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RACIAL FORTUITY, RIGHTS SACRIFICE, AND THE PROMISE OF CONVERGENCE IN PRISON AND POLICING POLICY

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In his 2004 book *Silent Covenants*,¹ Derrick Bell defined “racial fortuity” as a corollary to the “interest-convergence” principle first articulated in a 1976 *Notre Dame Law Review* piece on “racial remediation,”² and later given a name in the *Harvard Law Review* article³ with which we (and our students) are all familiar. Whereas the interest-convergence of the 1980 piece specifically targeted judicial decision-making, the interest-convergence of Bell’s later writings (including *Silent Covenants*) went further, articulating a link between the convergence of majority interests with the anti-racist interests of minority groups, on the one hand, and frustrated or abrogated racial justice remedies, on the other. In those later works, Bell gives this a name, defining “racial fortuity” as the phenomenon that emerges when an involuntary sacrifice of rights on the part of people of color and white hegemony combine to catalyze (largely unsatisfactory) remedies for racial injustices.

In *Silent Covenants*, Bell likened racial fortuity to the principle of the third party beneficiary in contract law. Just as the third party beneficiary to a contract cannot enforce the agreement’s rights and obligations if she is an unintended beneficiary,⁴ in Bell’s analysis, people of color (specifically Blacks, Latinos, and Native Americans) remain only incidental or fortuitous beneficiaries of racial justice remedies in the eyes of the law, usually as the beneficiaries of a universal “liberty” principle that permits the court to “do equality in an era of increasing pluralism anxiety.”⁵

Bell identifies three moments in nineteenth-century American history when racial fortuity and the covenants of persistent subordination and white hegemony combined in ways commonly understood as affording rights or protections to the formerly enslaved: the abolition of slavery in the northern states; the Emancipation Proclamation; and the Civil War Amendments (the Thirteenth, Fourteenth, and Fifteenth Amendments).⁶ In Bell’s analysis, racial fortuity works as follows: although the Emancipation Proclamation (for example) had immense symbolic power, authority, and meaning for Blacks in this country, the freedom of people of African descent from the tyranny of hereditary slavery was not the primary purpose, nor effect, of the Proclamation. In terms of purpose, Lincoln’s hopes for the Proclamation were to cripple the Confederacy by disrupting its labor force, preventing European powers from entering the war on the side of the Confederacy, and facilitating the Union’s own exploitation of

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¹ Derrick Bell, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM* (2004) [hereinafter *SILENT COVENANTS*].

² Derrick A. Bell, Jr., *Racial Remediation: An Historical Perspective on Current Conditions*, 52 *NOTRE DAME L. REV.* 5 (1976).

³ Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 *HARV. L. REV.* 518 (1980).

⁴ See *RESTATEMENT (SECOND) OF CONTRACTS* § 302 (1981).

⁵ Kenji Yoshino, *The New Equal Protection*, 124 *HARV. L. REV.* 747, 749 n.17, 750 (2011); *SILENT COVENANTS*, *supra* note 1 at 69–70.

⁶ *SILENT COVENANTS*, *supra* note 1 at 49.

Black labor in the form of military enlistment. In terms of effect, the Proclamation had no legal authority in the states that had seceded; at the same time, the Proclamation “carefully excluded” slaveholding Unionist territories;⁷ in sum, the Proclamation itself freed no one within the Union’s jurisdiction from the subordination of enslavement. While the nation’s wartime interests featured prominently in the President’s issuance of the Proclamation, the interests of its enslaved masses were privileged to a far lesser extent, as hereditary racial slavery persisted until the ratification of the Thirteenth Amendment two years later. In this example, America’s enslaved masses were the fortuitous beneficiaries of an act of war, which came to be publicly understood as a symbolic token of racial justice, a point that President Lincoln himself conceded.⁸

In the half-century since *Brown*, we have had numerous occasions to observe racial fortuity at work; in the past year alone, we have witnessed two critical moments of racialized fortuity, each involving the criminal justice system and the persistent criminalization of people of color in this country. One involves the courts, the venue of choice for the interest-convergence purists among us: I’m referring specifically to the Supreme Court’s May 2011 decision in *Brown v. Plata*,⁹ a pair of cases involving overcrowding in California’s state prisons and the state’s remedial efforts to implement a lower court’s prison-reduction order. Another of these racially-fortuitous moments concerns the media (and now, political) campaign being waged against police misconduct and brutality in the wake of the “occupation” of lower Manhattan’s Zuccotti Park¹⁰ and the accompanying public protests.

