a question of what a party walks away to, but also how the environment of the dispute resolution process structures what is considered to be reasonable. This insight manifested in Bell's recognition that mid-century Whites simply could not square the idea of neutrality with being asked to cede their privileges.[192]

Dominant groups tend to have better alternatives to negotiated agreements. Outsider groups may have alternatives that are always at risk of

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[187] Bell, *Racial History*, *supra* note 27, at 22.

[188] *Id.* at 32.

[189] G. RICHARD SHELL, BARGAINING FOR ADVANTAGE: NEGOTIATION STRATEGIES FOR REASONABLE PEOPLE 102–03 (2006).

[190] *Id.* at 104–05.

[191] This analysis of power within dispute resolution generally accords with a Foucauldian conceptualization of power as something fluid, continually contested, generative, and fundamentally relational, as opposed to something that one party simply possesses. *See* Hilary Astor, *Some Contemporary Theories of Power in Mediation: A Primer for the Puzzled Practitioner*, 16 AUSTRALASIAN DISP. RESOL. J. 30, 34 (2005). Consequently, this notion of power rejects the idea that subordinated groups are "powerless" or lacking in agency. *Compare* Ascanio Piomelli, *Foucault's Approach to Power: Its Allure and Limits for Collaborative Lawyering*, 2004 UTAH L. REV. 395, 426–27 (2004), *with* Driver, *supra* note 43, at 175–79.

[192] *See supra* note 68. The idea that equality may require Whites to forfeit certain advantages is not substantially more acceptable today among much of the White public and is at the core of the concept of "white fragility." *See generally* ROBIN DIANGELO, WHITE FRAGILITY: WHY IT'S SO HARD FOR WHITE PEOPLE TO TALK ABOUT RACISM (2018).

worsening, and any leverage is transient.[193] While widespread norms of equality provide some lasting sources of normative leverage, critical race theory also suggests strict limits on how that normative leverage can be invoked. Outsider groups, who, by definition, are outside of the "norm," are at a decided disadvantage when it comes to establishing the applicable criteria with which to distribute value; Whiteness, maleness, etc. continue to function as defaults.[194]

Different possible outcomes will advance some interests more than others, and consequently may benefit the parties differently. Interest-based dispute resolution theory recommends selecting a fair outcome on the basis of objective criteria rather than through force of will.[195] The theory defines objective criteria as relevant factors that are independent of the parties' control, such as legal precedents or market values.[196] The idea is that if the parties can identify an outcome that seems fair on the basis of objective criteria (and, consequently, consistent with comparable situations) and not arbitrary, then the outcome will be durable and neither side will feel cheated.[197] This accords with the basic principle of justice as treating like cases alike.[198] But this is easier said than done.

The utility of objective criteria can break down when the parties disagree about what the criteria in question are actually measuring. For example, market values are commonly considered to be sources of objective criteria,[199] but critically analyzing market values may reveal that the operations of power render these seemingly objective values highly skewed: salaries may reflect long-standing pay differentials between men and women that we consider to be unjust,[200] while housing values may reflect policies of red-lining

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[193] Bell, *Racial History*, *supra* note 27, at 27.

[194] *See supra* notes 97–109 and accompanying text.

[195] FISHER & URY, *supra* note 11, at 81–94. *See also* Patton, *supra* note 153, at 281–82.

[196] FISHER & URY, *supra* note 11, at 85–97.

[197] *Id.* at 82–84.

[198] *See, e.g.*, H.L.A. HART, THE CONCEPT OF LAW 159 (3d ed. 2012).

[199] This is based on the assumption that markets are reasonably efficient, such that market values are locally uniform and beyond the control of individual parties to affect. However, when we consider scenarios in which markets do not operate consistent with these idealizations, such that market values depend on the identity of the parties, this may stop being a good source of "objective criteria."

[200] For example, New York's ban on employers asking for salary history is explicitly meant to address the gender wage gap. *See Salary History Ban,* THE OFFICIAL WEBSITE OF N.Y. ST., https://www.ny.gov/programs/salary-history-ban (last visited Nov. 8, 2020). *See also* Andrea Schneider, *What to Not Negotiate About—Salary*, INDISPUTABLY (July 27, 2020), http://indisputably.org/2020/07/what-to-not-negotiate-about-salary-history/.

and racially biased investments in certain communities.[201] Predictive analytics, which seem to provide "objective criteria" by mechanically drawing lines on the basis of large pools of data, may encode bias, and may consequently further harm those who already face prejudice, while masking this prejudice under a veneer of objectivity.[202] Legal precedents also provide important sources of objective criteria, though their claims to objectivity may also collapse under scrutiny. This is where Derrick Bell's work is critically important.

Bell's early work surfaced the legal structure of racial inequality in ways that showed how the legal system's reverence for precedent was a vehicle for discriminatory ideas to extend their reach into the present day.[203] The critical argument of the interest convergence thesis—which argued that racism was a normative commitment supporting much of American law—directly extended his work interrogating the law of race relations.[204] Bell's critique of neutral principles showed that appeals to the seemingly objective nature of shared standards masked the depth of prejudice. He relied upon detailed analysis of legal precedent and factual analysis of how those precedents were used to expose how legal principles furthered bias.

The critical argument of interest convergence has important implications for the negotiation concept of objective criteria. The critical argument had suggested that acceptance of White supremacy was so deeply ingrained in the law as to have become naturalized and invisible.[205] Accordingly, the social standards used to resolve our disagreements through informal means would also potentially contain the same tacit presuppositions.[206] The critical argument of the interest convergence thesis suggested that the objective criteria used to determine an interest-based outcome might systematically favor some rather than others.

It may be more fruitful to see the "objectivity" of objective criteria as needing to be understood with reference to the positionality of the parties.[207]

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[201] *See, e.g.*, RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017).

[202] *See, e.g.*, Karen Hao, *This is How AI Bias Really Happens—and Why It's So Hard to Fix*, MIT TECH. REV. (Feb. 4, 2019), https://www.technologyreview.com/s/612876/this-is-how-ai-bias-really-happensand-why-its-so-hard-to-fix/.

[203] *See* BELL, *supra* note 11.

[204] *See supra* Section II.A.2.

[205] *See supra* note 85 and accompanying text.

[206] *See supra* Section II.B.

[207] This approach owes much to the tradition of feminist epistemology. *See* Katharine T. Bartlett, *Objectivity: A Feminist Revisit*, 66 ALA. L. REV. 375, 393 (2014). A similar approach is taken in the literature on narrative mediation and its concept of entitlement: "Patterns of entitlement often form around specific groups or identities in a community.

That is, agreement on the relevance and independence of any given criterion depends upon shared experiences and shared narratives, and the perspectives of dominant groups have an outsized influence in determining what constitute objective criteria relative to those of marginalized groups within society as a whole. The perspectives of dominant groups are treated as the objective "view from nowhere" while perspectives from the margins are indelibly marked by their subject positions. And, while many of the pioneers of dispute resolution theory were active in combatting racism,[208] the theory has had very little to say about identity.[209] Accordingly, the usage of objective criteria within dispute resolution may be one-sided in favor of dominant social groups by default. Trying to "separate the people from the problem," as dispute resolution theory recommends,[210] may have the effect of inadvertently grounding considerations of fairness in the values of the dominant culture. The theory of interest-based dispute resolution emphasizes the importance of understanding the problem from each party's perspective coupled with a denial that there is any objective "view from nowhere."[211] There is a tension between recognizing perspectives and analyzing problems without reference to the parties in their full humanity.

Societal discourse constructs patterns of entitlement that privilege the concerns of one individual or group of people over those of another." JOHN WINSLADE AND GERALD MONK, NARRATIVE MEDIATION: A NEW APPROACH TO CONFLICT RESOLUTION 96 (2000).

[208] For example, Frank Sander had been instrumental in recruiting Black law students to Harvard. *See* Moffitt, *supra* note 11, at 439.

