

4-2019

Afrofuturism, Critical Race Theory, and Policing in the Year 2044

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Recommended Citation

94 N.Y.U. L. Rev. 1 (2019)

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NEW YORK UNIVERSITY LAW REVIEW

VOLUME 94

APRIL 2019

NUMBER 1

ARTICLES

AFROFUTURISM, CRITICAL RACE THEORY, AND POLICING IN THE YEAR 2044

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In 2044, the United States is projected to become a “majority-minority” country, with people of color making up more than half of the population. And yet in the public imagination—from Robocop to Minority Report, from Star Trek to Star Wars, from A Clockwork Orange to 1984 to Brave New World—the future is usually envisioned as majority white. What might the future look like in year 2044, when people of color make up the majority in terms of numbers, or in the ensuing years, when they also wield the majority of political and economic power? And specifically, what might policing look like? This Article attempts to answer these questions by examining how artists, cybertheorists, and speculative scholars of color—Afrofuturists and Critical Race Theorists—have imagined the future. What can we learn from Afrofuturism, the term given to “speculative fiction that treats African-American themes and addresses African-American concerns [in the context of] techno culture?” And what can we learn from Critical Race Theory and its “father” Derrick Bell, who famously wrote of space explorers to examine issues of race and law? What do they imagine policing to be, and what can we imagine policing to be in a brown and black world?

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INTRODUCTION

By 2044, the United States will likely be a “majority-minority” country, with people of color making up more than half of the population.¹ And yet in the public imagination—from *Robocop* to *Minority Report*, from *Star Trek* to *Star Wars*, from *A Clockwork Orange* to *1984* to *Brave New World*—the future is usually envisioned as majority white. What might the future look like in the year 2044, when people of color make up the majority in terms of numbers, or in the ensuing years, when they also wield the majority of political and economic power? And specifically, what might policing look like? This Article attempts to answer these questions by examining how artists, cybertheorists, and speculative scholars of color—Afrofuturists and Critical Race Theorists—have imagined the future. What can we learn from Afrofuturism, the term given to “speculative fiction that treats African-American themes and addresses African-American concerns in the context of . . . technoculture?”² And what can we learn from Critical Race Theory (CRT) and its “father” Derrick Bell, who

¹ See SANDRA L. COLBY & JENNIFER M. ORTMAN, U.S. CENSUS BUREAU, REPORT NO. P25-1143, PROJECTIONS OF THE SIZE AND COMPOSITION OF THE U.S. POPULATION: 2014 TO 2060, at 9 (2015), <https://census.gov/content/dam/Census/library/publications/2015/demo/p25-1143.pdf> (projecting a majority-minority country by the year 2044). Projections further indicate that by the year 2060, whites will make up just 44% of the U.S. population, while people of color will make up 56%. *Id.* Specifically, Hispanics will make up 29% of the population, blacks will make up 14%, Asians will make up 9.3%, Native Americans and Pacific Islanders will make up 1%, and multiracial individuals will make up 6.2%. *Id.* at 9–10. The Census Bureau also projects that by 2060, 64% of all children in the United States will be children of color. *Id.* at 10–11.

² See Mark Dery, *Black to the Future: Interviews with Samuel R. Delany, Greg Tate, and Tricia Rose*, in *FLAME WARS: THE DISCOURSE OF CYBERCULTURE* 179, 180 (Mark Dery ed., 1994).

famously wrote of space explorers³ to examine issues of race and law?⁴ What do they imagine policing to be, and what can *we* imagine policing to be in a brown and black world?

As should be apparent by now, this is not a typical law review article, identifying a discrete problem in the law and offering a normative solution.⁵ This Article aspires to accomplish something different, and in a sense, more ambitious. Rather than imagining how things could be different in the near term, this Article imagines how things could be different decades from now. It offers not just *a* vision of the future, but something truly visionary.

To be sure, there have been a handful of speculative legal articles before. There is George Thomas's oft-cited article *Time Travel, Hovercrafts, and the Framers*.⁶ And there is Derrick Bell's *The Space Traders*.⁷ There was once even a vibrant movement to usher in a decidedly new type of scholarship—futurist scholarship—to engage seriously with nascent and yet-to-be technologies with the goal of imagining the distant future, and the law's role in that future.⁸ While my hope is that this Article will revive interest in futurist scholarship, my particular interest is in a subset of futurism: Afrofuturism. There are two reasons for this. One, most artistic visions of the future have been majority white, and given projected demographic shifts showing that America will likely be majority minority by the year 2044, it makes sense to consider how black and brown people have imagined the future. As one commentator has noted, "while our collective imaginings too often fall far short of a convincing alternative future, Afrofuturism has been proposing ways forward for decades."⁹ The

³ DERRICK BELL, *The Space Traders*, in *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* 158 (1992).

⁴ For a discussion of Derrick Bell's influence on Critical Race Theory (CRT), see Patricia Williams, *Tribute to Derrick Bell*, 69 N.Y.U. ANN. SURV. AM. L. 7 (2013).

⁵ Not that there is anything wrong with typical law review articles.

⁶ George C. Thomas III, *Time Travel, Hovercrafts, and the Framers: James Madison Sees the Future and Rewrites the Fourth Amendment*, 80 NOTRE DAME L. REV. 1451 (2005).

⁷ BELL, *supra* note 3. Other legal futurist articles include Anthony J. Casey & Anthony Niblett, *The Death of Rules and Standards*, 92 IND. L.J. 1401 (2017); James E. Jones, Jr., *Equal Employment Law in the Twenty-First Century*, 39 OHIO ST. L.J. 700 (1978); Daniel Martin Katz, *Quantitative Legal Prediction—or—How I Learned to Stop Worrying and Start Preparing for the Data-Driven Future of the Legal Services Industry*, 62 EMORY L.J. 909 (2013); Richard M. Re, *Imagining Perfect Surveillance*, 64 UCLA L. REV. DISCOURSE 264 (2016); Barton Beebe, Note, *Law's Empire and the Final Frontier: Legalizing the Future in Early Corpus Juris Spatialis*, 108 YALE L.J. 1737 (1999).

⁸ See generally David A. Funk, *Legal Futurology: The Field and Its Literature*, 73 LAW LIBR. J. 625 (1980) (offering an early bibliography of legal futurist writing).

⁹ Amah-Rose McKnight-Abrams, *The New Afrofuturism*, VICE: GARAGE (Feb. 9, 2018, 12:08 PM), https://garage.vice.com/en_us/article/437wq3/the-new-afrofuturism.

second reason is more personal. Like Patricia Williams, I readily acknowledge that “subject position is everything in my analysis of the law.”¹⁰ Afrofuturism, like Critical Race Theory, speaks to me as a black man. Indeed, one could even argue that my blackness invites speculation. As one writer put it:

The very idea of a global African diaspora creates the most fertile of grounds for a field of *what-ifs*. What if European enslavers and colonizers had never ventured into the African continent? More intriguing yet: What if African nations and peoples had successfully rebuffed generations of plunder and theft? What if the Zulu had won the wars against the Voortrekkers and the British, and a confederation of Bantu people had risen up and smashed Belgian rule? What if the Transatlantic children of the mother continent had been allowed to remain, building their empires with the bounties of the cradle of civilization?¹¹

There are a few more points to make before this Article begins in earnest. First, because this Article is what I term “futurist legal scholarship,” and indeed “Afrofuturist legal scholarship,” many of its references are also futurist, and therefore are atypical for a traditional law review article. Already there have been references to *Star Trek* and *Minority Report*. There will also be references to the Afrofuturist jazz artist Sun Ra, to Afrofuturist novelists Octavia Butler and Samuel Delany, to the Afrofuturist “cyber-soul”¹² singer Janelle Monáe, and one of the most well-known examples of Afrofuturism, the groundbreaking film *Black Panther*.¹³

This Article also relies heavily on those other minority visionaries, Critical Race Theorists. Indeed, this Article is indebted to CRT in two respects. First, Critical Race Theory has not only challenged the substance of legal scholarship. It has also “contest[ed] the very language of mainstream legal and social analysis,”¹⁴ arguing that a preference for neutral, disengaged, unraced, and unsexed voices in legal

¹⁰ PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 3 (1991) (“Since subject position is everything in my analysis of the law, you deserve to know it’s a bad morning.”).

¹¹ Vann R. Newkirk II, *The Provocation and Power of Black Panther*, ATLANTIC (Feb. 14, 2018), <https://www.theatlantic.com/entertainment/archive/2018/02/the-provocation-and-power-of-black-panther/553226>.

¹² Nate Chenin, *Multiple Visions of Soul Music’s Past and Future*, N.Y. TIMES (Aug. 29, 2008), <https://www.nytimes.com/2008/08/30/arts/music/30sadd.html> (describing Monáe as a “cyber-soul fabulist”).

¹³ See *infra* Section I.B.

¹⁴ Kimberlé Crenshaw et al., *Part Five: The Search for an Oppositional Voice*, in *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* 314, 314 (Kimberlé Crenshaw et al. eds., 1995) [hereinafter *CRITICAL RACE THEORY*].

scholarship reifies a baseline that is both white and male.¹⁵ To challenge this preference, Critical Race Theory embraces the notion of “grounding a scholarly voice in the material, aesthetic, emotional, and spiritual experiences of people of color.”¹⁶ Second, Critical Race Theory embraces storytelling as a way to interrogate the law and enrich the scholarly conversation. This Article does precisely that by imagining the future. In short, this Article *is* storytelling, and Critical Race Theory, in practice.

This still leaves open a question: Why focus on policing? It is my hope that there will one day be Afrofuturist articles considering a range of legal issues that may matter in the year 2044 and beyond, from affirmative action for whites to changes to the Voting Rights Act to ensure that whites are still represented. While those issues receive passing mention in this Article, ultimately the focus is on policing, criminal law, criminal procedure, and technology. I chose this focus in part for selfish reasons: I am a criminal justice scholar who writes about technology,¹⁷ so these are areas I know well. But, as a black man, I also chose policing because it is here, more than in any other area of the law, that “race matters.”¹⁸ Indeed, to a certain extent, many of the problems that plague the criminal justice system—mass incarceration, over-criminalization, and capital punishment, to name just a few—are only intelligible through the lens of race.¹⁹ How might

¹⁵ *Id.*; see also Kimberlé Crenshaw et al., *Introduction to CRITICAL RACE THEORY*, *supra* note 14, at xiii (noting that CRT “rejects the prevailing orthodoxy that scholarship should be or could be ‘neutral’ and ‘objective’”).

¹⁶ Crenshaw et al., *Part Five*, *supra* note 14, at 314; see also John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129, 2147 (1992) (noting that CRT, “at its best, creates an art style that represents a fulfillment of culture” that includes “adding our own distinctly stylized dimensions to legal scholarship”); Charles R. Lawrence, III, *The Word and the River: Pedagogy as Scholarship as Struggle*, 65 S. CAL. L. REV. 2231, 2252 (1992) (arguing for subjectivity—both in terms of nonneutrality and in terms of embracing “the linguistic position of subject rather than object” in CRT scholarship).

¹⁷ See, e.g., I. Bennett Capers, *Crime, Surveillance, and Communities*, 40 FORDHAM URB. L.J. 959 (2013) [hereinafter Capers, *Crime, Surveillance, and Communities*]; Bennett Capers, *Policing, Technology, and Doctrinal Assists*, 69 FLA. L. REV. 723 (2017) [hereinafter Capers, *Policing, Technology, and Doctrinal Assists*]; I. Bennett Capers, *Essay, Race, Policing, and Technology*, 95 N.C. L. REV. 1241 (2017) [hereinafter Capers, *Race, Policing, and Technology*]; I. Bennett Capers, *Techno-Policing*, 15 OHIO ST. J. CRIM. L. 495 (2018) [hereinafter Capers, *Techno-Policing*].

¹⁸ See generally CORNEL WEST, *RACE MATTERS* (2d ed. 2001); see also W.E.B. DU BOIS, *Of the Dawn of Freedom, in The Souls of Black Folk* 8, 8 (Henry Louis Gates, Jr. ed., 2007) (“The problem of the twentieth century is the problem of the color-line . . .”).

¹⁹ Several books have discussed this connection. See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010) (arguing that mass incarceration is metaphorically the new Jim Crow due to its disproportionate effect on African-Americans); DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* (1999) (arguing that there is a

these problems be addressed when people of color hold the keys to the courthouse and the prison? What can Afrofuturists and Critical Race Theorists tell us about what is likely to be decriminalized, and what “innocent” acts will in the future be deemed criminal? Or how the criminal procedure amendments—our “code of criminal procedure”²⁰—will be interpreted? Or about punishment, and even the abolition of prisons? This Article attempts to answer these questions.

This Article proceeds as follows. Part One provides an overview of Afrofuturism and some of its core concepts. Part Two provides an overview of Critical Race Theory. Part Three uses Afrofuturism and Critical Race Theory to imagine the future; specifically, how a range of criminal justice issues—from what constitutes a crime, to what technologies are deployed by the police, to how we punish—may be different in the year 2044, when this country becomes majority minority, and in the years beyond when the numerical power of black and brown people is matched by their economic and political power.

I

AFROFUTURISM

*What good is [science fiction] to Black people? What good is science fiction's thinking about the present, the future, and the past?
What good is its tendency to warn or to consider
alternative ways of thinking and doing?*

—Octavia Butler²¹

Science fiction isn't just thinking about the world out there. It's also thinking about how that world might be—a particularly important exercise for those who are oppressed, because if they're going to change the world we live in, they—and all of us—have to be able to think about a world that works differently.

—Samuel R. Delany²²

fundamental double standard in the American justice system rooted in race and class); DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* (2001) (arguing that modern policies of crime and punishment are based, in part, on changing race relations); *see also* Loïc Wacquant, *Deadly Symbiosis: When Ghetto and Prison Meet and Mesh*, 3 PUNISHMENT & SOC'Y 95 (2001) (arguing that the rise of prison populations in the United States and other countries is the implementation of incarceration as a social policy).

²⁰ Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 929 (1965).

²¹ OCTAVIA E. BUTLER, *Positive Obsession*, in *BLOODCHILD AND OTHER STORIES* 123, 134–35 (1995).

²² Rachel Kaadzi Ghansah, *Samuel R. Delany, The Art of Fiction No. 210*, PARIS REV., <https://www.theparisreview.org/interviews/6088/samuel-r-delany-the-art-of-fiction-no-210->

When the film *Black Panther* was released in 2018, becoming a cultural milestone and the third-highest grossing domestic film of all time,²³ it was described by many as cinematic Afrofuturism.²⁴ Indeed, for many, it prompted a quest to learn more about a different origin story, the story of Afrofuturism. This Part accordingly begins with an overview of Afrofuturism, including some of its tenets. It then returns to *Black Panther* as an entry point for discussing policing in the year 2044.