Bell’s concept of racial fortuity presumes that every remedy that ostensibly addresses or removes barriers to racial equality is the fortuitous result of a concomitant majority interest in the same remedy. The fortuity principle, however, goes further: It posits that wherever interest convergence results in an effective racial remedy, that remedy will be abrogated at exactly the point where it is seen to threaten white hegemony.¹¹ We are witnessing this phenomenon today in California, in response to the Supreme Court’s decision in *Brown v. Plata* that affirmed the specially-constituted three-judge panel’s order requiring California to reduce its prison population by nearly 40,000 people, or nearly thirty percent of its census, over the next two years.¹² When *Brown v. Plata* was before the Court, I, too, had high hopes for the case—I had proposed in a paper that the decision offered an unparalleled opportunity for advocates to attempt to treat, or even, cure the state’s addiction to incarceration. But just when the naïve among us may have started to believe that the Court’s decision would result in California actually reducing its prison population (of mostly Black and Latino men),¹³ the state legislature enacted Assembly Bill 109, which, far from a panacea, provides for no early releases. The legislation ostensibly functions to

⁷ Derrick Bell, *Brown v. Board of Education: Reliving and Learning from Our Racial History*, 66 U. PITT. L. REV. 21, 24 (2004).

⁸ See, e.g., Letter from Abraham Lincoln to Horace Greeley (Aug. 22, 1862), available at <http://cah-test.cc.columbia.edu/ps/10178.html> (“What I do about slavery, and the colored race, I do because I believe it helps to save the Union. . .”).

⁹ 131 S.Ct. 1910 (2011).

¹⁰ Zuccotti Park is the privately-held outdoor park space which was appropriated as headquarters for the Occupy Wall Street protests in New York City.

¹¹ See, e.g., *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (*Brown II*) (vesting authority for enforcement of 1954 *Brown* decision with district courts, and ordering that desegregation occur with “all deliberate speed.”).

¹² *Plata*, 131 S.Ct. at 1946 (2011).

¹³ Approximately seventy percent of all inmates in state correctional facilities in California are Black or Latino. See CAL. DEP’T OF CORR. & REHAB., PRISON CENSUS DATA AS OF DECEMBER 31, 2011, TBL.4 (2012) [hereinafter PRISON CENSUS DATA], available at http://www.cdcr.ca.gov/reports_research/offender_information_services_branch/Annual/Census/CENSUSd1112.pdf (stating that 69.6% of all inmates under CDCR jurisdiction are “Black” or “Hispanic”).

reallocate responsibility for low-risk offenders from state prisons to jails in local communities, but which, in no uncertain terms, will result in no relief for those currently incarcerated in the state. The state's plan to remedy the constitutional violation identified in the Court's opinion, and its plan to implement the population-reduction order affirmed therein, consists, to a large degree, of stemming the tide of new commitments while waiting out the sentences of those state inmates who were already scheduled for release in the next 18 months.¹⁴ If an individual is already in state prison custody, even on a parole violation (which constitutes more than twenty-eight percent of everyone serving a custodial sentence on any given day in California),¹⁵ they will serve that revocation sentence in full even though someone whose parole is revoked this week may not receive a custodial sentence for the revocation (and, if a custodial sentence is ordered, it will be served in the local jail of the county having jurisdiction over the parolee). As for the hundreds of thousands of mostly Black and Brown men serving custodial sentences in California's state prisons before *Brown v. Plata*, there will be no remedy for the months and years spent in living quarters so cramped that, in a rare gesture, Justice Kennedy saw fit to attach color photographs of the crowding as an appendix to the majority's opinion.¹⁶

The other steps taken by the state to reduce its prison population are similarly non-remedial to the extent that realigning offender supervision to the local level has the potential to exacerbate an already problematic overcrowding phenomenon in the state's county jails.¹⁷ In sum, communities (primarily, of color) affected for decades by the state's reliance on incarceration as its social control method of choice, and the overcrowding occasioned thereby, will see no remedy for their harms.