[209] Specifically, race has not been a major topic within ADR. For example, neither *The Handbook of Dispute Resolution*, a reference volume published by the Program on Negotiation at Harvard in 2005, nor *The Negotiator's Fieldbook*, a reference volume published by the ABA Section on Dispute Resolution in 2006 designed to be "the most comprehensive available reference work on negotiation," contain one reference to "race" in the index. The field has given more attention to gender, though, even so, all references to "gender" in the *Handbook*, and nearly all such references in the *Fieldbook*, refer to a single article in each book. *See* THE HANDBOOK OF DISPUTE RESOLUTION, *supra* note 153; Christopher Honeyman & Andrea Kupfer Schneider, *Introduction: A "Canon of Negotiation" Begins to Emerge*, *in* THE NEGOTIATOR'S FIELDBOOK, *supra* note 177, at 1. The more recent *Negotiator's Desk Reference* fares better in this regard, with a section dedicated to diversity. *See* THE NEGOTIATOR'S DESK REFERENCE, *supra* note 144. The treatment of identity in this literature has generally focused more on questions of individual self-identity: "Am I competent? Am I a good person? Am I worthy of love?" *See* DOUGLAS STONE ET AL., DIFFICULT CONVERSATIONS: HOW TO DISCUSS WHAT MATTERS MOST 111–28 (1999).

[210] FISHER & URY, *supra* note 11, at 17–39.

[211] *See* ROGER FISHER, DEAR ISRAELIS, DEAR ARABS: A WORKING APPROACH TO PEACE 5, 12–13 (1972). *See also* MICHAL ALBERSTEIN, PRAGMATISM AND LAW: FROM PHILOSOPHY TO DISPUTE RESOLUTION 313 (2002) ("What would have been considered radical and subversive in the legal realm—the claim that perception of facts is always subjective, that our judgments are full of biases, and that it is all a matter of settling and the way we present a matter—is assumed here nonchalantly as a state of nature, as a problem we can try and then master.").

Dispute resolution's grounding in behavioral economics and psychology has meant that the theory recognizes how cognitive biases limit rationality. Of particular significance is implicit bias, which captures the operations of unconscious prejudice. Implicit bias is one form of cognitive bias that limits our capabilities for rational thought and action.[212] And this has consequences: bias can lead to worse outcomes for people of color in negotiations.[213]

But the scholarship on implicit bias does more. Emphasizing implicit bias as a major obstacle to the achievement of equality transmutes a question of broad social structure into one of individual psychology.[214] The common response to the existence of implicit bias is to identify debiasing strategies on an individual level rather than to dismantle the systems that create and propagate the messages that generate prejudice, or to take a more critical view of the formulation of the problem.

The methods of interest-based dispute resolution require some modicum of trust to encourage the full, open, truthful exchanges of information that make it possible to create value. Accordingly, scholars and practitioners working in this tradition have paid increasing attention to the relationships among the parties,[215] as well as the patterns of communication that exist among them.[216] Strong relationships can indicate that the parties share common reference points and standards of fairness, and mutual trust can also streamline the process of generating options for agreement, identifying interests, and building mechanisms to encourage commitment. Concern with relationships also enables us to engage with emotions in a thoughtful way, which can improve the perceptions of dispute resolution processes.[217]

The attention given to relationships has grown significantly in recent years, as forms of restorative justice have become increasingly important

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[212] On cognitive biases in negotiation, generally, see MAX H. BAZERMAN & MARGARET A. NEALE, NEGOTIATING RATIONALLY (1992). For ways of overcoming bias, see Douglas N. Frenkel & James H. Stark, *Improving Lawyers' Judgment: Is Mediation Training De-Biasing?*, 21 HARV. NEGOT. L. REV. 1 (2015) (arguing that mediation training can reduce the effects of cognitive biases).

[213] *See* Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817 (1991); Michael Z. Green, *Negotiating While Black*, *in* 1 THE NEGOTIATOR'S DESK REFERENCE, *supra* note 144, at 563.

[214] *See* JONATHAN KAHN, RACE ON THE BRAIN: WHAT IMPLICIT BIAS GETS WRONG ABOUT THE STRUGGLE FOR RACIAL JUSTICE (2018).

[215] *See* Patton, *supra* note 153, at 282. *See also* Mamo, *supra* note 20, at 1444.

[216] *See* Patton, *supra* note 153, at 281–82.

[217] ROGER FISHER & DANIEL SHAPIRO, BEYOND REASON: USING EMOTIONS AS YOU NEGOTIATE (2005). *See also* Millner, *supra* note 149.

elements of the dispute resolution landscape.[218] Such methods are explicitly focused on repairing harm within communities by focusing attention on restoring the relationships among victims, perpetrators, and bystanders within the community.[219] The methods of restorative justice are becoming widely used in the context of racial justice.[220]

But relationships are not only about building trust and openness; they are also fundamentally about power. Patience Crowder has expanded upon the principles outlined in *Getting to Yes* by adding another element to the analysis: recognizing whether there are relationships of domination or subordination within a given matter.[221] This move explicitly builds upon Derrick Bell's descriptive claim that the interests of subordinate groups are only satisfied when the interests of dominant groups are also met and helps to foreground some of the power dynamics involved in resolving disputes.[222] Critical race theory has raised concerns about how such relationship-focused forms of dispute resolution are applied to groups who have often been seen as outsiders to the community. In many contexts, prejudice against outsiders has been the glue that binds an otherwise fractious community together.[223] Even when not explicitly functioning as a basis for discrimination, community values may nevertheless be more provincial than society's highest values in ways that encourage prejudice and suspicion of outsiders, as Delgado has long warned.[224]

An analysis of communications must distinguish between the content communicated and the dynamics of the channel being used for communication: how the message received compares to the message sent. Basic information theory gives us a vocabulary for understanding the dynamics of communication over a noisy channel and how those are influenced by the properties of a transmitter and receiver, independent of the content of the message communicated.[225]

In the context of racial justice, this involves the question of how to be

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[218] *See, e.g.*, Amy J. Cohen, *Moral Restorative Justice: A Political Genealogy of Activism and Neoliberalism in the United States*, 104 MINN. L. REV. 889 (2019).

[219] *See, e.g.*, Erik Luna, *Punishment Theory, Holism, and the Procedural Conception of Restorative Justice*, 2003 UTAH L. REV. 205 (2003).

[220] *See, e.g.*, Michael M. O'Hear, *Rethinking Drug Courts: Restorative Justice as a Response to Racial Injustice*, 20 STAN. L. & POL'Y REV. 463 (2009).

[221] Crowder, *supra* note 9, at 803–05.

[222] *Id.* This approach, however, frames power as something that one group does or does not possess, rather than as something fundamentally relational. *See* Piomelli, *supra* note 191.

[223] Bell's interest convergence thesis had argued that White supremacy was the glue holding American society together. *See supra* note 118 and accompanying text.

[224] Delgado et al., *supra* note 10.

[225] *See* CLAUDE E. SHANNON & WARREN WEAVER, THE MATHEMATICAL THEORY OF COMMUNICATION (1949).

heard and how to command attention when the presumption is that requests will not be given much weight. Legal complaints are relatively narrow in terms of informational content but send a strong signal (enforced by the state), while informal dispute resolution processes may permit more information and nuance to be communicated, at the expense of using a weaker signal. In terms of content, some messages may simply be unintelligible to many White recipients.[226]

Even if an interest-based process leads to an acceptable outcome, it requires a durable commitment—otherwise a party may simply back out once it has gotten what it wants.[227] And the interest convergence thesis is vitally concerned with what happens when interests diverge and a settled outcome no longer satisfies the interests of the parties moving forward. Bell recognized a recurring pattern in which outcomes that seemed to advance the interests of both White and Black Americans would collapse once the costs to Whites moving forward began to exceed the benefits.[228] The collapse of such agreements would generally result in the costs being borne by Blacks as a result of their weaker position.[229] It not only mattered what the outcome was, but also how this would be implemented and what protections against exploitation existed.

And part of the critique of ADR was simply that the privacy of informal dispute resolution took matters of profound public significance and hid them in private.[230] Even when interest convergence occurred in a public forum, as it did in many of the contexts that Bell studied, the expediency of interest-based solutions avoided engaging with the important questions of values on which these outcomes rested.