A. Afrofuturism: A Primer

In 1994, in an influential essay titled “Black to the Future,” the cultural critic Mark Dery introduced the term “Afrofuturism” to describe “speculative fiction that treats African-American themes and addresses African-American concerns in the context of twentieth-century technoculture.”²⁵ Dery added that the Afrofuturist movement addresses “African-American signification that appropriates images of technology and a prosthetically enhanced future” to imagine people of color in the future.²⁶ However, as is often the case with movements, the terminology was hardly contemporaneous with examples of Afrofuturism. Although not yet labeled Afrofuturism, Afrofuturist texts arguably date at least to 1857, when African-American novelist Martin Delany published *Blake or the Huts of America*, an alternative history in which Cuban and American slaves orchestrate a successful revolution,²⁷ and to 1904 when African-American novelist Edward Johnson published his speculative novel *Light Ahead for the Negro*, whose African-American protagonist time travels to a racially egalitarian future.²⁸ There is also George Schuyler’s novel *Black No More*, in which a black scientist invents a three-day process “to turn darkies

samuel-r-delany (last visited Nov. 10, 2018) (providing a transcript of and commentary on Ghansah’s interview with Delany).

²³ Alex Fitzpatrick, *It’s Not Just Black Panther. Afrofuturism Is Having a Moment*, TIME (Apr. 20, 2018), <http://time.com/5246675/black-panther-afrofuturism>.

²⁴ See, e.g., *id.* (claiming that *Black Panther* is both a “catalyst and symbol” of a “new wave of interest in Afrofuturism”); Clarisse Loughrey, *Black Panther Brings Afrofuturism into the Mainstream*, INDEP. (June 13, 2018, 2:14 PM), <https://www.independent.co.uk/arts-entertainment/films/features/black-panther-afrofuturism-ryan-coogler-definition-explainer-watch-release-date-a8209776.html> (arguing that *Black Panther* “draws on the rich, layered concept of Afrofuturism”); Brent Staples, Editorial, *The Afrofuturism Behind Black Panther*, N.Y. TIMES (Feb. 24, 2018), <https://www.nytimes.com/2018/02/24/opinion/afrofuturism-behind-black-panther.html> (arguing that *Black Panther*’s “most important distinction is that it is told from an Afrocentric point of view”).

²⁵ Dery, *supra* note 2, at 180 (coining the term in his published collection of interviews with artists Samuel R. Delany, Greg Tate, and Tricia Rose).

²⁶ *Id.*

²⁷ MARTIN R. DELANY, *BLAKE OR THE HUTS OF AMERICA* (Beacon Press 1970) (1857).

²⁸ E. A. JOHNSON, *LIGHT AHEAD FOR THE NEGRO* (1904).

white”²⁹ through “electrical nutrition and glandular control.”³⁰ The novel, a critique of the concepts of racial purity and racial hierarchy, subversively ends with most Americans a happy shade of brown. One could even add the African-American scholar W.E.B. Du Bois to the list. In 1920, Du Bois wrote the apocalyptic short story *The Comet*.³¹

In other words, though Afrofuturism itself was not new, the term was. More importantly, Dery seemed to recognize that, though there had been a handful of examples in the past, there was something of a real movement happening as he wrote his article in 1994.³² To be sure, the decades before had seen a rise in Afrofuturist engagement. There was the prolific jazz artist Sun Ra, who in the 1950s was already creating African-inspired and space-inspired music, ushering his bandmates “from one musical planet to another” and “from terrestrial city to city.”³³ In 1972, Sun Ra released perhaps his most-admired work, the film and soundtrack *Space Is the Place*, a space opera in which his avatar leads an exodus of blacks to another planet entirely, using music as the metaphorical spaceship.³⁴ There was also George Clinton and Parliament Funkadelic (their 1975 album *The Mothership Connection* introduced a universe of “Afronauts capable of funki-tizing galaxies”),³⁵ and other artists, incorporating science fiction in their music in the 1970s.

By 1994, however, there was a blossoming of examples of Afrofuturism not only in popular music, but increasingly in “high art,” or at least one rung below, as well.³⁶ The science fiction writer Octavia

²⁹ GEORGE S. SCHUYLER, *BLACK NO MORE* 10 (Negro Univ. Press 1969) (1931).

³⁰ *Id.* at 13.

³¹ W.E.B. DU BOIS, *The Comet*, in *DARKWATER: VOICES FROM WITHIN THE VEIL* 253 (1920). In *The Comet*, the Earth passes through the tail of a comet, which seems to kill everyone except one black male and white female. Left alone, they begin to see each other as humans rather than racial others—suggesting that racial hierarchies can be overcome. Their two-person utopia, however, comes to an end when another white person is discovered, and the old racial order is restored.

³² Dery acknowledges that “glimpses” of Afrofuturism can be found in earlier works before turning to interview Afrofuturist novelist Samuel Delany. See Dery, *supra* note 2, at 182–87.

³³ Brad Farberman, *Why Is Sun Ra Suddenly Having His Moment?*, *ROLLING STONE* (Oct. 18, 2017, 4:20 PM), <https://www.rollingstone.com/music/music-features/why-is-sun-ra-suddenly-having-his-moment-197156>.

³⁴ *SPACE IS THE PLACE* (North American Star System 1974) (film); *SUN RA AND HIS INTERGALACTIC SOLAR ARKESTRA, SOUNDTRACK TO THE FILM: SPACE IS THE PLACE* (Evidence Records 1993) (soundtrack).

³⁵ JASON HELLER, *STRANGE STARS: DAVID BOWIE, POP MUSIC, AND THE DECADE SCI-FI EXPLODED* 113 (2018) (quoting George Clinton describing Parliament’s album chronology as creating a cosmic mythology); see *PARLIAMENT, MOTHERSHIP CONNECTION* (Casablanca Records 1975).

³⁶ See Dery, *supra* note 2, at 180 (noting that science fiction has long been viewed as a pulp genre with sublegitimate status).

Butler had just published *Parable of the Sower*,³⁷ one of her most well-known books. Samuel Delany, after publishing several science fiction novels in the 1960s and 1970s (and twice winning the Nebula Award),³⁸ had just published *They Fly at Çiron* after a hiatus of several years.³⁹ And just two year earlier, in 1992, the Whitney Museum of Art had held a retrospective of the artist Jean-Michel Basquiat, whose work, such as the painting *Molasses*, included robots and provided glimpses of Afrofuturism.⁴⁰

Dery also recognized something else. The burgeoning turn to what he termed Afrofuturism satisfied an odd logic; if much of mainstream science fiction was about alien abductions and domination, then the very existence of blacks in America, originating as it did with abduction, enslavement, and forced breeding was “sci-fi.”⁴¹ In a very real sense, these African-American artists were “the descendants of alien abductees.”⁴²

The reach of Afrofuturism has only grown since Dery’s article. Indeed, it is safe to say that Afrofuturism, thanks in part to the film *Black Panther*, is once again having its moment, with features on Afrofuturism appearing in the *New York Times*, the *Washington Post*,

³⁷ OCTAVIA E. BUTLER, *PARABLE OF THE SOWER* (1993).

³⁸ See, e.g., SAMUEL R. DELANY, *ABEL-17* (1966); SAMUEL R. DELANY, *THE EINSTEIN INTERSECTION* (1967); SAMUEL R. DELANY, *TROUBLE ON TRITON: AN AMBIGUOUS HETEROTOPIA* (Wesleyan University Press 1996) (1976) [hereinafter *TROUBLE ON TRITON*]. Delany won the Nebula award for his novels *Babel-17* (1966) and *The Einstein Intersection* (1967). See Samuel R. Delany: Past Nominations and Wins, NEBULA AWARDS, <https://nebula.sfwaweb.org/nominees/samuel-r-delany> (last visited Oct. 27, 2018).

³⁹ SAMUEL R. DELANY, *THEY FLY AT ÇIRON* (1993). Delany’s prior book, *The Bridge of Lost Desire*, was published in 1987. SAMUEL R. DELANY, *THE BRIDGE OF LOST DESIRE* (1987).

⁴⁰ Dery, *supra* note 2, at 182 (noting that glimpses of Afrofuturism can be found in *Molasses*, which features a “pie-eyed, snaggletoothed robot”); Roberta Smith, *Review/Art; Basquiat: Man for His Decade*, N.Y. TIMES (Oct. 23, 1992), <https://www.nytimes.com/1992/10/23/arts/review-art-basquiat-man-for-his-decade.html> (describing Basquiat’s Whitney retrospective).

⁴¹ Dery, *supra* note 2, at 180. The Afrofuturist scholar Reynaldo Anderson makes a similar observation, noting that Africans were among the “first alien abductees, kidnapped by a strange people who take us over by ships and conduct scientific experiments on us. They bred us. They came up with a taxonomy for the people they bred: mulatto, octoroon, quadroon.” YTASHA L. WOMACK, *AFROFUTURISM: THE WORLD OF BLACK SCI-FI AND FANTASY CULTURE* 34–35 (2013) (quoting Anderson); see also BRIAN W. ALDISS, *TRILLION YEAR SPREE: THE HISTORY OF SCIENCE FICTION* 119 (1986) (noting that, in science fiction, “the essential American obsession . . . is with the Alien”); MARK ROSE, *ALIEN ENCOUNTERS: ANATOMY OF SCIENCE FICTION* 32 (1981) (noting that the predominant trope of science fiction is that of the alien encounter).

⁴² Dery, *supra* note 2, at 180.

and other mainstream media.⁴³ Recent years have also seen a new generation of black artists incorporating Afrofuturism: in pop music, Janelle Monáe, Beyoncé, Solange, Erykah Badu, and FKA Twigs; in jazz, Kamasi Washington and Nicole Mitchell; in science fiction, Nnedi Okorafor; and in the visual arts, Wangechi Mutu, Saya Woolfalk, Lina Idris Viktor, Serge Attukwei Clottey, and Nick Cave. Afrofuturism is also becoming the focus of academic interest. There are books devoted to Afrofuturism.⁴⁴ There are courses on Afrofuturism at UCLA, Duke, and Berkeley.⁴⁵ There have been art shows at the Museum of Contemporary Photography in Chicago, the Studio Museum in Harlem, and the Tel Aviv Museum of Art in Israel.⁴⁶ Afrofuturism is also a constant presence at the Afropunk Festival held each year in Brooklyn, New York.⁴⁷

Of course, this still begs the question: What is Afrofuturism? Dery's definition—"speculative fiction that treats African-American themes and addresses African-American concerns in the context of

⁴³ See, e.g., Fitzpatrick, *supra* note 23 (explaining how *Black Panther* has made the concept of Afrofuturism widely accessible); Chris Giles, *Afrofuturism: The Genre that Made Black Panther*, CNN (Feb. 12, 2018, 1:33 PM), <https://www.cnn.com/2018/02/12/africa/genre-behind-black-panther-afrofuturism/index.html> (discussing *Black Panther* within the context of Afrofuturism); Ruth LaFerla, *Afrofuturism: The Next Generation*, N.Y. TIMES (Dec. 12, 2006), <https://www.nytimes.com/2016/12/12/fashion/afrofuturism-the-next-generation.html> (contextualizing pop icons such as Rihanna, Beyoncé, and Solange within the history of Afrofuturism); Sonia Rao, *The Resurgence of Afrofuturism Goes Beyond Black Panther, to Janelle Monáe, Jay-Z and More*, WASH. POST (Feb. 17, 2018), <https://www.washingtonpost.com/news/arts-and-entertainment/wp/2018/02/17/the-resurgence-of-afrofuturism-goes-beyond-black-panther-to-janelle-monae-jay-z-and-more/> (discussing how *Black Panther*, among other pop culture projects, is creating a "resurgence" of Afrofuturism in mainstream culture).

⁴⁴ See, e.g., WOMACK, *supra* note 41.

⁴⁵ *Afrofuturism*, DUKE U., <https://aaas.duke.edu/courses/AAAS620S> (last visited Nov. 11, 2018) (giving a course description for a class about Afrofuturism); *General Catalog 2018–19: African American Studies Upper-Division Courses*, UCLA, <http://catalog.registrar.ucla.edu/ucla-catalog18-19-285.html> (last visited Nov. 11, 2018) (listing courses titled "Topics in African American Literature and Culture" and "Radical Black Imaginaries: Politics, Identity, and Struggle," which include Afrofuturism among their covered topics); *Special Topics: Black Science Fiction*, U. CAL. BERKELEY, <https://english.berkeley.edu/courses/5463> (last visited Nov. 11, 2018) (giving a course description for a class about the intersection of black fiction and science fiction, which is "sometimes called Afrofuturism").

⁴⁶ *In Their Own Form*, MUSEUM CONTEMP. PHOTOGRAPHY, <http://www.mocp.org/exhibitions/2018/4/in-their-own-form.php> (last visited Nov. 5, 2018); *Regarding Africa: Contemporary Art and Afro-Futurism*, TEL AVIV MUSEUM ART, <http://www.tamuseum.org.il/about-the-exhibition/regarding-africa> (last visited Nov. 5, 2018); *The Shadows Took Shape*, STUDIO MUSEUM HARLEM, <https://www.studiomuseum.org/exhibition/the-shadows-took-shape> (last visited Nov. 5, 2018).

⁴⁷ See, e.g., *The Dopest Afrofuturist Looks at Afropunk 2016*, VICE: THUMP (Aug. 30, 2016, 9:30 AM), https://thump.vice.com/en_us/article/ae84zj/afropunk-photo-gallery-2016-afrofuturism-christelle-de-castro (profiling various concertgoers dressed in Afrofuturist attire at the 2016 Afropunk Festival).

. . . technoculture”⁴⁸—is not the only one. In an interview, the Afrofuturist scholar Alondra Nelson describes Afrofuturism as a way of covering discussions about race, identity, alienation, and the aspirations of the black community in a utopic future.⁴⁹ Another commentator describes Afrofuturism as combining “aspects of cultural history with futurologies both fanciful and technologically grounded . . . pos[ing] a progressive question: What would a positive future for Africa’s citizenry and diaspora actually *look* like?”⁵⁰ Afrofuturist scholar Ytasha Womack defines Afrofuturism as “the intersection between black culture, technology, liberation and the imagination, with some mysticism thrown in, too. . . . It’s a way of bridging the future and the past and essentially helping to reimagine the experience of people of colour.”⁵¹

Beyond these broad definitions melding black culture and technology, one can discern certain themes. The most important of these is the insistence that people of color in fact *have* a future, and a commitment to disrupting racial, sexual, and economic hierarchies and categories. Subsidiary themes include foregrounding alienation and envisioning reclamation. Because these themes are critical to imagining policing in the year 2044 and beyond, I spend some time exploring them in particular below.

Black to the Future. One of the central tenets of Afrofuturist texts is the insistence that people of color *have* a future. This may seem an unnecessary assertion until one considers more mainstream visions of

⁴⁸ Dery, *supra* note 2, at 180.

⁴⁹ Soho Rep., *Afrofuturism*, YOUTUBE (Nov. 30, 2010), <https://www.youtube.com/watch?v=IFhEjaal5js>.

⁵⁰ McKnight-Abrams, *supra* note 9.