So, how does the public safety realignment in California demonstrate Bell's racial fortuity thesis? While the constitutional claims at issue in *Brown v. Plata* were not framed as a racial dispute or a dispute over differential racial treatment, the problem of overcrowding in California's prisons is inextricably linked with race-based policing strategies and penal practices:¹⁸ Approximately seventy-five percent of all persons incarcerated in California state institutions are people of color,¹⁹ and racial categorization and differentiation is woven into the fabric of the state's system of prison administration. For example, over the past several years, severe overcrowding in California's prisons has precipitated violent exchanges resulting in lockdowns lasting days, weeks, months, and even years. The policy of the California Department of Corrections and Rehabilitation (CDCR) is to respond to potential security threats by locking down all members of the involved prisoner's race, irrespective of whether all the prisoners in

¹⁴ Enacted in October 2011, Assembly Bill (AB) 109 expands the definition of "felony" to include any crime that is punishable by imprisonment in a county jail for more than one year. Previously, under California law, a felony was any crime that was punishable by death or by imprisonment in the state prison.

¹⁵ See PRISON CENSUS DATA, *supra* note 13, at tbl.1.

¹⁶ See 131 S.Ct. 1910 apps. B & C (2011) (attaching photographic images of overcrowding in sleeping quarters and of cramped space in medical treatment facilities).

¹⁷ See VERA INST. OF JUSTICE, LOS ANGELES COUNTY JAIL OVERCROWDING REDUCTION PROJECT (2011), <http://www.vera.org/download?file=3381/LA%2520County%2520Jail%2520Overcrowding%2520Reduction%2520Report.pdf>.

¹⁸ For nearly three decades, California maintained the nation's only race-based prison housing program. New inmates arriving at the state's reception centers were segregated on the basis of race for at least the first sixty days of their sentence, and sometimes longer. See *Johnson v. California*, 543 U.S. 499 (2005) (effectively striking down state's practice of race-based housing in prisons and similar programs by requiring strict scrutiny review), *rev'g* 321 F.3d 791, 799 (9th Cir. 2003) (finding program to have an "undoubtedly legitimate penological interest.>").

¹⁹ See CAL. DEP'T OF CORR. & REHAB., CALIFORNIA PRISONERS AND PAROLEES 2009, at 19 (2010), *available at* http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Annual/CalPris/CALPRISd2009.pdf.

that racial group have any involvement in the incident.²⁰ While “locked down,” racial groups are confined to their cells, deprived of programming, exercise, and visitation or calls from family and friends, members of those racial groups not “locked down” may participate in their regular activities in the prison. CDCR justifies its lockdowns as a method of managing the violence caused by overcrowding.

Just as it is possible to frame the prison-reduction order in *Coleman/Plata* as a potential remedy to address decades of racially-harmful criminal justice policies resulting in overcrowding, it is similarly possible to contextualize the order as a remedy to the state’s long reliance on race-based lockdowns: To the extent that decreasing the prison census will result in fewer security threats, and by extension, fewer race-based lockdowns (and lawsuits over race-based lockdowns),²¹ the court’s opinion in *Brown v. Plata* could have remedial effect upon this particular racialized harm even though prisoners in locked-down facilities were not the intended beneficiaries of the prison-reduction order. And to the extent that maintaining an overwhelmingly minority prison population functions to support white hegemony, the state’s legislature has facilitated a moment of racial fortuity by electing to eschew any substantive reform which could result in either early releases or genuine sentencing or policing or prison management reform in favor of a plan that stands to overpopulate the already compromised county jails (with those same minorities) and provides only prospective potential relief for a certain few offenders.