The motivation for developing interest-based dispute resolution was the belief that outcomes that satisfied the interests of the parties could avoid the binary, win-lose character of more adversarial processes while generating outcomes that the parties would voluntarily enforce in order to advance their interests. In addressing contexts where one party has few good alternatives, and in which prevailing standards are skewed against that party, engaging in an interest-based process not only has the possibility of generating inequality, but may be expected to do so. The outcome may improve the lot of the

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[226] *See supra* text accompanying note 66. The response of "all lives matter" to "Black lives matter" is an example of misunderstanding the nature of the argument. *See, e.g.*, john a. powell, *All lives can't matter until Black lives matter too*, OTHERING & BELONGINGNESS INSTITUTE BLOG (June 16, 2020), https://belonging.berkeley.edu/blog-all-lives-cant-matter-until-black-lives-matter-too.

[227] *See* Patton, *supra* note 153, at 284.

[228] Bell, Bakke, *supra* note 47, at 18–19.

[229] *Id.*

[230] Delgado et al., *supra* note 10, at 1359–60.

disadvantaged group, though without fundamentally changing the underlying relationship between the two groups. The language of efficiency cannot remedy injustice on its own.[231]

B. *Privileging Relationships*

As Derrick Bell's interest convergence thesis argued, agreements reached on the basis of interests would primarily benefit dominant groups, principally because the standards by which an outcome would be evaluated were those of the dominant groups, and also in part because those dominant groups had good alternatives away from the process. The theory of interest-based dispute resolution can help explain some of the mechanisms at the heart of the interest convergence analysis.

There remains an affinity between the two theories in their mutual de-centering of rights. But this affinity dissolves upon closer inspection. Interest convergence analysis understood the achievement of rights to be necessary but unavailable as a practical matter due to those rights resting upon social values that included tacit beliefs in White supremacy, and only turned to forging interest convergences out of necessity.[232] The interest-based theory instead saw interests as a normatively superior foundation for dispute resolution because it could efficiently give parties what they wanted, assuming rights-based mechanisms would remain accessible alternatives and thereby prevent exploitation.[233] Turning to an interest-based process in the absence of meaningfully enforceable rights may have been practically necessary but did not meet the conditions within which interest-based dispute resolution was supposed to occur.[234]

Bell's work spells this out: using interest-based processes makes the achievement of racial equality dependent on the enlightened self-interest of dominant groups, but dominant groups will only accept these arrangements

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[231] The field of community economic development has been vitally concerned with interrogating the relationship between market-driven approaches to economic development and broader concerns of justice. *See, e.g.*, Angela Harris, Margaretta Lin & Jeff Selbin, *From the Art of War to Being Peace: Mindfulness and Community Lawyering in a Neoliberal Age*, 95 CAL. L. REV. 2073, 2093 (2007). More broadly, the political economy perspective "requires a shift in our view of interpersonal relations—not as presumptively equal market transactions that are further legitimated by being voluntary and theoretically 'making everyone better off' but rather as fundamentally power-laden bargains that require law and policy to be rendered more equal and fair. It also requires a shift in our view of inclusion from the individual to the structural level, looking not just at individualized experience but rather at how law and policy construct systematic forms of hierarchy and domination through a market that is always embedded in social relations." *See* Britton-Purdy et al., *supra* note 35, at 1823.

[232] Bell, *Racial History*, *supra* note 27, at 31.

[233] *See* URY, BRETT & GOLDBERG, *supra* note 138, at 4–19.

[234] *Id.*

when they come out ahead—and when interests cease to align, the collapse of agreement will be to the detriment of subordinate groups.[235] There is a fundamental asymmetry between the parties, according to the interest convergence thesis: subordinate groups can only advance their interests by also meeting the interests of dominant groups, but those dominant groups can advance their own interests without needing to satisfy the interests of subordinate groups.[236]

These problems stem from the inherently economistic basis of interest-based dispute resolution; its focus on efficiency and value maximization translates what is fundamentally a question of justice into one of self-interest. Critical race theory shows the limitations of that standard understanding of dispute resolution theory. But if there are problems with understanding the interest-based dispute resolution methodology as operationalizing the logic of economics—problems such as taking a narrow view of interests,[237] failing to account for differences in bargaining power,[238] utilizing narrow standards of fairness[239]—there are ways of reframing the principles of interest-based dispute resolution in ways that center relationships and mutual understanding rather than the creation and distribution of value. In seeking an alternative framework, we can draw upon a critical counter-tradition within dispute resolution. However, there have been tensions between this critical strand of dispute resolution that builds upon a foundation of community and elements of critical race theory that emphasize the importance of difference.

1. *The Critique of Rights and the Creation of Communitarian Forms of Dispute Resolution*

Many critical legal theorists engaged with alternative forms of dispute resolution—if not with the institutionalized apparatus of ADR itself—through their critiques of the structure of legal rights within mainstream legal process. In the wake of the civil rights movement, critical theorists feared that rights provided too limited a basis for advancing the interests of marginalized groups. Even as Derrick Bell argued that the rights of African Americans were functionally limited by White interests, other legal scholars were questioning the role of rights within legal thought. For critics on the political right, reliance

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[235] Bell, *Dilemma*, *supra* note 11, at 523.
[236] *Id.*
[237] *See supra* notes 169–178 and accompanying text.
[238] *See supra* notes 184–191 and accompanying text.
[239] *See supra* notes 195–198 and accompanying text.

on rights inhibited dialogue and authentic human encounters.[240] For critics on the political left, rights were empty symbols whose content was provided by the powerful, thereby impeding true social progress.[241] Rights, after all, had traditionally protected property interests against claims for more equitable distributions.[242] The property interests protected by due process rights had historically included, for example, property interests in slaves.[243] The protection of equal rights by the Reconstruction amendments had permitted segregation and Jim Crow.[244] Given this history, it was far from clear to these critics that rights were the best foundation for protecting Black interests; rights protected the interests of the powerful at the expense of the weak.

At the heart of these varied critiques of rights were contested notions of community and human relatedness. Critics on the political right drew upon Burkean concepts of shared community norms and experiences as a basis for gradual reform through dialogue and gradual consensus-building.[245] Critics on the political left, associated with the critical legal studies movement, identified an undercurrent of this Burkean approach to community values within the regnant legal process theory that rendered incoherent that theory's commitments to liberalism[246]—an echo of Bell's discovery that the inner morality of legal process theory involved the protection of White interests.[247] Those critics on the left instead offered a vision centered on a multiplicity of human relationships and based on the mutual acceptance of vulnerable subjects.[248] These critics remained cautiously optimistic about the possibility of more authentic and engaged resolution of disputes and of activism within community centers, which contained "a potentially liberating element, if one that can be unleashed and made effective only through an autonomous political movement of the dominated classes."[249]

Building upon the work of critical legal studies, advocates of a "republican revival" on the left sought to overcome the limits of traditional

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[240] MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 14 (1991).

[241] Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1363–64 (1984).

[242] Morton J. Horwitz, *Rights*, 23 HARV. C.R.-C.L. L. REV. 393, 405–06 (1988).

[243] *See id.* at 396. *See also* Bell, *Racial Realism*, *supra* note 115, at 376. Patricia Williams reflected on the experience of reading the contract for the sale of her great-great-grandmother in WILLIAMS, *supra* note 101, at 17–19.

[244] *See* Bell, *Racial Realism*, *supra* note 115, at 376.

[245] *See* Mamo, *supra* note 20, at 1428–30.

[246] *See* Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 785 (1983).

[247] *See supra* notes 75–80 and accompanying text.

[248] *See* Mamo, *supra* note 20, at 1430–38.

[249] Boaventura de Sousa Santos, *Law and Community: The Changing Nature of State Power in Late Capitalism*, *in* THE POLITICS OF INFORMAL JUSTICE 249, 264 (Richard L. Abel ed., 1982).

understandings of community, which had functioned to exclude racial minorities.[250] An appropriately reconstituted ideal of community would foster the exercise of practical wisdom, dialogue, and authentic human relationships.[251] From the insight that rights were indeterminate, reflecting traditional community values and the interests of the powerful, critics on the left rejected rights language in favor of the possibility of more authentic interactions unmediated by the alienating effects of rights.[252] Being accepted as full members of this expanded community would permit reasoned deliberation in which people could bring their full selves and discuss deep differences in order to resolve disputes.