⁵¹ Lanre Bakare, *Afrofuturism Takes Flight: From Sun Ra to Janelle Monáe*, GUARDIAN (Aug. 7, 2014, 1:00 PM), <https://www.theguardian.com/music/2014/jul/24/space-is-the-place-flying-lotus-janelle-monae-afrofuturism> (quoting Womack). Indeed, in recent years, proponents of Afrofuturism have argued that the term itself may need redefining. For example, Alondra Nelson and Reynaldo Anderson have used the term “Afrofuturism 2.0” to include metaphysics, theoretical and applied sciences, social sciences, programmatic sciences, the philosophy of science, and geopolitics. *On Black Panther, Afrofuturism, and Astroblackness: A Conversation with Reynaldo Anderson*, BLACK SCHOLAR (Mar. 13, 2018), <https://www.theblackscholar.org/on-black-panther-afrofuturism-and-astroblackness-a-conversation-with-reynaldo-anderson> (providing a transcript of an interview with Anderson and discussing a conversation he had with Nelson regarding Afrofuturism 2.0). For her part, Daylanne K. English uses the term “neo-Afrofuturism” to describe the music of Janelle Monáe, whose work draws heavily from funk and “cybersoul,” a complex blend of multiple, often technologically mediated musical genres. See Daylanne K. English & Alvin Kim, *Now We Want Our Funk Cut: Janelle Monáe’s Neo-Afrofuturism*, 52 AM. STUD. 217, 217–18 (2013) (discussing Janelle Monáe’s music as both honoring and expanding upon earlier forms of Afrofuturistic funk).

the future.⁵² In most mainstream visions—from *Lost in Space* to *Minority Report* to *2001: A Space Odyssey* to *Blade Runner*⁵³ to *Terminator* to *Star Wars*—people of color are practically, and sometimes quite literally, nonexistent. Even visions that are touted as liberal-humanist and mindful of race, such as Gene Rodenberry's original *Star Trek* series,⁵⁴ are still deeply problematic from a minority perspective, often depicting one or two token black actors in secondary or even tertiary roles.⁵⁵ Other depictions border on the offensive, as in the case of the movie series *Planet of the Apes*⁵⁶ and H.G. Wells's

⁵² Indeed, outside of speculative fiction, black and brown people often suffer a fate worse than invisibility. In industry and mainstream media, "places populated by descendants of the African diaspora" are often depicted as "sites of absolute dystopia; . . . signific[rs of] a disastrous failure in the ongoing process of global capital itself." Lisa Yaszek, *Afrofuturism, Science Fiction, and the History of the Future*, *SOCIALISM & DEMOCRACY*, Nov. 2006, at 41, 48. These failures include mass migration and displacement resulting from climate change and internecine wars and the spread of unchecked diseases like Ebola and AIDS, all eventually overwhelming the West. In this sense, the media "conflate[s] blackness with catastrophe." *Id.*

⁵³ As film scholar Adilifu Nama notes, the "visual absence of black people in *Blade Runner* . . . reinforces the idea that 'blackness' itself is historical and no longer exists." ADILIFU NAMA, *BLACK SPACE: IMAGINING RACE IN SCIENCE FICTION FILM* 57 (2008).

⁵⁴ Daniel Bernardi, *Star Trek in the 1960s: Liberal-Humanism and the Production of Race*, 24 *SCI. FICTION STUD.* 209, 210 (1997) (noting that the original series was a liberal-humanist project).

⁵⁵ For a discussion of the token presence of people of color in science fiction, see Noah Berlatsky, *Star Wars and the 4 Ways Science Fiction Handles Race*, *ATLANTIC* (Mar. 25, 2014), <https://www.theatlantic.com/entertainment/archive/2014/03/em-star-wars-em-and-the-4-ways-science-fiction-handles-race/359507>; see also Bernardi, *supra* note 54, at 210 (noting that the original series kept the cast of color "in the background—visible but not essential"). Indeed, literary scholar Isiah Lavender has coined the term "blackground" in science fiction. See ISIAH LAVENDER III, *RACE IN AMERICAN SCIENCE FICTION* 6 (2011) (coining the term to describe the "embedded perceptions of race and racism—intended or not—in Western s[cience] f[iction] writing" and to "question racialized structures" in the genre).

⁵⁶ The original *Planet of the Apes* series begins with an American astronaut landing on a planet ruled by talking apes, only to eventually realize that he is on Earth in the future, and that once-oppressed apes have seized control from humans. Later movies in the series made the analogies to race relations clear, seemingly with liberal intentions. However, as several commentators have noted, even if the intent was to instill empathy for the apes and thus blacks, the analogy itself is problematic. See, e.g., Anita Sarkeesian, *Masculinity, Rage, and Racism: Some Thoughts on War for the Planet of the Apes*, *FEMINIST FREQUENCY* (July 18, 2017), <https://feministfrequency.com/2017/07/18/masculinity-rage-and-racism-some-thoughts-on-war-for-the-planet-of-the-apes> (noting, in describing the reboot, that "given the long, disgusting history of racial slurs and racist imagery that liken black people to apes, the more explicit the film makes its use of the apes as a stand-in for an oppressed group, the more uncomfortable things get"). Indeed, one recent controversy involved the comedian Roseanne Barr tweeting that an African-American official from President Obama's administration looked like a character from *Planet of the Apes*. See Dustin Whitlock, *Roseanne Barr and the Not So-Subtle Racism in Her Reference to 'Planet of the Apes,' USA TODAY* (May 31, 2018), <https://www.usatoday.com/story/life/movies/2018/05/31/roseanne-barr-not-so-subtle-racism-planet-apes/660113002/>. It should be noted that even the *Matrix* trilogy is reductive in its use of a "magical negro," a term used to

novel *The Time Machine*.⁵⁷ This is to say nothing of the resistance still shown to contemporary depictions of minorities in the future, such as the backlash that resulted when two black actors were cast as two main characters in *Hunger Games*,⁵⁸ when a black actor (John Boyega) was cast as a lead in *Star Wars: The Force Awakens*,⁵⁹ and again when Vietnamese-American actor Kelly Marie Tran was cast as a lead in *Star Wars: The Last Jedi*.⁶⁰ Against this background, Afrofuturism changes the script and insists on a different narrative of inclusion. As Ytasha Womack, author of the 2013 book *Afrofuturism: The World of Black Sci-Fi and Fantasy Culture*, put it in an interview with Ruth LaFerla: “[W]hen, even in the imaginary future . . . people can’t fathom a person of non-Euro descent a hundred years into the future, a cosmic foot has to be put down.”⁶¹

Equally important, Afrofuturists insist that people of color do more than simply exist in the future. They thrive. For example, in Octavia Butler’s two-book series *Parable of the Sower*⁶² and *Parable of the Talents*,⁶³ the protagonist, a young, black, “hyper-empathic” named Lauren Olamina leads a multiracial group of survivors out of a

describe the device of introducing a supporting black character who, through their special insight or mystical powers, aids the white main character in his or her character development. See Cerise L. Glenn & Landra J. Cunningham, *The Power of Black Magic: The Magical Negro and White Salvation in Film*, 40 J. BLACK STUD. 135, 135 (2009). See generally KRIN GABBARD, *BLACK MAGIC: WHITE HOLLYWOOD AND AFRICAN AMERICAN CULTURE* (2004) (exploring Hollywood’s practice of recruiting black bodies and black culture to tell white stories).

⁵⁷ For a discussion of the way race is used in *The Time Machine*, see LAVENDER, *supra* note 55, at 44–46.

⁵⁸ See Anna Holmes, *White Until Proven Black: Imagining Race in Hunger Games*, NEW YORKER (Mar. 30, 2012), <https://www.newyorker.com/books/page-turner/white-until-proven-black-imagining-race-in-hunger-games> (discussing the trend of racist tweets that emerged after two black actors were cast as lead characters in *The Hunger Games*).

⁵⁹ Benjamin Lee, *Twitter Trolls Urge Boycott of Star Wars over Black Character*, GUARDIAN (Oct. 20, 2015, 6:08 PM), <https://www.theguardian.com/film/2015/oct/20/twitter-trolls-boycott-star-wars-black-character-force-awakens-john-boyega> (reporting on the call on Twitter for a boycott of *Star Wars: The Force Awakens* following the casting of black actor John Boyega).

⁶⁰ Amy Zimmerman, *The Persecution of Kelly Marie Tran: How Star Wars Fandom Became Overrun by Alt-Right Trolls*, DAILY BEAST (June 5, 2018, 8:06 PM), <https://www.thedailybeast.com/the-persecution-of-kelly-marie-tran-how-star-wars-fandom-became-overrun-by-alt-right-trolls> (discussing the online vitriol and racism directed at Kelly Marie Tran following her casting in *Star Wars: The Last Jedi*).

⁶¹ LaFerla, *supra* note 43. In her interviews with various Afrofuturist thinkers and artists, LaFerla describes the resurgence of Afrofuturism in the *Black Panther* era, and identifies the impetus behind its revival. The Afrofuturist clothing designer Michelle Busayo Olupona makes a similar point to Womack, highlighting the reality of racial diversity in modern American society: “What [Afrofuturism] say[s] about the future is . . . that we’re always going to be here.” *Id.*

⁶² BUTLER, *supra* note 37.

⁶³ OCTAVIA E. BUTLER, *PARABLE OF THE TALENTS* (1998).

decaying, crime-ridden Los Angeles dominated by multinational corporations to start a new religion and found a safe, progressive utopian community. In Janelle Monáe's work, including her recent album *Dirty Computer*, black women are front and center, leading a revolution to ensure the future.⁶⁴

Disruption of Hierarchies. Another mainstay of Afrofuturism is a commitment to the disruption of hierarchies based on race, gender, sexuality, and class. This too may seem a matter of minor significance until one considers mainstream futuristic texts in which white men predominate. Even in science fiction texts that include individuals of different races and genders—again, consider the original *Star Trek*, with Lt. Uhura, Lt. Sulu, and even Spock—white men are given center stage.⁶⁵ It is not surprising that *In Living Color*, a comedy show written by black writers, spoofed this very hierarchy in a skit titled *The Wrath of Farrakhan*.⁶⁶ In the skit, Farrakhan encourages lieutenants Uhura and Sulu to protest their subordinate status, which they do. In the end, even Spock, who is half-Vulcan, joins in, proclaiming, “Logically speaking, Captain, I am the strongest and most intelligent person aboard this vessel . . . I should be captain.”⁶⁷

In contrast to these mainstream visions, Afrofuturists have made a point of challenging hierarchies along lines of race, gender, class, and sexuality. One of the very first Afrofuturist novels, Edward Johnson's 1904 novel *Light Ahead for the Negro*, uses time travel to imagine a racially egalitarian society.⁶⁸ And as early as 1979, Octavia Butler was upending gender conventions in *Bloodchild* by depicting a world in which men are impregnated, often against their will.⁶⁹ And again there is her two-book series *Parable of the Sower* and *Parable of the Talents*, which begins in a walled community comprised of whites,

⁶⁴ For example, in the song *Django Jane*, her character “Django, never Sambo,” promises to start “a motherfuckin’ pussy riot” as part of the liberation. JANELLE MONÁE, *Django Jane*, on *DIRTY COMPUTER* (Bad Boy Records 2018).

⁶⁵ See Bernardi, *supra* note 54, at 210 (discussing how actors of color were featured on the show, but not essential to the show's plot points).

⁶⁶ *In Living Color*: Season One, Episode Two (Fox television broadcast Apr. 21, 1990).

⁶⁷ *Id.* It is also telling that *Star Trek*, in all of its iterations, did not have as a central lead a captain of color until 1993 (*Star Trek: Deep Space Nine*), a female captain until 1995 (*Star Trek: Voyager*), or a gay or queer character until 2017 (*Star Trek: Discovery*). See James Hibberd, *First Openly Gay Star Trek TV Character Revealed*, ENT. WKLY. (July 27, 2017, 1:00 PM), <https://ew.com/tv/2017/07/27/star-trek-anthony-rapp-discovery>; Kendra James, *O Captain, My Captain: On the Importance of Ben Sisko*, MEDIUM (Sept. 8, 2016), https://medium.com/@KendraJames/_o-captain-my-captain-on-the-importance-of-ben-sisko-5a1eea3b1f00; Albert Kim, *Star Trek Voyager's First Female Captain*, ENT. WKLY. (Jan. 20, 1995, 5:00 AM), <https://ew.com/article/1995/01/20/star-trek-voyagers-first-female-captain>.

⁶⁸ JOHNSON, *supra* note 28.

⁶⁹ OCTAVIA E. BUTLER, *Afterword to Bloodchild*, in *BLOODCHILD*, *supra* note 21, at 30, 30.

blacks, Asians, and Latinos struggling to survive *together*.⁷⁰ Butler makes clear that one key to her protagonist's vision of leading a band of survivors to something more utopian is her rejection of racial, class, and sexual difference.⁷¹ One of the fundamental tenets of Olamina's utopian vision is, "Embrace diversity. . . . Or be destroyed."⁷² Disrupting gender hierarchies is also at the heart of Nnedi Okorafor's Afrofuturist novel *Who Fears Death*: the novel begins with images of mass rape and female circumcision and ends with a vision of gender freedom.⁷³ Consider too the music of Janelle Monáe, who tells the story of her cyborg alter ego Cindi Mayweather on her albums *Metropolis*, *The ArchAndroid*, and *Dirty Computer*.⁷⁴ Mayweather is visually gendered as female while nonetheless moving beyond the normative feminine.⁷⁵ Monáe then, sees a path to escape binaries and solid identities through a cyborg that transcends current gender narratives and attitudes, along the way taking on both male and female lovers.⁷⁶ It is because of this commitment to gender equality that Alondra Nelson describes Afrofuturism as a "feminist space."⁷⁷ Ytasha Womack adds, "Afrofuturism is a free space for women, a door ajar, arms wide open."⁷⁸

And it is not just gender. Janelle Monáe's Mayweather also wants to break the class hierarchies in which an elite class lives in leisure

⁷⁰ See BUTLER, *supra* note 37, at 176–77.

⁷¹ See BUTLER, *supra* note 63, at 80 (describing the protagonist as being attentive to racial, ethnic, religious, and class tolerance).

⁷² BUTLER, *supra* note 37, at 196.

⁷³ NNEDI OKORAFOR, *WHO FEARS DEATH* (2010).

⁷⁴ JANELLE MONÁE, *METROPOLIS* (Bad Boy Records 2008) [hereinafter MONÁE, *METROPOLIS*]; JANELLE MONÁE, *THE ARCHANDROID* (Bad Boy Records 2010) [hereinafter MONÁE, *THE ARCHANDROID*]; MONÁE, *supra* note 64; see also Aja Romano, *Janelle Monáe's Body of Work Is a Masterpiece of Modern Science Fiction*, *Vox* (May 16, 2018, 12:50 PM), <https://www.vox.com/2018/5/16/17318242/janelle-monae-science-fiction-influences-afrofuturism> (discussing the evolution of Cindi Mayweather as Monáe's cyborg alter ego over her five albums).

⁷⁵ English & Kim, *supra* note 51, at 222. The official video for *Many Moons* from *Metropolis* sees Mayweather seamlessly transform from an ultra-white and robotic Self to a human-seeming black version of her Self. *Id.*; Janelle Monáe, *Janelle Monae – Many Moons [Official Short Film]*, YOUTUBE (Oct. 3, 2008), <https://www.youtube.com/watch?v=LHgbzNHVg0c>.