The other “racially fortuitous” moment implicating this country’s persistent criminalization and brutalization of people of color is still developing factually. On September 24, 2011, New York Police Department (NYPD) Deputy Inspector Anthony Bologna was videotaped pepper-spraying two young white women in the face at the Occupy Wall Street (“OWS”) protests near Union Square, in what would come to be known in the blogosphere as the “shot heard ‘round the world.”²² Almost instantly, media organizations from New York to Mumbai were criticizing the NYPD and Mayor Bloomberg for the City’s handling of the protests. Other events followed: the corralling and subsequent arrest of protesters within police nets; physical altercations, including the punching and nose breaking of an HIV-positive protester, and the running over of another protester by a police vehicle; and the pre-dawn raid that ended the occupation at Zuccotti Park. Each of these incidents was covered widely in the national press.²³ Arguably, the media’s attention to, and near-obsession with, the NYPD’s use of apparently unnecessary force against predominantly-white appearing OWS protestors has precipitated a series of phenomena which have the promise to result in justice measures which could, but likely *will not*, function to root-out and penalize racial bias and race-based policing within the Department.

Between the time that the Bologna pepper spray video went “viral,” and the date of this conference (December 10, 2011), the *New York Times* ran 104 items on police misconduct or brutality, a

²⁰ Alvaro Quesada, P90436, IAB Case No. 0924608 (Cal. Dep’t of Corr. and Rehab. Sept. 3, 2010), in Second Amended Complaint at App. A, *Mitchell v. Cate*, No. 08-CV-1196-RAJ (E.D. Cal. Sept. 15, 2010), available at <http://www.prisonlaw.com/pdfs/MitchellComplaint.pdf> (relying upon CDCR testimony that “the management of inmate population by ethnicity and or subcultures has long been recognized by correctional professionals as an effective technique for establishing and maintaining control of inmate populations during periods of emergency.”).

²¹ This logic is premised upon the assumption that a prison with fewer perceived security threats would see little to no reason to institute lockdowns of any type. This assumption may, of course, be a false one, as lockdowns have, in the past, been used to brutalize and punish inmates (as well as maintain security). The twenty-three year-long lockdown of a federal penitentiary in Marion, Illinois, is a singular example. For a detailed account, see Stephen C. Richards, *USP Marion: The First Federal Supermax*, 88 THE PRISON J. 6 (2008).

²² Jen Doll, *Occupy Wall Street: 10 Halloween Costumes of the Movement*, VILL. VOICE BLOG (Oct. 17, 2011, 5:54 PM) http://blogs.villagevoice.com/runninscared/2011/10/occupy_wall_street_halloween_costumes.php.

²³ For example, during that week, Lawrence O’Donnell of MSNBC devoted several minutes of his show *The Last Word* to the protests. Regarding the Bologna incident, O’Donnell noted, “Of course, there is no conceivable justification for the use of the pepper spray.” *The Last Word: Rewriting The Occupy Wall Street Protests* (MSNBC television broadcast Sept. 26, 2011), available at <http://www.msnbc.msn.com/id/45755883/vp/44679119#44679119>.

fifty-five percent increase over the prior three months. Compare the *New York Times*' coverage of police misconduct just since September with its coverage over the preceding year of the NYPD's "stop-and-frisk" policy: In the eighteen months immediately preceding this conference, the Times had run only fifty-one items on stop-and-frisk. If the rate of publication is any indication of the outlet's interest in the matter, then the *Times* is little interested in stop-and-frisk, even though four million New Yorkers have been stopped and frisked by police, and ninety percent of those stopped are innocent of any wrongdoing and released. I would suggest that one reason why stop-and-frisk is of lesser concern is because, in every year since 2004, Blacks and Latinos (typically, men) have comprised at least eighty percent of all stops.

This implicit preference for protectionist tactics for the constitutional rights of white Occupy Wall Street protesters appears to extend beyond the so-called "liberal media elite." In the aftermath of the allegations of police misconduct associated with Occupy Wall Street, New York Congressman Jerrold Nadler called on United States Attorney General Eric Holder to investigate the NYPD to determine whether the Department's actions during these protests violated any constitutional rights of protesters or the press.²⁴ In contrast, after the racially-skewed stop-and-frisk data was released, Nadler called for no such investigation, apparently even declining to join the Manhattan Borough President, State Assemblyman Eric Adams, and City Councilman Jumaane Williams in formally calling for an investigation in October of 2011.²⁵

In effect, minority groups who have been subordinated by the operation of the city's policing strategies have only one hope for redress—the linking of this form of subordination with forms of police subordination suffered by whites. Through the relative inattention given to stop-and-frisk, the interests of Black and Brown folks in the city have been involuntarily sacrificed (in Derrick's words) and yet will (nevertheless) serve to catalyze the resolution of certain policy disputes to the extent that those disputes are viewed as negatively affecting white New Yorkers. If history is any indication, resulting reforms are likely to further entrench racial disparities in policing in New York City, threatening to actualize the belief among some that there is one NYPD for white New Yorkers and another for New Yorkers of color.