2. *CRITICAL RACE THEORY'S DEFENSE OF RIGHTS*

Efforts to forge a new republicanism that would permit self-government ran up against the recognition that shared community values in America had been based on the subordination of Blacks.[253] Bell argued that future efforts to resolve disputes and improve government by reaching political agreement would sacrifice Black interests.[254] Rights, limited as they were, nevertheless provided some bulwark against the unfettered exercise of power by serving as a basis for defining fairness.[255] Consequently, critical race theorists defended rights against communitarian efforts to resolve disputes on an informal basis.[256]

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[250] *See* Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1495 (1988).

[251] Frank I. Michelman, *Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 25 (1986). For additional context on the importance of communitarianism in 1980s legal thought on the left, see LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM 143–63 (1996).

[252] For the ways in which this has informed the theory of ADR, see Mamo, *supra* note 20, at 1438–40.

[253] Derrick Bell & Preeta Bansal, *The Republican Revival and Racial Politics*, 97 YALE L.J. 1609, 1611–12 (1988).

[254] *Id.* at 1620.

[255] *Id.* at 1619. *See also supra* note 86.

[256] Even at the 1976 Pound Conference, where the basic concept of contemporary ADR was first explored, Judge Leon Higginbotham reminded the participants that courts would need to play a key role in the protection of rights when other institutions (such as schools) failed to do so of their own accord. Higginbotham's argument for a more assertive role for the courts in the complex matters attending desegregation was based on his recognition that existing legal practices supported a system of racial inequality and needed to be actively dismantled. *See* A. Leon Higginbotham, Jr., *The Relevance of Slavery: Race and the American Legal Process*, 54 NOTRE DAME L. REV. 171, 179–80 (1978). This approach reflects Higginbotham's debt to Derrick Bell's work; *see* A. Leon Higginbotham, Jr., *Book Review* of DERRICK A. BELL, RACE, RACISM, AND AMERICAN LAW, 122 U. PA. L. REV. 1044, 1067 (1974).

The fear was that moving from the defense of rights to an exploration of interests and community would permit domination. In comparing her own experiences in the rental housing market with those of a White colleague affiliated with critical legal studies, Patricia Williams explained that a critique of rights might make sense for people whose rights were secure in a way that it did not for those whose claim to rights was more tenuous.[257] In those circumstances, rights—unreliable though they were—gestured toward the creation of boundaries. "It is true that the constitutional foreground of 'rights' was shaped by whites, parceled out to blacks in pieces, ordained in small favors, as random insulting gratuities," Williams wrote. "Perhaps the predominance of that imbalance obscures the fact that the recursive insistence of those rights is also defined by black desire for them, desire not fueled by the sop of minor enforcement of major statutory schemes like the Civil Rights Act, but by knowledge of, and generations of existing in, a world without any meaningful boundaries. And 'without boundary' for blacks has meant not untrammeled vistas of possibility, but the crushing weight of totalistic—bodily and spiritual—*intrusion*."[258] For Williams, the challenge was to expand the frame of reference to include Black people as individuals without exposing them to domination—which a true commitment to rights might help accomplish.[259]

Critical race theorists fully recognized the validity of the arguments being made by those in the critical legal studies movement. Regarding the indeterminacy of rights, Mari Matsuda noted that critical legal studies' "central descriptive message—that legal ideals are manipulable and that law serves to legitimate existing maldistributions of wealth and power—rings true for anyone who has experienced life in non-white America."[260] And yet, critical race theorists could not fully embrace these critiques. For the White critical legal scholars, "rights reinforce a soulless, alienating vision of society made up of atomized individuals whose only concern is to protect their own security and property,"[261] while for critical race theorists, "rights imply a respect which

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[257] Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 413 (1987).

[258] *Id.* at 430–31. There was value in the struggle for rights itself: "the experience of rights-assertion has been one of both solidarity and freedom, of empowerment of an internal and very personal sort; it has been a process of finding the self." *Id.* at 414. *See also* Bell, *Racial Realism*, *supra* note 115, at 378 ("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."); and *supra* note 120.

[259] Williams, *supra* note 257, at 423–25.

[260] Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 327 (1987).

[261] Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What*

places one within the referential range of self and others, which elevates one's status from human body to social being."[262] Rights defined community in ways that brought people of color within it; being recognized as one who could engage others as an equal on an informal basis required first being recognized as a rights-bearing subject.

These were not abstract, academic questions; rather, critical race theorists argued that their challenge to the critique of rights and communitarian perspectives on dispute resolution reflected the lived experience of the scholars themselves. Taking the view from the bottom—the view experienced by those most marginalized—revealed the necessity of claiming rights even in light of their instability and indeterminacy in the face of power.[263] Scholars occupying more privileged positions could understand, and even feel in their bones, the urgency of rethinking the nature of rights[264]—but not with the same immediacy as those whose lives, liberty, and welfare were continually in jeopardy by virtue of their identities.[265] While White scholars on the left could agitate for revolution, those on the margins could not lose sight of the strategic possibilities of incremental steps as a bridge to more fundamental change.[266] The recognition of difference was a way of creating space to develop arguments and of asserting an expertise gained through lived experience and shared standards.

The lessons from this earlier moment teach us the limits of purely informal means of dispute resolution while underscoring the importance of thinking explicitly about power. Accordingly, the informal, dialogical process outlined in the remainder of this Article must engage with projects of law reform and rights definition, as well as with projects of building power. There is no avoiding the need to think strategically about opportunities both inside and outside of the legal process.

Minorities Want?, 22 HARV. C.R.-C.L. L. REV. 301, 304 (1987) [hereinafter Delgado, *Ethereal Scholar*]. *See also* Peter Gabel, *Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563 (1984).

[262] Williams, *supra* note 257, at 416.

[263] Matsuda, *supra* note 260, at 338.

[264] *See* Bell & Bansal, *supra* note 253, at 1620–21. Williams notes that by acknowledging these different perspectives, "one can fully appreciate the underlying common ground of the radical left and the historically oppressed: the desire to heal a profound existential disillusionment." Williams, *supra* note 257, at 414–15.

[265] Matsuda, *supra* note 260, at 346–49. *See also* Harlon L. Dalton, *The Clouded Prism*, 22 HARV. C.R.-C.L. L. REV. 435, 439–40 (1987). *Cf.* Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561 (1984). For a critique of arguments concerning this kind of perspectivism, see Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745, 1785–87 (1989).

[266] Delgado, *Ethereal Scholar*, *supra* note 261, at 319.

Richard Delgado has become skeptical of the ability of courts to defend against injustices.[267] He is not alone in doing so. But this suspicion of the *courts* is distinct from suspicion of the *law*; Delgado, after all, had defended the law in an earlier moment for its ability to give life to our deepest values.[268] It is significant that Delgado's skepticism regarding the courts has not softened his view on alternative dispute resolution.[269] Insofar as his use of the term "ADR" refers to the dominant strand of interest-based dispute resolution, it is easy to see why he remains critical of its possibilities.

But, fundamentally, ADR does not mean only interest-based practices; it can refer to any set of practices that provides an alternative to the use of litigation. In a moment in which the courts are increasingly unavailable and seem increasingly hostile to projects of advancing racial justice, we may need to find alternatives to both the courts and interest-based processes. It would be a mistake to think that the dominant economistic approach to dispute resolution exhausts the possibilities of ADR for racial justice, just as it would be a mistake to think that forms of dispute resolution that provide alternatives to litigation are hostile to the language of rights. The remainder of this Article outlines a system of human encounters concerned with probing the nature of justice and the prevailing standards of fairness that forthrightly explores the differences in how we understand what it means to do right. Such a system would, of necessity, de-emphasize the *resolution* of disputes in favor of describing visions of *what might be*. It would also acknowledge that we experience conflict because we all have fundamentally different views of what might be, and of what values inform those visions of the future. Rather than seeking to find solutions that advance the interests of the parties, this program would dwell at the point where we engage without pretense in conversation about what we believe to be right.