⁷⁶ See English & Kim, *supra* note 51, at 221–22 (describing the gender fluidity of both Monáe and Mayweather displayed through their physical appearances). In all her hypothesizing of a futuristic post-gender world, Monáe does not forget to explore her lived reality. A spoken voice close to the end of *Many Moons* offers an incantation of more rigid identities of stereotypes of black women followed by a number of references to Monáe's own lived identities: "crack whore," "closet drunk," "black girl," "bad hair," then "outcast . . . tuxedo." *Many Moons*, on MONÁE, *METROPOLIS*, *supra* note 74.

⁷⁷ WOMACK, *supra* note 41, at 109 (discussing, in an interview with Nelson, how Afrofuturism creates a space for women to play central roles).

⁷⁸ *Id.* at 100.

because of the physical labor of the lower classes.⁷⁹ Challenging the very notion of class and sexuality is also at the heart of much of Samuel Delany's work, such as in his Nebula Award-nominated novel *Trouble on Triton*.⁸⁰ Even Afrofuturists working in the visual arts embrace this perspective. For the visual artist Nick Cave, determining how "we both diversify and come together with a more globally unified vision" is part and parcel of Afrofuturism.⁸¹

Alienation and Reclamation. The remaining two themes of Afrofuturism are alienation and reclamation. Alienation is a traditionally Marxist theory that holds that the capitalist mode of production limits and constricts humans' naturally free, creative, and social selves.⁸² Under a capitalist system, we experience alienation from the products of our labor, from our creative powers, and from intra and interpersonal relationships.⁸³ The concept of alienation in Afrofuturism is analogous. Afrofuturist texts frequently invoke the slave trade as an entry point for examining how blacks were alienated from their homeland and culture.⁸⁴ Or as Afrofuturist scholar Lisa Yaszek writes, Afrofuturism, and specifically Afrodiasporic histories, "insist both on the authenticity of the black subject's experience in Western history and the way this experience embodies the dislocation felt by many modern peoples."⁸⁵

Reclamation is closely related to alienation. A recurring theme in Afrofuturism is reclaiming the identities and perspectives that were lost as a result of the slave trade and colonialism.⁸⁶ In this sense,

⁷⁹ See Angela Watercutter, *6 Things You Should Know About Janelle Monáe*, WIRED (Sept. 30, 2014, 6:30 AM), <https://www.wired.com/2014/09/6-things-janelle-mona-e> (discussing Monáe's working-class sensibilities and describing Mayweather as a "messiah to the people of a class-divided city").

⁸⁰ See Kathy Acker, *On Delany the Magician: A Foreword*, in *TROUBLE ON TRITON*, *supra* note 38, at ix, xi (describing the world in *Trouble on Triton* as one in which "women can become men and men, women," and remarking on Delany's novel as a conversation about "identity, desire, and gender, . . . democracy, liberalism, and otherness").

⁸¹ McKnight-Abrams, *supra* note 9 (quoting Cave, who discusses the need to interrogate the propulsive forces behind the first wave of Afrofuturism, and to consider how today's issues of diversity and globalism should shape modern conceptions of Afrofuturism).

⁸² See generally *Introduction to KARL MARX, ECONOMIC AND PHILOSOPHIC MANUSCRIPTS OF 1844*, at 8–9 (Dover Publ'ns 2007) (1961) (noting Marx's emphasis on the alienation of the laborer from the means of production in a capitalist system).

⁸³ *Id.*

⁸⁴ See Kodwo Eshun, *Future Considerations on Afrofuturism*, NEW CENTENNIAL REV., Summer 2003, at 287, 298–99 (discussing how Afrofuturism uses extraterrestriality in science fiction as a trope to explore the implications of the forced dislocation and alienation of Afrodiasporic peoples).

⁸⁵ Yaszek, *supra* note 52, at 47.

⁸⁶ See Eshun, *supra* note 84, at 301 (characterizing a tenet of Afrofuturism as "recovering the histories of counter-futures"); see also Reynaldo Anderson, *Afrofuturism*

Afrofuturism is both future looking and backward looking, committed to reclaiming approaches, methodologies, and ways of thinking that predate slavery and colonization.⁸⁷ Afrofuturism asks: What would we be without? What would we be if? Most importantly, by engaging in reclamation, by valorizing a range of cultural traditions,⁸⁸ it offers a vision of what could be in the future.

It may seem strange, at this point, to segue from a discussion of Afrofuturism in general to a discussion of the film *Black Panther*. It is a Marvel Studios film based on a comic book; it is a Hollywood film, a box office juggernaut to boot, and on the surface has little to do with law. In short, even in the law-in-film movement, *Black Panther* is hardly the type of film one would expect to see discussed in a law review article. But underneath the surface of its fast-paced action sequences and fight scenes, *Black Panther* does have something to say about policing in a world informed by Afrofuturism. This aspect of *Black Panther* is taken up below.

B. *Wakanda Forever!*

The film *Black Panther* is not set in the year 2044. Nonetheless, with its “science-fiction celebration of the imaginary country of Wakanda, a high-tech utopia that is a fictive manifestation of African potential unfettered by slavery and colonialism,”⁸⁹ *Black Panther* is certainly Afrofuturistic and gave Americans, especially black and brown Americans, a sense of what could have been. It also gave black and brown Americans a sense of what could be. As one commentator put it: *Black Panther* was “also about black culture’s journey, and it

2.0 & the Black Speculative Art Movement: Notes on a Manifesto, 42 OBSIDIAN, nos. 1/2, 2016, at 228, 228 (stating that Afrofuturism 2.0 thinkers are both reclaiming their right to tell their own stories, and also critiquing Western science fiction writers’ presumed authority as the “sole interpreters of Black lives and Black futures”).

⁸⁷ The theme of reclamation permeates nearly every Afrofuturist work, from the film *Black Panther*, to Nnedi Okorafor’s novel *Who Fears Death*, to Erykah Badu’s album *New Ameryka Part II (The Return of the Ankh)*, to Frank Ocean’s song *Pyramids*. For a discussion of Afrofuturism in the latter two works, see *Dissect, Pyramids (Part I)* by Frank Ocean (June 1, 2018) (downloaded using Spotify); *Dissect, Pyramids (Part II)* by Frank Ocean (June 8, 2018) (downloaded using Spotify); IAMBSF, *4 Times Erykah Badu Proved She’s from Beyond this World & Time*, BLACKSCIFI.COM (Aug. 29, 2016, 1:49 PM), <https://blacksci-fi.com/4-times-erykah-badu>.

⁸⁸ See André-Naquiian Wheeler, *Why Afrofuturism Is the Art Movement We Need in 2017*, VICE: i-D (Mar. 6, 2017, 12:30 PM), https://i-d.vice.com/en_us/article/vbdgxx/why-afrofuturism-is-the-art-movement-we-need-in-2017 (describing the aesthetic of Afrofuturism as multicultural).

⁸⁹ Adam Serwer, *The Tragedy of Erik Killmonger*, ATLANTIC (Feb. 21, 2018), <https://www.theatlantic.com/entertainment/archive/2018/02/black-panther-erik-killmonger/553805>.

points towards a future where it could be *the* culture.”⁹⁰ It was this celebration of potential that prompted many black and brown people, including athletes and celebrities, to adopt the Wakanda greeting and exclaim “Wakanda forever.”⁹¹

In a way, the story at the core of the film—about a battle between the superhero Black Panther (who is also T’Challa, the king of Wakanda) and his cousin and nemesis Erik Killmonger—is secondary to the film’s celebration of this black past and black future. Beginning with the past, instead of an imagined “heart of darkness,” to borrow from the writer Joseph Conrad,⁹² *Black Panther* imagines an African country bright with possibilities and untouched by colonialism, slavery, or the plundering of its natural resources. The film is also grounded in the present. The film opens and closes in a housing project in Oakland, California, contrasting the wealth of Wakanda with the plight and subaltern existence of the descendants of Africans who were enslaved. Turning to the future, *Black Panther* offers a future in which blacks thrive in part by reclaiming their past. By insisting that people of color have a future and by disrupting hierarchies based on race or gender—race and gender exist horizontally in *Black Panther*, but not vertically or hierarchically⁹³—this groundbreaking film is Afrofuturism.

⁹⁰ Tre Johnson, *Black Panther Is a Gorgeous, Groundbreaking Celebration of Black Culture*, VOX (Feb. 23, 2018, 12:40 PM), <https://www.vox.com/culture/2018/2/23/17028826/black-panther-wakanda-culture-marvel>.

⁹¹ See, e.g., Cindy Boren, ‘It’s Everything’: Black Athletes Are Celebrating with ‘Wakanda Forever’ Salutes, WASH. POST (Mar. 13, 2018), <https://www.washingtonpost.com/news/early-lead/wp/2018/03/13/its-everything-black-athletes-are-celebrating-with-wakanda-forever-salutes-from-black-panther> (reporting that athletes are making the “Wakanda forever” salute in sports as diverse as tennis, soccer, rugby, and wrestling). At the 2018 French Open, Serena Williams played rounds in what she described as a “Wakanda-inspired catsuit.” Ron Dicker, *Serena Williams’ ‘Wakanda-Inspired Catsuit’ Is a Hit at French Open*, HUFFPOST (May 30, 2018, 6:32 AM), https://www.huffingtonpost.com/entry/serena-williams-wakanda-inspired-catsuit-is-a-hit-at-french-open_us_5b0e6aade4b0fdb2a583668. The French Tennis Federation subsequently declared that it would introduce a new dress code stressing tradition, and singled out the Wakanda catsuit as dress that failed to show respect for tradition. See Laurel Wamsley, ‘One Must Respect the Game’: French Open Bans Serena Williams’ Catsuit, NPR (Aug. 24, 2018, 1:00 PM), <https://www.npr.org/2018/08/24/641549735/one-must-respect-the-game-french-open-bans-serena-williams-catsuit>.

⁹² JOSEPH CONRAD, HEART OF DARKNESS (Dover Publ’ns 1990) (1902); see also Jelani Cobb, *Black Panther and the Invention of “Africa,”* NEW YORKER (Feb. 18, 2018), <https://www.newyorker.com/news/daily-comment/black-panther-and-the-invention-of-africa> (observing that “Wakanda is no more or less imaginary than the Africa conjured” by European writers in the nineteenth century or “canonized in such Hollywood offerings as *Tarzan*”).

⁹³ Although the throne in Wakanda seems to fall to the male heir, other leaders in Wakanda are female. Wakanda is protected by an all-female militia, and Black Panther’s

This is not to say the story at the heart of *Black Panther* does not matter. It does. Indeed, the story, though on the surface a battle between good (Black Panther/T'Challa) and evil (Killmonger), is in fact widely viewed as a meditation on Pan-Africanism and as deeply philosophic.⁹⁴ After all, the conflict between Black Panther/T'Challa and Killmonger is not over power for the mere sake of power; Killmonger wants Wakanda's power and technology so that he can liberate black people from oppression and colonialism, or at least this is what Killmonger believes. He scolds T'Challa for being an isolationist: "Two billion people all over the world who look like us whose lives are much harder, and Wakanda has the tools to liberate them all. . . . Where was Wakanda?"⁹⁵ As one observer put it, Killmonger "shows us the limits of the Wakandan project—the people it leaves behind."⁹⁶ In a sense, T'Challa might be the Black Panther, but Killmonger symbolizes the Black Panther Party,⁹⁷ which in the 1960s sought to liberate blacks. It is not a coincidence that Killmonger's character arc "begins in Oakland, once the cradle of the Black Panther Party"⁹⁸ or that a poster of Huey P. Newton, a co-founder of the Party, hangs on a wall in an early scene.⁹⁹ While the ideological conflict between Black Panther/T'Challa and Killmonger is worthy of its own discussion—indeed, Jelani Cobb has described the conflict as

"handler" is in fact his brilliant sister. Thus, one senses that though women and men may have different roles, these roles are not hierarchical.

⁹⁴ See Cobb, *supra* note 92 (describing *Black Panther* as not just another superhero film, but as a profound work that taps into the Pan-Africanist tradition of reclaiming Africa in the minds of Afrodiasporic people).

⁹⁵ BLACK PANTHER (Marvel Studios 2018). Wakanda's tradition of isolation becomes evident at the start of the film. The audience first sees T'Challa/Black Panther when he comes to the aid of Nakia as she rescues refugees from a Boko Haram-type military. After the rescue, T'Challa/Black Panther insists that Wakanda cannot take in the newly freed refugees—Wakanda's isolation from the rest of the world must be preserved. See Zack Beauchamp, *What Black Panther Can Teach Us About International Relations*, Vox (Feb. 27, 2018, 9:10 AM), <https://www.vox.com/culture/2018/2/27/17029730/black-panther-marvel-killmonger-ir> (analyzing Wakanda's foreign policy and isolationism, including the scene where Nakia and Black Panther rescue refugees).

⁹⁶ Doreen St. Félix, *On Killmonger, the American Villain of Black Panther*, NEW YORKER (Feb. 20, 2018), <https://www.newyorker.com/culture/culture-desk/on-killmonger-black-panther-s-american-villain>.

⁹⁷ Others have commented on this connection between Killmonger and the Black Panther Party. See, e.g., Serwer, *supra* note 89 (suggesting that Killmonger represents the Black Panther Party in its later years, embodying its "revolutionary possibility and noble intentions, but also its degeneration into fratricidal violence"). As an example of art imitating life, after the film's release, Michael B. Jordan, the actor who plays Killmonger, appeared on the cover of *British GQ* dressed "as a couture Huey Newton." St. Félix, *supra* note 96; see Cover of the March 2018 issue, *BRITISH GQ*, <https://www.gq-magazine.co.uk/magazine/march-2018> (last visited Nov. 12, 2018).

⁹⁸ Newkirk, *supra* note 11.

⁹⁹ See Cobb, *supra* note 92 (describing Killmonger's apartment in Oakland).

reflecting the “fundamental dissonance in the term ‘African-American,’ two feuding ancestries conjoined by a hyphen”¹⁰⁰—there is another aspect of the film that runs just below the surface and is pertinent here. Consider how the film opens. After a voice-over describing Wakanda, the film opens on a group of black boys—one will grow up to become Killmonger—playing basketball on a make-shift basketball court, while in an apartment a television flickers images of what appears to be scenes from the L.A. Riots. In the apartment, two heavily armed men appear to be planning a drug heist. In short, *Black Panther* opens with urban blight and criminal justice issues in the background, and what appears to be a crime in progress (drug dealing) in the foreground.¹⁰¹ Now consider how the film ends: with T’Challa and his sister appearing on the same basketball court and housing project—in a way, the scene of the original “crime”—but this time to share technology, capital, and education to liberate the impoverished black and brown people there. This, the ending seems to suggest, will also address the scourge of crime.

Of course, Afrofuturism as a whole has much more to say about policing in the year 2044 and beyond. It has much to say about what should constitute a crime, about the rights of individuals vis-à-vis the police, about punishment, and about criminal justice more broadly. Critical Race Theory has a lot to say about these issues too. How Afrofuturism and Critical Race Theory can inform policing is the focus of Part III. However, before turning to policing in 2044 and beyond, it makes sense to first present a brief overview of Critical Race Theory.

II

CRITICAL RACE THEORY AND ITS CHRONICLES

*The question always lurking in the background of CRT is this:
What would the legal landscape look like today if people of color
were the decision-makers?*

—Roy L. Brooks¹⁰²

¹⁰⁰ *Id.*; see also Newkirk, *supra* note 11 (describing the juxtaposition of Killmonger’s embrace of “Africanness” and “conversations that have dominated black thought in the United States”).