On the subject of race-based policing and confinement tactics, I imagine that Derrick would defend his interest-convergence thesis to its recent critics²⁶ by arguing that interest-convergence is an accepted theory of policy governance, and that it goes a long way (when properly contoured for this

²⁴ Press Release, Congressman Jerrold Nadler, *Nadler Calls for Full DOJ Investigation into NYPD Conduct with Occupy Wall Street and Media* (Dec. 6, 2011), <http://nadler.house.gov/press-release/nadler-calls-full-doj-investigation-nypd-conduct-occupy-wall-street-and-media>. Nadler renewed his request for a Department of Justice investigation in March 2012, stating, "I am disturbed yet again by allegations of police misconduct and excessive force used against Occupy Wall Street protesters during this weekend's demonstrations at Zuccotti Park." Press Release, Congressman Jerrold Nadler, *Nadler Reiterates Call for DOJ Investigation into NYPD Conduct with Occupy Wall Street and Media* (Mar. 19, 2012), <http://nadler.house.gov/press-release/nadler-reiterates-call-doj-investigation-nypd-conduct-occupy-wall-street-and-media>.

²⁵ Press Release, N.Y. State Sen. Eric Adams, *Manhattan BP Scott Stringer and NYS Senator Eric Adams Call on Federal Government to Investigate NYPD's Controversial Stop and Frisk Program* (Oct. 21, 2011), <http://www.nysenate.gov/news/manhattan-bp-scott-stringer-and-nys-senator-eric-adams-call-federal-government-investigate-nypd>. Last fall, Councilman Williams was detained and handcuffed while attending Brooklyn's "Caribbean Day" parade. See Fernanda Santos & Michael Wilson, *Police Detain Brooklyn Councilman At West Indian Parade*, N.Y. TIMES, Sept. 6, 2011, at A20.

²⁶ See, e.g., Justin Driver, *Rethinking the Interest-Convergence Thesis*, 105 NW. U. L. REV. 149, 157 (2011) (identifying four supposed analytical flaws inherent to Bell's interest-convergence thesis, and arguing that "[t]he insistence that fortuitous moments of converging racial interests account for favorable judicial and policy decisions may regrettably lead the theory's adherents to limit their strategies for achieving genuine racial equality."); cf. Stephen M. Feldman, *Do the Right Thing: Understanding the Interest-Convergence Thesis*, 106 NW. U. L. REV. COLLOQUY 248, 250 (2012), available at <http://www.law.northwestern.edu/lawreview/colloquy/2012/4/LRColl2012n4Feldman.pdf> (critiquing Driver's piece on the grounds that Driver mischaracterized Bell's work).

context) toward explaining the persistent subordination of Blacks and Latinos in this country—whether the forum be legislative, judicial, or executive in nature. While it may be arguable that a focus on racialized interest-convergence to the detriment of other models of possible progress is disadvantageous, we cannot ignore the importance or even predominance of this paradigm in the history of race relations in this country, and accordingly, its importance to future developments. As we continue to pay tribute to Derrick and honor his legacy, my hope is that such moments shed light on lost opportunities and our misplaced priorities, even in an era that has been described as “post racial.” These particular recent racially fortuitous moments suggest that, with respect to policing and imprisonment in the United States, the time has come for theorizing how best to transform racial justice and genuine equality into a universally convergent principle.²⁷

²⁷ In her introduction to this panel, Professor Paulette Caldwell urged us to “re-read” Derrick’s work, and my hope is that, over successive “re-readings” we can begin to move from interest-convergence to interest *conversion*, as remarked by one of our conference participants.