IV. DIALOGUE AND DEMONSTRATION AS RELATIONAL METHODS

The vision of resolving disputes in the context of unalienated relationships led to possibilities of creating transformational models of dispute resolution.[270] But critical race theory's defense of rights also recognized the possibility that claiming rights could transform conflicts in ways that informal means could not.[271] The tension between these two visions revolved around the question of whether transformation was best achieved through authentic

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[267] Delgado, *supra* note 22.

[268] Delgado et al., *supra* note 10, at 1383–89.

[269] Delgado, *supra* note 22, at 637.

[270] *See* Peter Gabel, *Critical Legal Studies as Spiritual Practice*, 36 PEPP. L. REV. 515, 530 (2009).

[271] *See* Williams, *supra* note 257, at 416–17.

dialogical encounters or through the assertion of formal rights. This section outlines a way of achieving transformation without relying either on the good will of our counterparts[272] or on potentially illusory rights.[273] This task has only become more pressing in light of the nationwide protests over policing and race in the summer of 2020.

Transformational dispute resolution is most often associated with the transformative model of mediation pioneered by Robert Baruch Bush and Joseph Folger.[274] In recent years, the aspirations of the transformational model to improve mutual understanding and strengthen relationships manifest in the dialogue initiatives that have arisen to combat political polarization[275] and to strengthen the often tense relationships between police and communities.[276] The obvious danger in a relationship-centered approach in a society with deep social divisions is that it risks exacerbating prejudice.[277] Appeals to community, to local control, and the like have often simply been cover for mistreatment of those who are different.[278]

This section considers how we might structure an approach to dispute resolution that can achieve mutual understanding about what really matters: explaining our needs, our values, and our understandings of fairness, deepening our relationships and strengthening our communities, and building trust. This approach decenters questions of economic value to instead foreground human relatedness, opportunities to understand people in their full complexity and to engage with sources of disagreement and conflict at a deep

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[272] *See generally* Robert J. Condlin, *Bargaining with a Hugger: The Weaknesses and Limitations of a Communitarian Conception of Legal Dispute Bargaining, or Why We Can't All Just Get Along*, 9 CARDOZO J. OF CONFLICT RESOL. 1 (2007).

[273] *See generally* West, *supra* note 81.

[274] *See generally* ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT (2004). On the uses of this approach to achieve broader aspirations of justice, see Robert A. Baruch Bush & Joseph P. Folger, *Mediation and Social Justice: Risks and Opportunities*, 27 OHIO ST. J. ON DISP. RESOL. 1, 45–46 (2012) (describing ADR as a process "where actual changes in attitudes and perceptions can occur, over time and on a micro-level, changes that ultimately lay a foundation for more sustainable macro-level change").

[275] This connection is most explicit in Erik Cleven, Robert A. Baruch Bush & Judith A. Saul, *Living with No: Political Polarization and Transformative Dialogue*, 2018 J. DISP. RESOL. 53 (2018). Nevertheless, many of these dialogue initiatives have grown out of the interest-based tradition rather than the transformative one. *See, e.g.*, Robert C. Bordone, *Building Conflict Resilience: It's Not* Just *About Problem-Solving*, 2018 J. DISP. RESOL. 65 (2018).

[276] *See, e.g.*, SHARON PRESS, REFLECTIONS: WEAVING THREADS TO STRENGTHEN THE FABRIC OF OUR COMMUNITIES (2020), https://open.mitchellhamline.edu/dri_press/11/.

[277] Delgado et al., *supra* note 10; Lawrence, *supra* note 98.

[278] *See* Bell & Bansal, *supra* note 253.

level.[279] It similarly decenters *resolution* in light of the unceasing nature of the struggle for justice. The idea of a relationship-driven process of dialogue may seem naïve,[280] which is why it is essential to give adequate attention to the matter of power.[281] It aims to transform the conditions within which legal remedies can be exercised and parties seek to reach agreements. This approach to dispute resolution stands to learn much from critical race theory and methods of political economy.

A. *Empathy as the Basis for a Relationship-Oriented Process*

The challenge is how to achieve mutual understanding in the face of ineradicable subjectivity. One vehicle for doing so is empathy. The term is defined several different ways, generally describing practices of attempting to learn the situation of another—cognitively and/or emotionally, stepping into another's shoes either by projecting oneself into their situation or by exploring their stories in depth, and either as an impetus to act or solely for the purpose of understanding.[282] Empathy, the ability to understand another, functions as a counterpoint to the ability to tell one's own story.[283] It is difficult because it requires genuine curiosity toward one's counterpart as well as vulnerability.[284]

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[279] *See* Rana & Britton-Purdy, *supra* note 20 ("even if solidarity begins with shared material interest, for real community to develop it has to transcend material interest alone. It has to speak to a sense of common ethical endeavor—the willingness to bear real costs even if not in one's immediate self-interest, as occurred at various moments in the national past").

[280] *See* Condlin, *supra* note 272.

[281] It is important to draw attention to power precisely because the standard appeal of dispute resolution is in its *downplaying* of power through the claim that rational, good-faith problem-solving can generate efficient outcomes with mutual gains by prioritizing integrative moves over distributive ones. *See* Russell Korobkin, *Against Integrative Bargaining*, 58 CASE W. RES. L. REV. 1323, 1323–24 (2008). *See also* Britton-Purdy et al., *supra* note 35, at 1827 ("part of the allure of discourses of efficiency and neutrality lies precisely in the claim that these discourses—and the system of market governance itself—can produce optimal outcomes without the messiness of politics and, ultimately, the acknowledgement that political conflict is resolved in an exercise of public power in which some win and some lose").

[282] Kathryn Abrams, *Empathy and Experience in the Sotomayor Hearings*, 36 OHIO N.U. L. REV. 263, 268 (2010). The emotional dimension of empathy is not without controversy; *see generally* PAUL BLOOM, AGAINST EMPATHY: THE CASE FOR RATIONAL COMPASSION (2016).

[283] MNOOKIN, PEPPET & TULUMELLO, *supra* note 176, at 44–68.

[284] Engaging in good faith dialogue with empathy cannot mean demanding that only those with whom we disagree change their views while ours remain unaltered; dialogue requires reflexivity in being vulnerable and openness to learning from our dialogical partners. In holding dialogue regarding our deepest beliefs, the traditional ADR maxim that "acknowledgment does not mean agreement" only takes us so far—dialogue requires

A call for empathy heightens the need to consider questions of power. Vulnerability, as a precondition to the exercise of empathy, manifests differently for parties depending on their circumstances; in the context of policing, for example, the psychic vulnerability that police officers may experience when seriously engaging with activist critiques is qualitatively different from the psychic *and bodily* vulnerability that activists may experience when delivering their message before armed organs of the state. Calls for empathy that do not account for asymmetries in the forms of vulnerability demanded of the parties risk causing harm to those who are already the most vulnerable.

But empathy also creates possibilities to utilize power to advance principles of equality. Some scholars have interpreted empathy as being in tension with traditional legal principles of neutrality: Lynne Henderson reads *Brown* as pitting Thurgood Marshall's arguments on the basis of empathy against John Davis's legalistic invocations of precedent and principles of federalism.[285] In this reading, Wechsler's argument about *Brown* in *Neutral Principles*[286] is an example of a failure of empathy; its decontextualized concept of neutrality elevated a kind of abstracted legalism above an appreciation of human reality.[287] Bell's response might simply be that the refusal to practice empathy demonstrates the White solipsism at the heart of interest convergence.

The possibility of empathy (understood as projecting oneself into another's circumstances) seems to assume the existence of some abstract core self, independent of characteristics such as race or gender, that projects into the other's circumstances and renders the person doing the empathizing capable of understanding.[288] The challenges that critical race theory raises against the specter of the default legal subject apply here too.[289] The process

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more than mere acknowledgement of differing views; it requires openness to the possibility of changing our views to the extent that we would hope that others change theirs: reflexivity without openness means that we are simply sharing our positions. *See* Rothman, *supra* note 34. This vulnerability is what makes meaningful dialogue particularly difficult when power is implicated (as it always is).