¹⁰¹ Of course, the viewer soon learns that the “drug dealer” is not a “drug dealer” at all, but T’Challa’s uncle attempting to build a militant army to liberate blacks, an attempt that fails when T’Challa’s father kills him.

¹⁰² Roy L. Brooks, *Critical Race Theory: A Proposed Structure and Application to Federal Pleading*, 11 HARV. BLACKLETTER L.J. 85, 85–86 (1994).

We are gifted by an ability to imagine a different world—to offer alternative values—if only because we are not inhibited by the delusion that we are well served by the status quo.

—Charles R. Lawrence¹⁰³

Given census projections that by the year 2044 whites will no longer be able to claim majority status, it makes sense to include CRT in any discussion of the law in the future. After all, Critical Race Theory, more than any other legal school of thought, imagines the future in color. This Part accordingly provides an overview of Critical Race Theory, especially future-looking Critical Race Theory. In addition, it provides an overview of CRT's most well-known offshoot: Latin American Critical Race Theory (LatCrit).¹⁰⁴ It then describes one of CRT's most futuristic chronicles, Derrick Bell's *Chronicle of the Space Traders*.¹⁰⁵

Critical Race Theory has an almost mythical origin story. Many students of color at Harvard Law School felt frustrated after Professor Derrick Bell departed,¹⁰⁶ and with Harvard's refusal to replace the "Constitutional Law and Minority Issues"¹⁰⁷ course he'd been teaching or hire another faculty member of color.¹⁰⁸ Students responded by protesting, and also by creating their own race and the law course and inviting a rotating group of scholars of color from other schools to teach it each week.¹⁰⁹ In a very real sense, this was one half of the beginning of Critical Race Theory.¹¹⁰ For the students, it was a formative experience, and several went on to become founders of the CRT movement.¹¹¹

¹⁰³ Lawrence, *supra* note 16, at 2239.

¹⁰⁴ See RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 178 (3d ed. 2017) (defining LatCrit as a form of "critical race theory that considers issues of concern to Latinos, such as immigration, language rights, and multi-identity").

¹⁰⁵ BELL, *supra* note 3.

¹⁰⁶ Bell left Harvard because he was frustrated with Harvard's failure to hire another professor of color. Letter from Derrick Bell to Robert Clark, Dean, Harvard Law Sch. (Apr. 9, 1990), in *THE DERRICK BELL READER* 205, 205 (Richard Delgado & Jean Stefancic eds., 2005).

¹⁰⁷ Kimberlé Williams Crenshaw, *Twenty Years of Critical Race Theory: Looking Back to Move Forward*, 43 CONN. L. REV. 1253, 1266 (2011).

¹⁰⁸ For a fuller discussion of CRT's origin and the role that Bell's departure from Harvard Law School played, see *id.* at 1262–77.

¹⁰⁹ *Id.* at 1278 (citing George E. Bisharat, Opinion, *Third World Students Believe Harvard Law Is Symbol of Bias*, BOS. GLOBE, Feb. 19, 1983, at 11).

¹¹⁰ See Crenshaw et al., *supra* note 14, at xxi (noting that the student-created course "was in many ways the first institutionalized expression of Critical Race Theory").

¹¹¹ See Crenshaw, *supra* note 107, at 1263–64 (listing notable CRT scholars involved in the student protests).

The other half of the beginning of CRT came several years later when law professors of color—several of whom had been students at Harvard Law during the agitation there¹¹²—decided to splinter from Critical Legal Studies (CLS), which had been the de facto movement for left-leaning, progressive law professors.¹¹³ The rift grew out of a growing perception that CLS was unwilling to engage with race,¹¹⁴ and CLS's insistence that rights were a sham, nothing more than a way to make the social world appear rationally mediated by the rule of law.¹¹⁵ By contrast, scholars of color saw rights as problematic but necessary.¹¹⁶ Indeed, for scholars of color, Martin Luther King Jr.'s view on rights still held sway: "It may be true that the law cannot make a man love me, but it can keep him from lynching me and . . . that's pretty important."¹¹⁷ In 1989, these two rifts—over race and rights—prompted several scholars of color to host their own "workshop" at the University of Wisconsin, drawing twenty-four attendees.¹¹⁸ Out of the strands of dissatisfaction with Harvard Law School's response to student demands and CLS's failure to take race or rights seriously, Critical Race Theory was conceived.¹¹⁹

What was it that allowed CRT to not only survive conception, but to quicken and emerge as a leading and influential intellectual movement, now extending beyond law to education,¹²⁰ psychology,¹²¹ philosophy,¹²² political science,¹²³ and cultural studies,¹²⁴ and generating

¹¹² *Id.*

¹¹³ See OSAGIE K. OBASOGIE, *BLINDED BY SIGHT: SEEING RACE THROUGH THE EYES OF THE BLIND* 189 (2014).

¹¹⁴ Crenshaw, *supra* note 107, at 1292.

¹¹⁵ *Id.* at 1296 (citing Peter Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563, 1573–74 (1984) (characterizing rights discourse as "alienat[ing]" and the "schema" of legal rights as intended to "make the reproduction of [this] alienation a condition of group membership")).

¹¹⁶ *Id.* at 1296; see also WILLIAMS, *supra* note 10, at 13 (describing how a focus on individual rights discredits valid assertions of group interests).

¹¹⁷ See OBASOGIE, *supra* note 113, at 189 (quoting Notable & Quotable: The Rev. Dr. Martin Luther King Jr., in an Address at Cornell College, Mt. Vernon, Iowa, WALL STREET J., Nov. 13, 1962, at 18).

¹¹⁸ Ambitiously, they titled the workshop "New Developments in Minority Scholarship." Crenshaw, *supra* note 107, at 1298; see also Angela Onwuachi-Willig, *Celebrating Critical Race Theory at 20*, 94 IOWA L. REV. 1497, 1497 (2009).

¹¹⁹ See Crenshaw, *supra* note 107, at 1288 (explaining that "CRT emerged not only as a critical intervention in a particular institutional contestation over race but also as a race intervention in a critical space, namely C[ritical] L[egal] S[tudies]").

¹²⁰ See, e.g., *CRITICAL RACE THEORY IN EDUCATION: ALL GOD'S CHILDREN GOT A SONG* (Adrienne D. Dixon & Celia K. Rousseau eds., 2006); *FOUNDATIONS OF CRITICAL RACE THEORY IN EDUCATION* (Edward Taylor et al. eds., 2009).

¹²¹ See, e.g., *CRITICAL RACE REALISM: INTERSECTIONS OF PSYCHOLOGY, RACE, AND LAW* (Gregory S. Parks et al. eds., 2008).

¹²² As mentioned in the *New York Times*, the journal *Critical Philosophy of Race* was founded in 2012 to provide a forum for philosophy about race by and about people of

other intellectual movements, including LatCrit, QueerCrit, DisCrit, and recently eCRT?¹²⁵ Or as Crenshaw rhetorically asks—rhetorically, since she of course knows the answer—“What was it that ignited CRT as a movement in law?”¹²⁶ The answer has much to do with the broad goals, and perhaps broader intent, of CRT. Critical Race Theory, after all, is committed to confronting “the historical centrality and complicity of law in upholding white supremacy (and concomitant hierarchies of gender, class, and sexual orientation),”¹²⁷ and transforming the relationship between law and white supremacy to reshape American jurisprudence in a project of racial emancipation and anti-subordination.¹²⁸ CRT demonstrates a “commitment to radical critique of the law . . . and . . . radical emancipation by the law.”¹²⁹ And it aims “to develop a jurisprudence that accounts for the role of racism

color. See George Yancy, Opinion, *The Pain and Promise of Black Women in Philosophy*, N.Y. TIMES (June 18, 2018), <https://www.nytimes.com/2018/06/18/opinion/black-women-in-philosophy.html>; see also Robert Bernasconi et al., *Letter from the Editors*, 1 CRITICAL PHIL. RACE, at iv, iv (2013) (introducing the inaugural issue of *Critical Philosophy of Race*).

¹²³ See, e.g., Barbara Luck Graham, *Toward a Critical Race Theory in Political Science: A New Synthesis for Understanding Race, Law, and Politics*, in AFRICAN AMERICAN PERSPECTIVES ON POLITICAL SCIENCE 212 (Wilbur C. Rich ed., 2007).

¹²⁴ See, e.g., Imani Perry, *Cultural Studies, Critical Race Theory and Some Reflections on Methods*, 50 VILL. L. REV. 915 (2005).

¹²⁵ For a discussion of these newer movements see Subini Ancy Annamma et al., *Dis/ability Comparative Critical Race Studies (DisCrit): Theorizing at the Intersections of Race and Dis/ability*, 16 RACE ETHNICITY & EDUC. 1 (2013) (proposing a new theoretical framework that merges Disability Studies and CRT); Devon W. Carbado & Daria Roithmayr, *Critical Race Theory Meets Social Science*, 10 ANN. REV. L. & SOC. SCI. 149 (2014) (proposing the careful integration of social science research and techniques into CRT); Leslie Espinoza & Angela P. Harris, *Afterword: Embracing the Tar-Baby—LatCrit Theory and the Sticky Mess of Race*, 85 CALIF. L. REV. 1585, 1605–06 (1997) (describing LatCrit as one lens through which to examine race); Kimani Paul-Emile, *Foreword: Critical Race Theory and Empirical Methods Conference*, 83 FORDHAM L. REV. 2953, 2954 (2015) (describing the origins of critical race theory and empirical methods (eCRT)); Francisco Valdes, *Theorizing “OutCrit” Theories: Coalitional Method and Jurisprudential Experience—RaceCrits, QueerCrits and LatCrits*, 53 U. MIAMI L. REV. 1265 (1999) (describing the emergence of LatCrit and QueerCrit).

¹²⁶ Crenshaw, *supra* note 107, at 1258.

¹²⁷ Cornel West, *Foreword to CRITICAL RACE THEORY*, *supra* note 14, at xi, xi.

¹²⁸ See Francisco Valdes, Jerome McCristal Culp & Angela P. Harris, *Introduction: Battles Waged, Won, and Lost: Critical Race Theory at the Turn of the Millennium*, in CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY 1 (Francisco Valdes, Jerome McCristal Culp & Angela P. Harris eds., 2002) (explaining how CRT theorists attempt to expose and undermine the whiteness underpinning the legal status quo); see also Crenshaw et al., *supra* note 14, at xiii (observing that the goal of CRT is “not merely to understand the vexed bond between law and racial power but to *change* it”).

¹²⁹ Derrick A. Bell, *Who’s Afraid of Critical Race Theory?*, 1995 U. ILL. L. REV. 893, 899.

in American law and that works toward the elimination of racism as part of a larger goal of eliminating all forms of subordination.”¹³⁰

This still leaves the question of what Critical Race Theory is. Although there is no single answer—indeed, most CRT scholars eschew the notion of a fully unified school of thought¹³¹—it is safe to say Critical Race Theory begins with a rejection of legal liberalism. As one group of CRT scholars put it:

Critical race theorists have not placed their faith in neutral procedures and the substantive doctrines of formal equality; rather, critical race theorists assert that both the procedure and the substances of American law, including American antidiscrimination law, are structured to maintain white privilege.¹³²

Beyond this broad concern, a review of the movement’s key writings reveals several recurring themes that will be pertinent to this Article’s discussion of policing in the year 2044 in Part III. One, race is biologically insignificant; as such, it is important to attend to how race is socially constructed, and how law itself constructs race and produces racial meaning.¹³³ Two, the American legal system, despite its notional neutrality, is “structurally designed to keep insiders in power”¹³⁴—a design that typically works to disadvantage outsiders such as people of color, women, sexual minorities, and the poor.¹³⁵ Three, even “color-

¹³⁰ Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1331 n.7 (1991).

¹³¹ See Crenshaw et al., *supra* note 14, at xiii (noting that “there is no canonical set of doctrines or methodologies to which [CRT scholars] all subscribe”); Jasmine B. Gonzales Rose, *Toward a Critical Race Theory of Evidence*, 101 MINN. L. REV. 2243, 2248–49 (2017) (observing that part of CRT’s “richness and insight stems from its diversity and internal debates”).

¹³² Valdes, Culp & Harris, *supra* note 128, at 1.

¹³³ See Calmore, *supra* note 16, at 2160 (“Critical Race Theory begins with a recognition that ‘race’ is not a fixed term. Instead, ‘race’ is a fluctuating, decentered complex of social meanings that are formed and transformed under the constant pressures of political struggle.”); Espinoza & Harris, *supra* note 125, at 1605–06 (“Race . . . is there and not there, race is a reality and a social construction. Race is quite like the ‘Tar-Baby.’ You punch the Tar-Baby, you think you have got him, but instead you become stuck.” (footnotes omitted)); Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CALIF. L. REV. 741, 774 (1994) (“[R]ace’ is neither a natural fact simply there in ‘reality,’ nor a wrong idea, eradicable by an act of will.”). Perhaps no CRT scholar has explored this issue more deeply than Ian Haney López. See IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (10th anniversary ed. 2006) (documenting how the legal system has shaped, constructed, and defined notions of race). In the criminal justice context, CRT scholars have gone a step further by showing how policing contributes to the social construction of race. See, e.g., I. Bennett Capers, *Policing, Race, and Place*, 44 HARV. C.R.-C.L. L. REV. 43 (2009).

¹³⁴ Gonzales Rose, *supra* note 131, at 2250.

¹³⁵ *Id.* at 2249 (noting that “CRT posits that there are ‘insiders’ and ‘outsiders’ in American society and its legal systems”). For example, the Court’s analysis of the Equal Protection Clause from what Professor Alan Freeman calls the “perpetrator

blind” laws often serve to further insider privileges along the lines of race, gender, and class while marginalizing and obscuring social, political, and economic inequality.¹³⁶ Four, legal reforms that ostensibly benefit minorities occur only when such reforms also advance the interests of the white majority, a requirement most often referred to as “interest convergence.”¹³⁷ Five, Critical Race Theory rejects crude essentialism—the notion that there is, for example “a single woman’s, or Black person’s, or any other group’s, experience that can be described independently from other aspects of the person”¹³⁸—and insists on “the need to account for multiple grounds of identity when

perspective”—recognizing only discrimination that is “intentional” regardless of how it is experienced by its victims—allows the law to at once acknowledge discrimination as “real” while at the same time framing forms of racial subordination that do not have obvious markers of intentional discrimination as not racism. See Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1054, 1069 (1978). This approach favors the status quo, which includes structural racism and benefits insiders. See *id.* at 1105 (demonstrating how the Court’s privileging of the perpetrator perspective at the expense of the victim perspective entrenches inequality); see also Mario L. Barnes, “*The More Things Change . . .*”: *New Moves for Legitimizing Racial Discrimination in a “Post-Race” World*, 100 MINN. L. REV. 2043, 2067 (2016) (extending Freeman’s analysis to argue that the Court is now in an “Era of Incredulity” when it comes to claims from outsiders challenging insiders).

¹³⁶ See, e.g., Gonzales Rose, *supra* note 131, at 2251–52 (explaining that animus and intentionality are not necessary to produce racist outcomes that disproportionately benefit whites).

¹³⁷ Derrick A. Bell, Jr., Comment, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) (“The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites.”). In this piece, Derrick Bell applies his interest convergence theory in his analysis of *Brown v. Board of Education*, 347 U.S. 483 (1954), demonstrating that civil rights advances for blacks only occurred because they coincided with the self-interest of white elites, who were concerned with promoting a humanitarian image of the United States vis-à-vis their foreign relations with the Soviet Union. *Id.*; see also DERRICK BELL, *Racial Symbols: A Limited Legacy*, in *FACES AT THE BOTTOM OF THE WELL*, *supra* note 3, at 15, 26 (discussing how the legal rights of African-Americans have advanced and regressed depending on what whites deemed to be in their best interests).

¹³⁸ Trina Grillo, *Anti-Essentialism and Intersectionality: Tools to Dismantle the Master’s House*, 10 BERKELEY WOMEN’S L.J. 16, 19 (1995). CRT scholars have long critiqued the essentialism that pervades much scholarship. See, e.g., Trina Grillo & 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, 404 (arguing that essentialism separates women from people of color, rendering the experiences of women of color invisible); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990) (contending that gender essentialism silences the voices of black women). They have also emphasized the importance of anti-essentialism within CRT scholarship. See, e.g., Regina Austin, “*The Black Community, Its Lawbreakers, and a Politics of Identification*,” 65 S. CAL. L. REV. 1769, 1775, 1817 (1992) (advocating for “an integrated politics of identification” that recognizes the social, economic, and political differences within the black community).

considering how the social world is constructed,”¹³⁹ especially when law is involved. For example, a black working class lesbian in one part of the United States likely experiences oppression differently than a black male investment banker in another part of the United States.¹⁴⁰ Six, because racial privilege and racial subordination are often elided in the law, much of CRT involves making race visible, or as I have described it elsewhere, “reading black.”¹⁴¹ Seven, Critical Race Theory is committed to the development of “counter-accounts of social reality by subversive and subaltern elements of the reigning order”¹⁴² and to offering what cultural theorist Edward Said describes as “antithetical knowledge.”¹⁴³ To this end, CRT supports the incorporation of personal narrative, or what is often referred to as “legal

¹³⁹ Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1245 (1991).

¹⁴⁰ See Austin, *supra* note 138, at 1817 (emphasizing differences in racial identity along gender, class, and geographic lines); see also Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561, 640–41 (1997) (offering multidimensionality to describe the very inseparability of identity categories). There are numerous examples of the application of intersectionality to legal analysis. One of the best known comes from Professor Paulette Caldwell. See Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 371–72 (analyzing a district court decision that upheld an employer’s prohibition on braided hairstyles in the workplace, a decision exemplifying intersectional race and gender discrimination). Critical Race Theorists have also brought intersectionality to bear in criminal justice scholarship. See, e.g., Frank Rudy Cooper, “Who’s the Man?”: *Masculinities Studies, Terry Stops, and Police Training*, 18 COLUM. J. GENDER & L. 671 (2009); Dorothy E. Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. REV. 1474 (2012) [hereinafter Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*]; Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991) [hereinafter Roberts, *Punishing Drug Addicts Who Have Babies*].

¹⁴¹ See I. Bennett Capers, *Reading Back, Reading Black*, 35 HOFSTRA L. REV. 9, 12 (2006) (using the term “reading black” to describe “a reading practice that is not only critical, but particularly attuned to the frequencies and registers of race”); see also Paul Butler, *The White Fourth Amendment*, 43 TEX. TECH L. REV. 245, 249 (2010) (describing several Fourth Amendment cases in which the decisions make no mention of race, even though “race seemed an integral element”); Devon W. Carbado, *(E)Racing the Fourth Amendment*, 100 MICH. L. REV. 946, 974–75 (2002) (arguing for a re-reading of two Fourth Amendment cases to expose how they actively construct race and racial preferences).

¹⁴² Crenshaw et al., *supra* note 15, at xiii; see also Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2437–38 (1989) (arguing that marginalized communities should tell their counter narratives as an effective advocacy strategy).

¹⁴³ EDWARD W. SAID, *COVERING ISLAM* 157 (Vintage Books 1997) (1981) (describing antithetical knowledge as a “kind of knowledge produced by people who quite consciously consider themselves to be writing in opposition to the prevailing orthodoxy”); see also Crenshaw et al., *supra* note 15, at xiii (describing the CRT writings as contributing “to what Edward Said has called ‘antithetical knowledge’”).

storytelling,” to critique and “assess law’s master narratives.”¹⁴⁴ This includes “looking to the bottom” to surface the perspectives of outsiders.¹⁴⁵ This embrace of outsider voices and narrative is so fundamental that CRT has been called “voice scholarship.”¹⁴⁶ Eight, Critical Race Theory maintains that true change is possible only through radical interventions. The changes associated with the “victories” of civil rights litigation and “formal equality” will be inadequate.¹⁴⁷ Rather, what is necessary is a broader attack, deeper alliances, and a fundamental interrogation of all power.

Given that much of the change in racial demographics predicted for the year 2044 will be attributable to the growth of the Latino population, any discussion of Critical Race Theory would be incomplete without some discussion of Latin American Critical Race Theory

¹⁴⁴ DELGADO & STEFANCIC, *supra* note 104, at 10. Numerous CRT scholars employ narrative. The following are just a handful of well-known examples. See, e.g., Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993); Margaret E. Montoya, Máscaras, Trenzas, y Greñas: *Un/Masking the Self While Un/Braiding Latina Stories and Legal Discourse*, 17 HARV. WOMEN’S L.J. 185 (1994); Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093 (2008); Gerald Torres & Kathryn Milun, *Translating Yonondio by Precedent and Evidence: The Mashpee Indian Case*, 1990 DUKE L.J. 625; Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401 (1987); Richard Delgado, *Rodrigo’s Chronicle*, 101 YALE L.J. 1357 (1992) (book review). Several CRT criminal justice scholars have also brought “voice,” or a personal narrative that includes insights based on racial experience, to their scholarship. See, e.g., Paul Butler, *The Case of the Speluncean Explorers: Revisited*, 112 HARV. L. REV. 1917 (1999) (retelling the classic legal story of the Speluncean Explorers using the voice of a black housemaid as a way to criticize the Anglo-American system of justice); I. Bennett Capers, Essay, *Criminal Procedure and the Good Citizen*, 118 COLUM. L. REV. 653, 656 (2018) (incorporating personal narrative in a discussion of recent developments in criminal procedure); Carbado, *supra* note 141, at 947–59 (opening the article with a personal narrative of how the author “became a black American”).

¹⁴⁵ See Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324 (1987) (defining “[l]ooking to the bottom” as “adopting the perspective of those who have seen and felt the falsity of the liberal promise”).

¹⁴⁶ Monica Bell, *The Obligation Thesis: Understanding the Persistent “Black Voice” in Modern Legal Scholarship*, 68 U. PITT. L. REV. 643, 646 (2007). Bell describes voice and narrative in CRT as “core means of emphasizing the centrality of race because they give racial minorities space to ‘name their own reality.’” *Id.* at 647 (citing *Storytelling, Counter-Storytelling, and “Naming One’s Own Reality,”* in CRITICAL RACE THEORY: THE CUTTING EDGE 37, 37 (Richard Delgado ed. 1995)); Stephen Shie-Wei Fan, Note, *Immigration Law and the Promise of Critical Race Theory: Opening the Academy to the Voices of Aliens and Immigrants*, 97 COLUM. L. REV. 1202, 1204 (1997) (observing that CRT “eschews the conventions of traditional interpretation and instead endeavors to recognize the voices of outsiders”).

¹⁴⁷ Crenshaw et al., *supra* note 15, at xiv. For CRT, “the ‘legislation’ of the civil rights movement and its ‘integration’ into the mainstream commonsense assumptions in the late sixties and early seventies were premised on a tragically narrow and conservative picture of the goals of racial justice and the domains of racial power.” *Id.* at xvi.

(LatCrit),¹⁴⁸ which emerged in part to fill a gap in what some saw as Critical Race Theory's black-white paradigm.¹⁴⁹ For example, LatCrit scholars have explored and critiqued issues relating to immigration, language rights, bilingual schooling, internalized colonialism, sanctuary for Latin American refugees, and census categories for Hispanics.¹⁵⁰ Like CRT, LatCrit subscribes to the notion that white supremacy and racial power are maintained over time and that the law plays a central role in this process; LatCrit thus pursues a goal of racial emancipation and anti-subordination.¹⁵¹ Like CRT, LatCrit is committed to the production of "critical knowledge necessary to help fuel the social relevance of theory and theory-making," and embraces the deployment of "critical outsider jurisprudence" to counter dominant narratives that promulgate a racial hierarchy.¹⁵²

Returning to CRT, one thing that positions CRT well for imagining 2044 is the fact that it is "dynamically constituted" for embracing change.¹⁵³ As Kimberlé Williams Crenshaw writes:

CRT is not so much an intellectual unit filled with natural stuff—theories, themes, practices, and the like—but one that is dynamically constituted by a series of contestations and convergences pertaining to the ways that racial power is understood and articulated in the post civil-rights era. In the same way that Kendall Thomas reasoned that race was better thought of as a verb rather than a noun, I want to suggest that shifting the frame of CRT toward a dynamic rather than static reference would be a productive means by which we can link CRT's past to the contemporary moment.¹⁵⁴

And not just the "contemporary moment," but also the future.

¹⁴⁸ See *supra* note 104 and accompanying text.

¹⁴⁹ See DELGADO & STEFANCIC, *supra* note 104, at 79 (noting that the black-white binary can "conceal the checkerboard of racial progress and retrenchment"); see also Richard Delgado, *Derrick Bell's Toolkit—Fit to Dismantle That Famous House?*, 75 N.Y.U. L. REV. 283, 290 (2000) (noting that the black-white binary can overlook the experiences of other individuals of color); Juan F. Perea, *The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought*, 85 CALIF. L. REV. 1213, 1215 (1997) (exposing how the black-white binary distorts the perception of Latinxs).

¹⁵⁰ See DELGADO & STEFANCIC, *supra* note 104, at 90–91.

¹⁵¹ See Margaret E. Montoya, *Introduction: LatCrit Theory: Mapping Its Intellectual and Political Foundations and Future Self-Critical Directions*, 53 U. MIAMI L. REV. 1119, 1121 (1999) (identifying anti-subordination as a defining feature of LatCrit); Margaret E. Montoya & Francisco Valdes, *"Latinas/os" and the Politics of Knowledge Production: LatCrit Scholarship and Academic Activism as Social Justice Action*, 83 IND. L.J. 1197, 1227 (2008) (discussing LatCrit's "basic commitment to antisubordination in multidimensional terms").

¹⁵² Steven W. Bender & Francisco Valdes, *LatCrit XV Symposium Afterword—At and Beyond Fifteen: Mapping LatCrit Theory, Community, and Praxis*, 14 HARV. LATINO L. REV. 397, 402 (2011).

¹⁵³ Crenshaw, *supra* note 107, at 1261.

¹⁵⁴ *Id.* (footnote omitted).

There is one more thing to be said about Critical Race Theory before turning to how it can inform policing in the year 2044: At its best, it has always imagined traveling across time, in both the past and the future, and has always been at once both specular and speculative. There is Geneva Crenshaw, Derrick Bell's time-traveling interlocutor and alter ego in several of his narrative articles—which he calls chronicles.¹⁵⁵ In one chronicle that brings to mind Octavia Butler's novel *Kindred*,¹⁵⁶ in which the protagonist finds herself transported to a slave plantation where she must protect the future, Bell's alter ego attempts to change the future by going back in time to appear before the Constitutional Convention of 1787 to urge the founding fathers to reconsider including slavery in the Constitution, staining it with a contradiction (proclaiming equality on its face despite its acceptance of slavery) that will have repercussions into the present.¹⁵⁷ And there is Bell's perhaps most well-known chronicle, *The Space Traders*, in which Bell imagines, rather pessimistically, a future in which space aliens land on earth and offer needed resources in exchange for black and brown bodies, and the white majority's acceptance of that exchange.¹⁵⁸

The one flaw in *The Space Traders*, published in 1989, is that Bell failed to imagine an America in which black and brown people were not still a numerical minority,¹⁵⁹ subject and subjected to the “interests” of the majority. But that is not what the future will look like; at least not according to projections. What might CRT, and Afrofuturism, tell us about a future in which black and brown people are the majority, and wield a majority of the political, economic, and social capital?¹⁶⁰ After all, as Roy Brooks observes, “The question

¹⁵⁵ See, e.g., Derrick Bell, *The Supreme Court, 1984 Term, Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4 (1985) (deploying the character of Geneva Crenshaw to discuss the exploitation and oppression in America from the perspective of an other-worldly, all-powerful court).

¹⁵⁶ See generally OCTAVIA E. BUTLER, *KINDRED* (1979).

¹⁵⁷ DERRICK BELL, *The Chronicle of the Constitutional Contradiction*, in *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* 26, 26–28 (1987).

¹⁵⁸ BELL, *supra* note 3, at 158–60. In exchange for enormous amounts of gold and fuel, the visitors want “to take back to their home star all the African Americans.” *Id.* at 159–60. The Cabinet is called into session, state legislatures are convened, and eventually a constitutional convention is convened to draft an amendment that would override the Reconstruction Amendments and allow the sacrifice, quite literally, of minorities in order to benefit the majority. *Id.* at 192.

¹⁵⁹ In a sense, Bell was intentionally shortsighted. In 1989, he was imagining what might happen if aliens descended upon the Earth in the year 2000. *Id.* at 158.

¹⁶⁰ See *supra* note 1. Although economic and political power is well understood, there is also the significance of social capital, that bundle of resources and connections we have as a result of our social relationships, which are often structured along lines of race, gender, and class. For discussions of the role of social capital in maintaining inequality from a CRT

always lurking in the background of CRT is this: What would the legal landscape look like today if people of color were the decision-makers?"¹⁶¹ The Part below answers that very question.

III

THE YEAR 2044 AND BEYOND

We will make our own future Text.

—Ishmael Reed, *Mumbo Jumbo*¹⁶²

The revolution will not be televised.

WILL not be televised, WILL not be televised;

WILL not be televised.

The revolution will be no re-runs brothers.

The revolution will be live.

—Gil Scott-Heron, *The Revolution Will Not Be Televised*¹⁶³

We have taken control.

—George Clinton of Parliament, *The Mothership Connection*¹⁶⁴

How might policing—from what constitutes a crime, to what technologies are deployed by police, to what constitutional restraints are brought to bear on law enforcement, to what sentences and punishments are deemed appropriate—change in the year 2044 and beyond when people of color make up the majority of the country and become the country's decisionmakers? Informed by Afrofuturism and Critical Race Theory, this Part offers an answer to that question. Before turning to the answer, however, this Part begins by imagining—and discounting—dystopian “white fears” about a future in which whites no longer wield control.

A. *Black to the Future*,¹⁶⁵ or *Fear of a Black Planet*¹⁶⁶

One might assume that in the year 2044, when whites lose majority status in the United States—or more accurately, in the

perspective, see DARIA ROITHMAYR, *REPRODUCING RACISM: HOW EVERYDAY CHOICES LOCK IN WHITE ADVANTAGE* (2014); Capers, *supra* note 133; Sumi Cho, *Embedded Whiteness: Theorizing Exclusion in Public Contracting*, 19 *BERKELEY LA RAZA* L.J. 5 (2008).