[285] Lynn N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1596–1609 (1987).

[286] Wechsler, *supra* note 69.

[287] Henderson, *supra* note 285, at 1608. *But see* Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds*, 87 MICH. L. REV. 2099, 2108 (1989) (arguing that *Brown* can be understood as traditional lawyering, without reference to empathy).

[288] *See* Cynthia V. Ward, *A Kinder, Gentler Liberalism? Visions of Empathy in Feminist and Communitarian Literature*, 61 U. CHI. L. REV. 929, 939–43 (1994).

[289] *See supra* notes 101–109 and accompanying text.

of comparing one's own position to that of another—to say "I understand you"—obscures the intersubjective gulf across which we try to empathize. And yet this comparative process is also necessary to understand others' lives as best we can, incomplete though it may be.[290] Analogizing across differences can involve "taking back the center stage" when race or gender issues are addressed, to marginalize these concerns by shifting to other forms of oppression that the empathizer perhaps feels more acutely[291]—without necessarily recognizing that this assumes that oppression is fungible.[292] The belief in the fungibility of oppression leads some to fail to adequately listen to their counterparts or be curious about their experiences, or even to accord any weight to supposedly "lesser" forms of oppression.[293] Empathy cannot guarantee that any full understanding can be achieved.[294] Empathy, operating in the name of building understanding across differences, can have the effect of reinscribing those differences.[295]

An alternative form of empathy embraces a thick description of identity: from a communitarian perspective, the self is inseparable from the particularities of one's circumstances, which makes an empathy grounded in equality (and abstracted sameness) impossible across difference.[296] Instead of projection, this notion of identity would require understanding the other's situation from *their* perspective (to the extent possible)—an exercise that those on the margins are most often called to perform, rather than those in positions of power.[297] But the fact that the self is grounded in its own situation means that there are strict limits to the capacity to achieve intersubjective understandings, particularly across the differences that most strongly call out

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[290] Trina Grillo and Stephanie M. Wildman, *Obscuring the Importance of Race: The Implication of Making Comparisons between Racism and Sexism (or Other -Isms)*, 1991 DUKE L.J., 397, 398 (1991). *See also* Richard Delgado, *Rodrigo's Eleventh Chronicle: Empathy and False Empathy*, 84 CAL. L. REV. 61, 70 (1996).

[291] For example, Mike O'Meara, president of the Police Benevolent Association of New York, decried that police were being painted as "animals and thugs" in the protests following the killing of George Floyd. Frank Miles, *NY State Police Union Boss Says Officers Shouldn't be Treated "Like Animals and Thugs"*, FOX NEWS (June 9, 2020), https://www.foxnews.com/us/ny-state-police-union-boss-officers-treated-like-animals-and-thugs. In doing so, O'Meara criticized the use of language against police officers that has long been used to associate Black men with criminality. *See, e.g.*, Bryan Adamson, *"Thugs," "Crooks," and "Rebellious Negroes": Racist and Racialized Media Coverage of Michael Brown and the Ferguson Demonstrations*, 32 HARV. J. ON RACIAL & ETHNIC JUST. 189, 232–34, 244 (2016).

[292] Grillo and Wildman, *supra* note 290, at 401–04.

[293] *Id.* at 405–10.

[294] Henderson, *supra* note 285, at 1585.

[295] Delgado, *supra* note 290, at 70.

[296] Ward, *supra* note 279, at 944.

[297] *Id.* at 946–51.

for such understandings. And the failure to recognize those limits can be dangerous, resulting in a presumption that we can understand another completely, essentializing the other.[298] The recognition of difference requires respect for some fundamental *un*knowability, even as the imperative of equality demands the achievement of some glimmer of understanding on the basis of shared experience and common humanity.[299]

An appropriately cautious appeal to empathy has space to acknowledge the unknowability of others' experiences and that some parties have the option of exercising empathy from positions of privilege while those in subordinate positions must, as a practical necessity, learn to try to see the world from the perspective of others. This form of empathy nevertheless permits us to see the fundamental interrelatedness of our varied subjective positions, what powell described as generating possibilities of *empowerment*—a process of continual becoming, within networks of relationships, presupposing "that our relationship with each other is constituted and yet unclear. We never have full access to each other, and yet we are not fully strangers … the institutional arrangements themselves are part of the discourse."[300] Awareness of the ways in which we construct ourselves, in spite of our internal fragmentation, provides a model for how to relate with others across an intersubjective gulf—feeling our way towards that unalienated relatedness that is both empowered and always tentative. Armed with a critical view of community and relationships, we can complicate and destabilize these concepts—focusing not only on the immediate working relationships among specific individuals, but also analyzing how they stand in more complex relationships with each other. The primary payoff of working through such relationship questions would come from the *doing* itself, by focusing the attention of the participants on problematizing relationships and moving to a more critical and engaged frame of mind.[301]

For example, in the context of community dialogues regarding policing and racial justice, we would need to look beyond the specific individuals—police officers, mayors, community members, families of victims—who are engaged in discussions at the local level. We would instead need to take a systems-level view to analyze such matters as the local history

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[298] Lucie E. White, *Seeking "... The Faces of Otherness... ": A Response to Professors Sarat, Felstiner, and Cahn*, 77 CORNELL L. REV. 1499, 1508 (1992).

[299] *See id.* Peter Gabel has recently described practices centering on such understanding as a possible path to a revitalized jurisprudence of social transformation. *See* Gabel, *supra* note 270, at 530–31.

[300] john a. powell, *Disrupting Individualism and Distributive Remedies with Intersubjectivity and Empowerment: An Approach to Justice and Discourse*, 1 MARGINS 1, 17–20 (2001).

[301] *See id.*

regarding policing, changing demographics, and the structure of relationships among the stakeholders.[302] What are the larger social struggles in which the local challenges are situated—operating at the national level, or lasting across centuries? The act of having frank and open discussions about where these participants are coming from would strengthen their abilities to talk about hard matters without papering over the deep points of difference that run through our communities.[303] Such context can help give meaning to differences.

A desire to explore relationships and develop empathy for others requires also strengthening the ability of ourselves and others to speak and be heard. But it is one thing to share stories about how we are situated in the world. It is quite another for these stories to *matter*, to penetrate the consciousness of others. Ultimately, as a precondition to engaging through informal means, we must be able to *seize* our interlocutors, to make them listen.[304] Litigation does so, but at the cost of channeling the dispute into a narrowly defined process. Interest-based dispute resolution does so by holding out the possibility of creating value. A process of engaging disputes by sharing perspectives on justice and sources of fairness requires something different—not the stick of a lawsuit or the carrot of deal-making, but the experience of being brought up short by a sense of injustice. This was the necessary feature of the civil rights movement, a complement to the legal struggles that occurred in court and the legislative deals that were struck. It is genuinely radical insofar as it brings us to the root of the problem. And it is one reason why the Black Lives Matter movement has attracted such a diverse base of support.

B. *Demonstration as Communication*

How can those on the margins make their perspectives intelligible to their counterparts? Whereas litigation and rights-based mechanisms command attention through the action of the state, and interest-based mechanisms command attention through appeals to self-interest, a dialogical and relationship-based mechanism does not necessarily draw upon either. What is needed instead is a way to amplify messages from the margins and challenge pre-existing assumptions, creating the conditions within which to exercise empathy through the shared experience of vulnerability, and ultimately to have meaningful dialogue across difference.

The first step is to strengthen communication within the outsider group, drawing on the possibilities of using narrative as a vehicle for argument. Narrative could take the form of instructional parables or dialogues, which

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[302] On the systems-level view in ADR, see Cohen, *supra* note 139.

[303] Cleven et al., *supra* note 275, at 53–54.

[304] JAMES M. JASPER, THE ART OF MORAL PROTEST 106 (1997).