¹⁶¹ Brooks, *supra* note 102, at 85–86.

¹⁶² ISHMAEL REED, *MUMBO JUMBO* 204 (1972).

¹⁶³ GIL SCOTT-HERON, *The Revolution Will Not Be Televised*, on *THE REVOLUTION WILL NOT BE TELEvised* (Flying Dutchman Productions 1974).

¹⁶⁴ PARLIAMENT, *P. Funk (Wants to Get Funked Up)*, on *MOTHERSHIP CONNECTION* (Casablanca Records 1975).

¹⁶⁵ “Black to the Future” is at once a reference to Mark Dery’s seminal article in which he coins the term “Afrofuturism” and a play on *Back to the Future*, the popular 1985

ensuing decade or so when people of color use their numerical advantage to secure corresponding political and economic power and social capital¹⁶⁷—whites will be relegated to the low group on the totem pole. That the old saying (or at least old saying in black communities)—“If you’re white, you’re right; if you’re brown, stick around; if you’re black, get back”¹⁶⁸—will now be completely reversed. Indeed, white fears might imagine a host of changes, from the tectonic to the mundane, though perhaps even the mundane will seem significant, prompting “Oscars so Brown” and “Grammys so Black” protests and a rash of white hashtags.¹⁶⁹ In this dystopian future, in rom-coms, white actors will have to make do with being the sidekick/best friend; in horror movies, the white guy, used to always dying last, will now

science fiction film starring Michael J. Fox and directed by Robert Zemeckis. See Dery, *supra* note 2. In the film, the “present” is a type of dystopia: Fox’s character has an alcoholic mother, his father is bullied by his supervisor, and the town, which is marked by blight, has a black mayor. Through time-travel, Fox’s character travels to the more “idyllic” 1955 when the town is prosperous and clean, the mayor is white, and the actor who played the black mayor is a busboy at the soda shop. *BACK TO THE FUTURE* (Universal Studios 1985).

¹⁶⁶ “Fear of a Black Planet” is of course a nod to Public Enemy’s album by that name. See PUBLIC ENEMY, *FEAR OF A BLACK PLANET* (Def Jam Recordings 1990). The album has been described as “the first true rap concept album” and a major contribution to Afrofuturism. See André M. Carrington, *Afrofuturism, Public Enemy, and Fear of a Black Planet at 25*, SOUNDING OUT! (Nov. 9, 2015), <https://soundstudiesblog.com/2015/11/09/afrofuturism-and-fear-of-a-black-planet-at-25> (quoting Tom Moon, ‘*Fear of a Black Planet*’ – Concept Rap from Public Enemy, PHILA. INQUIRER, Apr. 10, 1990, at C07).

¹⁶⁷ See *supra* note 1 and accompanying text. As others have noted, even as a minority, whites will likely maintain power for some time, and resist efforts to cede power or have it distributed more equitably. Indeed, the efforts to stem immigration, eliminate affirmative action, restrict voting, and invoke criminal laws along lines of race are in part an effort to maintain the racial status quo. See Jamelle Bouie, *White Fight: Donald Trump Is Leading the Republican Charge to Preserve a Shrinking White Majority*, SLATE (July 5, 2018, 5:50 AM), <https://slate.com/news-and-politics/2018/07/donald-trump-is-leading-the-republican-charge-to-preserve-a-shrinking-white-majority.html> (describing the Republican Party’s wide-ranging efforts to “preserve a white majority in American politics”).

¹⁶⁸ The saying is sometimes attributed to a 1930s protest song written by Big Bill Broonzy. See BIG BILL BROONZY, *Black, Brown, and White Blues, on TROUBLE IN MIND* (Smithsonian Folkways Recordings 2000). Others trace it to a commonly known African-American rhyme. See, e.g., Claude M. Steele, *Race and the Schooling of Black Americans*, ATLANTIC (Apr. 1992), <https://www.theatlantic.com/magazine/archive/1992/04/race-and-the-schooling-of-black-americans/306073> (recalling the rhyme from childhood). President Obama also mentioned the rhyme in his biography. BARACK OBAMA, *DREAMS FROM MY FATHER: A STORY OF RACE AND INHERITANCE* 193 (2004).

¹⁶⁹ This is a reference to protests over the paucity of people of color nominated for Oscar Awards and the Grammys’ preference for white musicians. See, e.g., Jon Caramanica, *#GrammysSoWhite Came to Life. Will the Awards Face Its Race Problem?*, N.Y. TIMES (Feb. 13, 2017), <https://www.nytimes.com/2017/02/13/arts/music/grammys-adele-beyonce-black-artists-race.html>; Patrick Ryan, *#OscarsSoWhite Controversy: What You Need to Know*, USA TODAY (Feb. 2, 2016, 6:55 PM), <https://www.usatoday.com/story/life/movies/2016/02/02/oscar-academy-award-nominations-diversity/79645542>.

always die first. Newly designed cameras will make whites appear washed out on film. After all, color photography was designed with only white skin tones in mind;¹⁷⁰ in the future, a range of darker skin tones might be the norm. In this dystopia, black musicians will have white backup singers. There will still be white performers, of course, but the Grammy for “Album of the Year” will never go to the likes of Taylor Swift or Adele (upstanding and talented as they are in their way); rather, the controversy each year will be whether the Grammy for best album will go to a hip-hop artist, or a jazz artist, with a secondary controversy about why the country music awards are announced pre-show instead of during the television broadcast.¹⁷¹ One might even assume that in the future, it will be harder to find flesh-colored Band-Aids that match white skin.¹⁷² That everything will run on CP Time.¹⁷³ And that at restaurants, nothing will be served smothered with mayonnaise.¹⁷⁴ In this dystopian future inspired by white fears,

¹⁷⁰ For a discussion of how white skin bias was embedded in color film stock emulsions and digital camera design, making it easy to film white skin but correspondingly difficult to film darker skin, see Lorna Roth, *Looking at Shirley, the Ultimate Norm: Colour Balance, Image Technologies, and Cognitive Equity*, 34 CANADIAN J. COMM. 111, 117 (2009); Maz Ali, *A Brief History of Color Photography Reveals an Obvious but Unsettling Reality About Human Bias*, UPWORTHY (Sept. 25, 2015), <https://www.upworthy.com/a-brief-history-of-color-photography-reveals-an-obvious-but-unsettling-reality-about-human-bias>; Mandalit Del Barco, *How Kodak's Shirley Cards Set Photography's Skin-Tone Standard*, NPR (Nov. 13, 2014, 3:45 AM), <https://www.npr.org/2014/11/13/363517842/for-decades-kodak-s-shirley-cards-set-photography-s-skin-tone-standard>.

¹⁷¹ See Michael Hann, *From Aretha to Beyoncé: The Black Artists Snubbed by the Grammys*, GUARDIAN (Feb. 16, 2017, 1:23 PM), <https://www.theguardian.com/music/2017/feb/16/from-aretha-to-beyonce-the-black-artists-snubbed-by-the-grammys> (describing how black artists continually lose out at the Grammys).

¹⁷² This is a play on Peggy McIntosh's invisible knapsack of privilege, in which she famously explored white privilege by comparing it to “an invisible weightless knapsack of special provisions, maps, passports, codebooks, visas, clothes, tools, and blank checks.” Peggy McIntosh, *White Privilege: Unpacking the Invisible Knapsack*, PEACE & FREEDOM MAG., July–Aug. 1989, at 10, 10, https://psychology.umbc.edu/files/2016/10/White-Privilege_McIntosh-1989.pdf. One of the items she lists is the ease in finding flesh-colored bandages that match white skin. *Id.* at 11.

¹⁷³ “CP Time,” or “colored people time,” is a term used within the African-American community to describe tardiness or to allow for delays in starting. For more on CP Time, see Baratunde Thurston, *Black History Month: An Explanation of CP Time by Your Very Delayed Guest Book Editor*, HUFFPOST (Apr. 25, 2010, 5:12 AM), https://www.huffingtonpost.com/baratunde-thurston/black-history-month-an-ex_b_472959.html.

¹⁷⁴ The disgust many African-Americans have for mayonnaise, and their association of mayonnaise with whites, is a joke in the Afrofuturist comedy *Undercover Brother*, in which a black superhero prepares to pass as white so he can take down a white corporate autocrat—simply known as “The Man”—but balks at eating mayonnaise. His chief of technology insists that he master this skill, saying, “if you’re going to pass in white America, you are going to have to learn to like mayonnaise.” UNDERCOVER BROTHER (Universal Studios 2002).

black and brown babies will have white nannies.¹⁷⁵ In higher education, affirmative action for blacks and Latinos will no longer be necessary—Justice O'Connor was right!¹⁷⁶—but the privilege once afforded to whites through legacies, geographic diversity (“I’m from Idaho!”), and generations of wealth and higher education will now be viewed as a penalty.¹⁷⁷ July 4th will still be celebrated in some circles as Independence Day¹⁷⁸, though not uncritically, but Juneteenth, commemorating the abolition of slavery, will have bigger parades. Columbus Day will not be celebrated at all. The now familiar song *Happy Birthday to You* will still be sung to celebrate birthdates, but relatively infrequently compared to Stevie Wonder’s song by the same title, and the refrain from 50 Cent’s song “In Da Club,” “Go shorty, it’s your birthday!” Almost no one will sing *I’m Dreaming of a White Christmas* at Christmas time.

A dystopian future based on white anxiety is also easy to imagine on the political front, especially now, when the slogan “Make America Great Again” is often heard as “Make America White Again.”¹⁷⁹ In this future, political commentator Pat Buchanan’s fear that Americans of European descent will become “a minority in the nation their

¹⁷⁵ See, e.g., Sally Mann, *White Child, Black Nanny*, SATURDAY EVENING POST (Oct. 26, 2015), <https://www.saturdayeveningpost.com/2015/10/white-child-black-nanny> (“Down here, in the South, you can’t throw a dead cat without hitting an older, well-off white person raised by a black woman . . .”); Sana Venjara, *Stroller Surveillance: Race, Class and New York City Nannies*, NEXT CITY (Apr. 2, 2012), <https://nextcity.org/daily/entry/stroller-surveillance-race-class-and-new-york-city-nannies> (noting that the majority of nannies in New York City are of Caribbean, Latin-American, or African descent).

¹⁷⁶ In *Grutter v. Bollinger*, 539 U.S. 306 (2003), Justice O’Connor wrote the majority opinion upholding the University of Michigan’s affirmative action plan, but added that the Court “expect[s] that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.” *Id.* at 343.

¹⁷⁷ For a discussion of the role these advantages play, see NATASHA K. WARIKOO, *THE DIVERSITY BARGAIN: AND OTHER DILEMMAS OF RACE, ADMISSIONS, AND MERITOCRACY AT ELITE UNIVERSITIES* 24, 30–31, 94 (2016) (demonstrating how geographic diversity, legacy status, and wealth help with college admissions and tend to benefit white applicants).

¹⁷⁸ As Frederick Douglass stated in his now-famous speech at an event commemorating the signing of the Declaration of Independence: “What, to the American [black], is your 4th of July? I answer: a day that reveals to him, more than all other days in the year, the gross injustice and cruelty to which he is the constant victim. To him, your celebration is a sham . . .” Frederick Douglass, *The Meaning of July Fourth for the Negro*, Speech at Rochester, N.Y. (July 5, 1852), in 2 *THE LIFE AND WRITINGS OF FREDERICK DOUGLASS* 181, 192 (Philip S. Foner ed., 1950) [hereinafter *LIFE AND WRITINGS OF FREDERICK DOUGLASS*].

¹⁷⁹ See, e.g., Eugene Robinson, *Trump Can’t Make America White Again*, WASH. POST (July 5, 2018), https://www.washingtonpost.com/opinions/try-as-he-might-trump-cant-make-america-white-again/2018/07/05/0634e02e-8088-11e8-b0ef-fffcabeff946_story.html (arguing that racism is an active part of the Trump Administration’s public messaging).

ancestors created and built”¹⁸⁰ and President Trump’s fear about immigrants “infest[ing] our country”¹⁸¹—will be looked back on as prescient. There will be no need for a Congressional Black Caucus or Hispanic Caucus, though out of necessity there will be a White one, comprised of representatives from North Dakota, Wyoming, Maine, and a handful of other still white states.¹⁸² In this dystopian future based on white anxiety, the change in the hue of elected representatives will make reparations a reality paid out of white taxpayers’ pockets (not just for slavery, but also for Jim Crow, for the forced separation of children from their parents at the border, and for the 200-plus years that whites benefited from affirmative action and privilege). What else? ICE will have been abolished, corporations will no longer be people, and the Treaty of Guadalupe Hildago will have been renegotiated, resulting in the return of California, Nevada, Utah, and other land to Mexico. And this is just on the domestic front. In this future, international conflict will be handled differently as well. It will be conflict in Africa and Latin America that stirs outrage or calls for intervention, while conflicts in Europe will be met with a ho-hum response. Or the response: “World War I. World War II. They’re always fighting there.”

By the year 2044, one could imagine jurisprudential changes as well. Although it is unlikely the Supreme Court will be comprised *entirely* of justices of color—life tenure will result in some time lag, though of course there will be efforts to reinterpret Article III, Section 1. In this imagined future, much to the chagrin of some whites, these justices of color will refuse to believe that they are merely umpires, calling “balls and strikes.”¹⁸³ They will also decline to be

¹⁸⁰ PATRICK J. BUCHANAN, *STATE OF EMERGENCY: THE THIRD WORLD INVASION AND CONQUEST OF AMERICA* 12 (2006). Buchanan goes on to warn, “No nation has ever undergone so radical a demographic transformation and survived.” *Id.*

¹⁸¹ Abigail Simon, *People Are Angry President Trump Used This Word to Describe Undocumented Immigrants*, *TIME* (June 19, 2018), <http://time.com/5316087/donald-trump-immigration-infest> (quoting Trump).

¹⁸² For a state by state projection of demographic changes by the year 2044 and beyond, see Rob Griffin et al., *The Demographic Evolution of the American Electorate, 1980–2060*, CTR. FOR AM. PROGRESS (Feb. 24, 2015, 6:00 AM), <https://www.americanprogress.org/issues/democracy/news/2015/02/24/107166/interactive-the-demographic-evolution-of-the-american-electorate-1980-2060>.