Bell frequently used,[305] or it could take the form of autobiography.[306] The narrative turn in critical race theory let outsider scholars speak with a distinctive voice that was explicitly intended to challenge predominant narratives and to build solidarity and community within outsider groups.[307]

The importance of voice followed from standpoint theories—the recognition that scholars from different vantage points could see different sides of an issue and that the views from the margins deserved particular attention because those on the margins often have more at stake and have so frequently been deprived of voice.[308] Consequently, those perspectives tended not to penetrate the consciousness of the dominant groups, and in their absence legal discourse unwittingly would be limited to a narrow (i.e., White, male) perspective.[309]

As a general matter, this acceptance of the partiality of perspective is understood within alternative dispute resolution, where the emphasis on reaching mutually acceptable outcomes tends to be more important than ascertaining the precise truth of a given matter.[310] Indeed, storytelling has even been described as being particularly well suited to dispute resolution, insofar as it permits the parties to describe disputes in their own terms.[311] Accordingly, ADR practitioners accept that the parties to ADR processes may have significantly different stories about what is happening, based on the

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[305] *See, e.g.*, DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987).

[306] *See, e.g.*, Jerome McCristal Culp, Jr., *Autobiography and Legal Scholarship and Teaching: Finding the Me in the Legal Academy*, 77 VA. L. REV. 539 (1991). This turn toward narrative was the subject of some controversy, beyond the scope of this Article. *See* Daniel A. Farber and Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993). For more on the centrality of "objective" voices in legal thought, see WILLIAMS, *supra* note 101, at 9. Williams describes the application of this principle to her own writing by a law review in *Id.* at 47–48.

[307] Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2413–14 (1989) [hereinafter Delgado, *Storytelling*].

[308] *See* Matsuda, *supra* note 259.

[309] Delgado, *Storytelling*, *supra* note 307, at 2439; *see also* Culp, *supra* note 306, at 547. The poet and mediator Pádraig Ó Tuama describes how anger can lead to activism through stories: "To find a way within which to tell the stories that are being suppressed and to believe them. To practice the radical, radical thing of believing something to be true, especially when there have been systems to deny the truth of it." *See* Pádraig Ó Tuama and Marilyn Nelson, *A New Imagination of Prayer*, THE ON BEING PROJECT (Sep. 6, 2018), https://onbeing.org/programs/padraig-o-tuama-and-marilyn-nelson-a-new-imagination-of-prayer/ (unedited audio version).

[310] *See* Amy J. Cohen, *Revisiting* Against Settlement*: Some Reflections on Dispute Resolution and Public Values*, 78 FORDHAM L. REV. 1143, 1165 (2009).

[311] Hilary Astor, *Elizabeth's Story: Mediation, Violence, and the Legal Academy*, 2 FLINDERS J. L. REFORM 13, 17 (1997).

information they have access to and the frames through which they interpret that information.[312] And ADR accepts that the best way to approach the truth is by hearing a multiplicity of stories.[313] Hence the need for empathy.

But stories must be *listened to* if they are to matter. Demonstrations and protests can provide amplification. To be sure, not every demonstration is an invitation to dialogue. Some demonstrations may function primarily to build solidarity among those who are already committed to particular views, maintaining the coherence of the group making the claim.[314] Many demonstrations are also directed toward audiences who may not share those commitments.[315] They need to be persuasive to their audiences.

Demonstrations seek to persuade in order to build a new shared moral understanding.[316] While many issue demands (and may consequently be seen as "positional" in the language of interest-based dispute resolution), or may speak in the language of legal rights, taking to the streets may be more fruitfully seen as an appeal to shift consciousness by making audiences see the world in a new light. They are focused not only on finding *solutions* to the problem at hand, but, even more fundamentally, on coming to a new understanding of what is right and of whose perspectives matter.[317] Protest is an alternative to the legal process that has the ability to change the dispute resolution landscape by engaging with questions of right and of power in the first instance by amplifying voices from the margins and redefining the situation.[318]

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[312] *See* Douglas Stone and Sheila Heen, *Bone Chips to Dinosaurs: Perceptions, Stories, and Conflict*, *in* THE HANDBOOK OF DISPUTE RESOLUTION, *supra* note 153, at 150.

[313] Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5, 20 (1996). *See also* Carrie Menkel-Meadow, *The Power of Narrative in Empathetic Learning: Post-Modernism and the Stories of Law*, 2 UCLA WOMEN'S L.J. 287 (1992) (reviewing WILLIAMS, *supra* note 101).

[314] For more on some of the internal-facing effects, see Jeffrey S. Juris, *Performing Politics: Image, Embodiment, and Affective Solidarity during Anti-Corporate Globalization Protests*, 9 ETHNOGRAPHY 61 (2008).

[315] Jennifer W. Reynolds, *The Activist Plus: Disputes Systems Design and Social Activism*, 13 U. ST. THOMAS L.J. 334, 335 (2017). Reynolds has done important work on expanding the scope of alternative dispute resolution to include activism, and to consider how our understanding of activism may be improved by viewing it through the lens of ADR theories. The benefits of understanding activism as a form of ADR include having a better understanding of the systems-level consequences of activism and protest, and consequently how such actions may be better able to engage with other stakeholders. *See id.* at 342–47.

[316] *See* JASPER, *supra* note 304.

[317] *Id. See also* Akbar, *supra* note 1, at 476.

[318] BELL, CONFRONTING AUTHORITY, *supra* note 120, at 8 ("By challenging authority, the protester undermines the assumption that things are either as they are supposed to be

Protest is a way of calling attention to a problem. It is the opening move and the background context for creating space to have genuine dialogue around an issue by contesting existing narratives.[319] A relationship that begins in the context of a protest or demonstration is unlikely to be an "easy" one. But this difficulty ultimately is beneficial because the parties will need to squarely address the hard issues; there is no possibility of moving forward without doing the most important work. As the parties navigate their relationship, the ongoing nature of the protest movement provides both urgency for the task and ensures that the perspectives of the "weaker" group remain visible and at the heart of the dialogue rather than being coopted. Finding solutions will likely involve operating on multiple dimensions—invoking the state through the legal process, seeking opportunities to strike deals, and continuing to hold dialogue regarding what is right.[320]

This pattern is visible in the protests that have followed the killing of George Floyd. As Amna Akbar describes the networks of activists that have worked for years to challenge police practices in the context of racial justice, "[m]any of these campaigns have seen concrete wins and, by shifting the larger public discussion around police and prisons, they've redefined the debate."[321] Recognizing their efforts will not end conflict, poverty, and inequality, the activists' "invitation is to investigate these problems with care and particularity, and collectively craft responses that do not rely on violence and punishment."[322] The steps that are ultimately taken by state actors or others tend to be more conservative than activists' visions, though success is not measured solely by the end results—the moral vision has a still deeper significance.[323]

C. *Dialogue and the Possibility of Justice*

The various parties to a dispute may well have very different ideas about which principles of fairness control and which reference points are

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or as they must be. What is most heretical, though, is that, in every case, the protester asserts the right to have a meaningful—as opposed to a token—voice."). While not the focus of this Article, protests can also engage with questions of law, and they very well may influence the cost/benefit calculation of other parties.

[319] *See* Charles R. Lawrence III, *The Fire This Time: Black Lives Matter, Abolitionist Pedagogy, and the Law*, 65 J. LEGAL EDUC. 381, 387 (2015).

[320] *See* K. Sabeel Rahman & Jocelyn Simonson, *The Institutional Design of Community Control*, 108 CAL. L. REV. 679, 689–90 (2020).

[321] Amna A. Akbar, *How Defund and Disband Became the Demands*, N.Y.R. DAILY (June 15, 2020), https://www.nybooks.com/daily/2020/06/15/how-defund-and-disband-became-the-demands/.

[322] *Id.*

[323] Akbar, *supra* note 1, at 476.

legitimate, and the perspectives of outsider groups may lack the imprimatur of "objectivity."[324] Rather than proceeding on the presumption that there exists an "objective" solution to be found, principles of dialogue can help us to recognize that the sources of our disagreements are deeper still—concerning the very foundations of our standards of fairness. While citations to legal precedents or market valuations—the usual controlling criteria in dispute resolution—may remain useful, the point of engaging in dialogue is to not rest at the level of instrumental reason but to genuinely engage with the deep principles for why we believe certain outcomes are fair and others are not.

Faced with the problematization of the "objectivity" of objective criteria and the concern that objectivity may be associated with dominant perspectives, we can shift our attention from arguing about what the applicable criteria *are* to understanding how the determination of what is objective in the first place implicates our identities and relationships; the discussion of the governing criteria can benefit from a discussion about the definition of our positionalities and the communities that we inhabit.[325] We can move away from describing informal standards of fairness—which may embed problematic biases—to discuss our *sources* of objective criteria. We may ask: in what ways do we tell similar stories about the problem, and in what ways do we tell different stories? Why? How do these stories reflect our experiences and our ways of being in the world, and how can differences in those experiences explain our different perceptions of fairness and objective criteria? As we share our stories and our understandings of the world and strive for mutual understanding, what factors inform our sense of fairness? A discussion of sources of fairness will not immediately provide us with the standards that can help us *resolve* disputes, but we can create the conditions for achieving mutual understanding of our differences, without judgment.

The approach outlined here similarly strives to probe below the level of party interests. The dispute resolution literature often starts with interests as a given: they are subjectively valid and require no further justification; they are to be accepted on their own terms, with no greater moral significance.[326] In this view, parties can rationally act upon their own interests and strategically consider their counterparts'—but each takes the other as they find them. It

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[324] *See supra* notes 102–109 and accompanying text.

[325] This explicitly calls for drawing upon the tradition of feminist epistemology. *See, e.g.*, Bartlett, *supra* note 207, at 389 ("Positionality combines self-skepticism with a commitment to truth-seeking, encompassing a responsibility both for understanding our own partiality and distorted ways of thinking *and* for striving to overcome these multiple distortions. Acknowledging the limitations of truth, positionality insists that we nonetheless are obligated to strive toward it.").

[326] *See, e.g.*, Susan Silbey & Austin Sarat, *Dispute Processing in Law and Legal Scholarship: From Institutional Critique to the Reconstruction of the Juridical Subject*, 66 DENV. U. L. REV. 437, 490–92 (1989).

needn't be that way. Interests do not simply exist independently; rather, they emerge dialectically through testing and refining and dialogue.

Traditional dispute resolution contemplates play in defining interests. Much of the process of interest-based dispute resolution involves identifying and clarifying the interests at play for both parties, as well as the relative weights of those interests.[327] But the theory also contemplates that one's counterparts will not necessarily have done this analysis and that there may be work necessary to help the counterparts ascertain what they really want in order to achieve wise and durable agreements. The process of learning a party's interests can also involve *shaping* the definition of those interests because individuals often have limited self-knowledge and often hold inconsistent beliefs.[328] Even as we learn from others what their interests might be, we can also help them understand those interests in new ways and recognize interests that they may not have considered.

For example, policing often involves the prioritization of "safety" with the use of high-powered military technology and privileging the protection of property.[329] Community members less likely to be on the receiving end of police force may distinguish decisions impacting themselves, as individuals, from the broader social questions of how to build a just society. A discussion of interests should problematize precisely these kinds of distinctions—what are the interests that bear upon the parties as *individuals*? What interests bear upon the parties as members of *society*? How are we to consider all of these various interests and the tensions that exist between prioritizing certain interests over others? The point is not that this exercise will result in the parties prioritizing social interests over individual ones (or vice versa), but that it may prompt us to be cognizant of a broader range of interests than are often considered and the tensions among our own interests as we consider them from other facets of our own positionality. As Delgado pointed out in the early years of contemporary ADR, there are meaningful differences between the interests of individual disputants in getting their problems resolved and the broader interests in resolving social injustices.[330]

It behooves parties to understand themselves and their counterparties without judgment. A deep understanding of the other is necessary in order to identify the interests that the counterparty has not yet been able to identify and

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[327] Raiffa, *supra* note 140, at 198.

[328] *See* Hollander-Blumoff, *supra* note 180, at 1174. *See also* Jennifer W. Reynolds, *On Commitments*, 39 WASH. U. J. L. & POL'Y 231, 238–39 (2012).

[329] *See, e.g.*, Cadman Robb Kiker III, *From Mayberry to Ferguson: The Militarization of American Policing Equipment, Culture, and Mission*, 71 WASH. & LEE L. REV. ONLINE 282, 285–90 (2014).

[330] Delgado et al., *supra* note 10, at 1359–60.

name, and to define interests in ways that are conducive to advancing justice. Those on the margins have long been in a position in which it has been essential to develop concern for the perspective of the other, but this work has rarely been met by comparable concern for their perspectives by those from dominant groups.[331] The result has been that the interests of dominant groups tend to have greater weight in defining successful outcomes.

A powerful example of work that shifts the nature of the interests at play can be seen in the civil rights movement. As Bell and others have explained, the civil rights movement benefitted from the important economic and political interests in integration.[332] But the movement did not stop with fighting for outcomes that satisfied existing interests; its strength consisted in appealing to new visions of a just society in which America could live up to its unrealized higher ideals.[333] Considerations of interests in material terms can give way to considerations of interests in more ideal terms.

On the basis of sharing the sources of standards of fairness and of continually exploring and testing the deep interests of the parties, an informal process can generate possible options for moving forward. Reflecting the depth of the differences to be addressed and the possibility of failing to reach agreement, a dialogical process must contemplate the alternatives available outside the process in the same breath as the options at the table. By not making a process center on resolution, the distinction between alternatives away from the table and options at the table becomes less salient; the emphasis is on the strategic component of the long-term struggle rather than on tactical questions at any specific negotiating table. Framing the outcome of a dialogical process as an opportunity for the parties to create a new future together focuses attention on the need for sustained commitment over the long term—and not only for as long as it advances the interests of dominant groups.

One possibility is to increase the publicity of agreements reached concerning entrenched injustices as a way of strengthening its likelihood of enforcement by rendering public the moral reasoning on which it relies. Even in local disputes, such as those regarding policing, the public remains deeply

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[331] This has often been seen as leading to self-estrangement, as, for example, in W.E.B. Du Bois's important formulation. *See* W.E.B. DU BOIS, THE SOULS OF BLACK FOLK 38 (1903).

[332] Bell, *Racial Remediation*, *supra* note 11, at 12–13.

[333] *See* David Luban, *Difference Made Legal: The Court and Dr. King*, 87 MICH. L. REV. 2152, 2218 (1989) ("[D]issent can hope to succeed only when it is unofficial and therefore most typically extra- or contra-legal. An officially recognized, undisruptive Messiah who abides by the law loses the power to redeem. And thus the excluded voice can be included in authority's narrative only at the price of domesticating its redemptive force.").

implicated.[334] This is consistent with the idea that we can influence how our interlocutors understand their interests by appealing to moral reasoning, and consistent with the idea that we can productively discuss the sources of our ideas of fairness. Leaving this reasoning implicit in the hopes of avoiding a difficult discussion about values is risky; that runs the risk of letting the terms and purposes be defined by those with the largest megaphones, as Bell's interest convergence analysis suggests.

This dialogical method is fundamentally about *power*—power as a means of reconfiguring the conditions that sustain inequality. Dialogue rests neither on assertions of right backed by the state nor on calculations of interest and the possibility of gain; it is instead about channeling power by reconfiguring the pathways through which influence is exercised. It is about dismantling ossified structures and clearing space for new possibilities—and doing so in ways that promote justice.[335] A demonstration or protest is but one part of a larger social dialogical project that may involve negotiations, litigation, and more. What is crucial is that these moves are conducted in the spirit of genuine engagement. Embracing one's positionality, voicing one's narratives, and listening to the other with empathy can create the possibility of effecting genuine change, even if the paths by which that change occurs are winding.

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[334] Ury describes a "third side" to a dispute consisting of interested publics who can help the parties commit to maintaining agreement. WILLIAM URY, THE THIRD SIDE: WHY WE FIGHT AND HOW WE CAN STOP 14 (2000).

[335] *See* Beverly Daniel Tatum, *Community or Chaos? Dialogue as Twenty-First Century Activism*, 49 U. MEM. L. REV. 285, 313 (2018) ("If we don't want chaos, we *must choose* community; we *must choose* to listen, even to the stories that are hard to hear and work for *lasting* change so we can all enjoy the fruits of our democracy as a *united* community, together.").