¹⁸³ Chief Justice John Roberts asserted that the job of being a justice was objective, on par with calling balls and strikes, during his confirmation hearing. See *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005) (statement of John G. Roberts, Jr.). CRT scholars have long rejected the notion of objectivity, judicial or otherwise. See *supra* note 15 and accompanying text. Indeed, in rejecting Roberts’s analogy to baseball, the justices of color on the Court may recall the words of social commentator Fran Lebowitz, who says that what it should be like “to be white is not to say, ‘We have to

bound by original intent. Indeed, recalling the words of Justice Thurgood Marshall,¹⁸⁴ they will reject any obeisance to the Founding Fathers (all white and male) who, after all, wrote inequality into the Constitution, who gave their imprimatur to that “peculiar institution”¹⁸⁵ called slavery and who, out of convenience, permitted human beings to be propertized. While this alone will irk the white minority population, the real insult in this dystopian future will be that these justices of color adhere to precedent when convenient. For example, when black and brown legislators pass laws that disadvantage the white minority, the justices will recall *Washington v. Davis* and its progeny and find the laws perfectly constitutional: *We have long held, and continue to hold, that absent clear proof of invidious discriminatory purpose, the Equal Protection Clause is not violated.*¹⁸⁶ The Court will repeat this line in case after case. When a few sympathetic jurisdictions attempt to pass laws to benefit the new white minority, the Court will again look to words from the past. Finding unconstitutional such race-conscious remedial measures to benefit whites under a strict scrutiny analysis, they will recall the words of former Chief Justice John Roberts and remind legislators that “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”¹⁸⁷

And as for policing? In this dystopian future based on white anxiety, the police (now made up mostly of “big black men”¹⁸⁸) will now

level the playing field,’ but to acknowledge that not only do white people own the playing field but they have so designated this plot of land as a playing field to begin with. White people *are* the playing field.” Fran Lebowitz, *Fran Lebowitz on Race and Racism*, VANITY FAIR (Oct. 1, 1997), <https://www.vanityfair.com/culture/2016/01/fran-lebowitz-on-race-and-racism> (emphasis added).

¹⁸⁴ Thurgood Marshall, invited as a speaker to mark the 200th Anniversary of the United States Constitution and specifically to celebrate the drafters of the Constitution, gave a speech declining the invitation. Emphasizing that the Founders drafted a document that was “defective from the start,” he stated: “[T]he effects of the Framers’ compromise have remained for generations. They arose from the contradiction between guaranteeing liberty and justice to all, and denying both to Negroes.” Thurgood Marshall, *The Bicentennial Speech* (May 6, 1987), in Thurgood Marshall, *The Constitution: A Living Document*, 30 HOW. L.J. 915, 916, 918 (1987).

¹⁸⁵ See, e.g., Fitzhugh Brundage, *American Slavery: A Look Back at the Peculiar Institution*, J. BLACKS HIGHER EDUC., Spring 1997, at 118, 118.

¹⁸⁶ 426 U.S. 229 (1976) (establishing that, absent proof of discriminatory purpose, laws that have a racially discriminatory effect are not unconstitutional).

¹⁸⁷ *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007).

¹⁸⁸ In this dystopian future, the fear many whites have of black men, especially large black men, will likely persist. On this fear in general, see Lawrence Vogelstein, *The Big Black Man Syndrome: The Rodney King Trial and the Use of Racial Stereotypes in the Courtroom*, 20 FORDHAM URB. L.J. 571, 573 n.5 (1993); see also Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781 (1994) (discussing how self-defense law countenances race-based

target whites, especially white men. Indeed, relying on studies showing that whites use drugs more than other racial groups and the common sense knowledge that whites routinely and naturally engage in crime (tax evasion, for example), police will focus their surveillance and enforcement efforts on the few remaining white enclaves (some private schools, some college campuses, rural areas, and most of Seattle, Washington, and Portland, Oregon, etc.), as the new hot spots.¹⁸⁹ In this future, whites will complain about being targeted for police stop-and-frisks, and will rail that every young white man will always “fit the description because there is only one guy who is always the guy fitting the description.”¹⁹⁰ They will complain that when officers stop whites and say, “Who’s the Man?,”¹⁹¹ it will have an entirely different valence. There will be complaints that frisks are sexualized.¹⁹² There may even be complaints that police are now too trigger happy with white suspects, the same suspects they would have years ago taken to McDonald’s.¹⁹³ Whites may even need a “White Lives Matter” movement.

In this future, when white Americans experience another drug epidemic like the current opioid crisis, black and brown legislators will recall the response to crack cocaine and enact draconian punish-

fears of black men); N. Jeremi Duru, *The Central Park Five, The Scottsboro Boys, and the Myth of the Bestial Black Man*, 25 CARDOZO L. REV. 1315, 1320 (2004) (describing the myth that “black men are animalistic, sexually unrestrained, inherently criminal, and ultimately bent on rape”); Michel Martin, *Fear of Black Men: How Society Sees Black Men and How They See Themselves*, NPR (Mar. 31, 2015, 4:58 AM), <https://www.npr.org/2015/03/31/396415737/societys-fear-of-black-men-and-its-consequences> (“It’s an open secret among African-American men and boys that people are often afraid of them.”).

¹⁸⁹ Part of this dystopian vision involves my imagining “white anxiety” and how some whites must view the prospect of losing majority status. My assumption is that even in this dystopian view, many whites will still imagine themselves able to retreat to private schools and white enclaves—a type of “white flight” for the twenty-first century—but I imagine their position in these enclaves will be more precarious.

¹⁹⁰ This line comes from Claudia Rankine’s much heralded book-length poem *Citizen: An American Lyric*, and appears in a section titled “Stop-and-Frisk.” The full stanza reads: “And you are not the guy and still you fit the description because there is only one guy who is always the guy fitting the description.” CLAUDIA RANKINE, *CITIZEN: AN AMERICAN LYRIC* 105 (2014).

¹⁹¹ Cooper, *supra* note 140, at 671, 674–75 (discussing the implication of police officers using this phrase when stopping black people).

¹⁹² See PAUL BUTLER, *CHOKEHOLD: POLICING BLACK MEN* 98–103 (2017) (describing the frisks black men endure at the hands of police as sexual assault and degradation).

¹⁹³ See, e.g., Jason Silverstein, *Cops Bought Dylann Roof Burger King After His Calm Arrest: Report*, N.Y. DAILY NEWS (June 23, 2015), <http://www.nydailynews.com/news/national/dylann-roof-burger-king-cops-meal-article-1.2267615> (describing how police officers bought Dylann Roof, a self-proclaimed white supremacist, a burger after arresting him for shooting and killing nine black worshippers at a South Carolina church).

ments,¹⁹⁴ and even imprison white mothers who use drugs while pregnant.¹⁹⁵ There may likewise be complaints that the media—Univision and BET are the dominant media in this future—unfairly and disproportionately show the faces of white perpetrators of crimes, and unnecessarily identify them by race: “This morning, the FBI arrested John Doe, a 44-year-old white male, for his role in an insider trading scheme.”¹⁹⁶

One might imagine these things. One might even imagine that when the country becomes majority minority in terms of who wields economic, political, and social power, that black and brown people will call the police on white people on a lark—for barbecuing, or sitting in coffee shops, or taking a nap in a dorm’s common area, or attending a campus tour for admitted students, or using a swimming pool, or being a paperboy, or babysitting, or speaking French, or presenting a coupon at a drug store, or even while canvassing for votes.¹⁹⁷

¹⁹⁴ See An-Li Herring, *Why Has the Opioid Crisis Prompted Far More Compassion Than the Crack Epidemic of the Past?*, 90.5 WESA (Apr. 20, 2018), <http://www.wesa.fm/post/why-has-opioid-crisis-prompted-far-more-compassion-crack-epidemic-past> (interviewing race and law scholar Ekow Yankah); German Lopez, *When a Drug Epidemic’s Victims Are White*, Vox (Apr. 4, 2017), <https://www.vox.com/identities/2017/4/4/15098746/opioid-heroin-epidemic-race> (arguing that race is why government officials are treating victims of the opioid epidemic much more compassionately than victims of the crack epidemic).

¹⁹⁵ See Roberts, *Punishing Drug Addicts Who Have Babies*, *supra* note 140, at 1436 (describing the criminal prosecution of drug-addicted mothers as punitive and noting that it disproportionately impacts black women).

¹⁹⁶ Blacks remain overrepresented as crime perpetrators on television news. As one scholar recently noted: “Blacks are also more likely than Whites to have their mug shots displayed on local news, be shown handcuffed, be on ‘perp walks,’ and have prejudicial information aired about them (for example, as having a criminal record).” Bryan Adamson, “Thugs,” “Crooks,” and “Rebellious Negroes”: *Racist and Racialized Media Coverage of Michael Brown and the Ferguson Demonstrations*, 32 HARV. J. RACIAL & ETHNIC JUST. 189, 192 (2016) (footnotes omitted).

¹⁹⁷ For a discussion of the rash of recent incidents in which whites have called the police (and worse) on blacks engaged in the banalities of everyday life, see Sarah Mervosh, *Woman Assaulted Black Boy After Telling Him He ‘Did Not Belong’ at Pool, Officials Say*, N.Y. TIMES (July 1, 2018), <https://www.nytimes.com/2018/07/01/us/pool-patrol-paula.html>; see also Aris Folley, *Black Man Asked to Leave His Own Pool by Officer in Viral Video*, MSN (July 11, 2018), <https://www.msn.com/en-us/news/us/black-man-asked-to-leave-his-own-pool-by-officer-in-viral-video/ar-AAzWN6X>; Nicole Hensley, *Woman Calls Cops on Black 12-Year-Old Boy Delivering Newspapers in Ohio Neighborhood*, N.Y. DAILY NEWS (July 10, 2018), <http://www.nydailynews.com/news/national/ny-news-ohio-child-police-delivering-newspapers-20180710-story.html>; Brandon E. Patterson, *11 More Things You Can’t Do While Black (or Brown)*, MOTHER JONES (May 9, 2018, 6:00 AM), <https://www.motherjones.com/crime-justice/2018/05/11-more-things-you-cannot-do-while-black-starbucks-nordstrom-rack-1>; Matt Stevens, *CVS Fires 2 For Calling Police on Black Woman Over Coupon*, N.Y. TIMES (July 16, 2018), <https://www.nytimes.com/2018/07/16/business/cvs-coupon-manager-black-woman-police.html>; Mihir Zaveri, *A Black Oregon*

But in a future informed by Afrofuturism and Critical Race Theory—and more precisely, in *this* Afrofuturist and CRT future—many of those assumptions would be wrong. Recall that the primary concern of Critical Race Theory is eradicating subordination along *all* racial lines.¹⁹⁸ The goal of CRT is not racial domination—it is certainly not racial comeuppance. The goal of CRT is equality, including along lines of gender, sexuality, class, and disability.¹⁹⁹ Likewise, although Afrofuturists insist that black and brown individuals will survive in the future, that survival is not contingent upon the subordination of whites. Rather, Afrofuturists imagine a future free of hierarchies along the lines of race, gender, class, or sexuality.²⁰⁰ To be sure, some assumptions might prove true. ICE might be abolished and a more humane agency put in its place. And there might be some discussion of reparations, but the discussions will likely be symbolic, since in a future informed by Afrofuturism and Critical Race Theory, economic parity will already be the norm. To be sure, black and brown individuals will have newfound political clout, but it is unlikely that they will use it to disenfranchise whites. In a future informed by Afrofuturism and CRT, their experience “on the bottom” and commitment to equality will likely spur them to ensure fundamental fairness in voting and even eschew a “winner take all” system.²⁰¹

While much more could be said about how life will be different in the year 2044 and beyond—such as the existence of universal health-

Lawmaker Was Knocking on Doors. Someone Called the Police, N.Y. TIMES (July 5, 2018), <https://www.nytimes.com/2018/07/05/us/janelle-bynum-police-portland.html>; Karen Zraick, *Man Labeled 'ID Adam' Is Fired After Calling the Police on a Black Woman at Pool*, N.Y. TIMES (July 6, 2018), <https://www.nytimes.com/2018/07/06/us/pool-racial-profiling-white-man.html>.

¹⁹⁸ See *supra* notes 133–47 and accompanying text.

¹⁹⁹ See, e.g., Calmore, *supra* note 16, at 2166–67 (“[M]any adherents of critical race theory see an interlocking set of oppressions that extend beyond the singular base of race and include the bases of gender, economic class, and sexual orientation.”); Charles R. Lawrence III et al., *Introduction* to MARI J. MATSUDA ET AL., *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 6* (1993) (“Critical race theory works toward the end of eliminating racial oppression as part of the broader goal of ending all forms of oppression.”); Jerome M. Culp, Jr. et al., *Subject Unrest*, 55 STAN. L. REV. 2435, 2447 (2003) (book review) (observing that critical race theory not only investigates race and gender, but also incorporates “class, sexual orientation, ethnicity, disability, immigration status, and other interlocking constructs of identity and hierarchy to produce a more contextual and substantive account of the conditions under inquiry”).

²⁰⁰ See West, *supra* note 127, at xi–xii.

²⁰¹ A CRT future is likely to build on the work of CRT scholar Lani Guinier, including her exploration of a range of decisionmaking alternatives to avoid the unfairness of majority rule. See LANI GUINIER, *THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY* 14 (1994) (outlining alternatives to ensure American politics are “open to genuine participation by all voters”).

care, access to higher education, a right to a job, environmental justice, and food justice²⁰²—it is imagining the future of policing that is the *raison d'être* for this Article.²⁰³ Accordingly, the next section imagines policing in 2044 and the ensuing years. It begins by discussing broad societal changes that will likely impact policing. It then turns to advances in technology. Finally, it turns to a range of policing issues, from what constitutes a crime, to how constitutional protections will likely be interpreted, to how crimes will be punished.

B. Policing in the Year 2044 and Beyond

1. Societal Changes

Although predicting levels of crime is notoriously difficult, in this Afrofuturist and CRT future, it is safe to say that crime as we know it will have dropped dramatically. First, to the extent that much economic crime and even violent crime is traceable to frustrations from wealth inequality, legislation and norm building to redistribute wealth and de-fetishize unadulterated capitalism will have already removed the major incentive for much of this type of crime. After all, in *this* Afrofuturistic and CRT future, conspicuous consumption will be viewed as gauche and déclassé; even having nannies will be looked at as “simply not done,” especially since universal childcare will be readily available. Indeed, in *this* Afrofuturistic and CRT future, old magazine issues listing the fifty wealthiest Americans will be viewed with a mixture of collective embarrassment and disdain, much in the same way most people will think about the beauty pageants that once existed. *Were we all suffering from plutomania?*, people will occasion-

²⁰² Numerous CRT scholars have explored these safety nets. See, e.g., Austin, *supra* note 138, at 1807–08 (describing training programs, non-wage-based social welfare benefits, and state promotion of communal or cooperative ownership); Adrien Katherine Wing, *Conceptualizing Global Substantive Justice in the Age of Obama*, 13 J. GENDER RACE & JUST. 705, 713 (2010) (adopting a CRT perspective to argue for “second-generation” rights, such as the rights to “education, health, jobs, clean water, food, [and] social security”); Eric K. Yamamoto & Jen-L W. Lyman, *Racializing Environmental Justice*, 72 U. COLO. L. REV. 311, 312–14 (2001) (arguing for the racialization of environmental justice to include attention not just to issues of health and distributional justice but also issues of self-determination and sovereignty).

²⁰³ Again, the reason is personal: criminal law and procedure are the areas I write in, and they are the areas I have experienced viscerally as a black man. But even if this were not the case, there is at least one other reason that futurist legal scholarship should begin, though not end, with policing. W.E.B. Du Bois famously said, “[t]he problem of the twentieth century is the problem of the color-line,—the relation of the darker to the lighter races of men in Asia and Africa, in America and the islands of the sea.” W.E.B. DU BOIS, *THE SOULS OF BLACK FOLK* 12 (Yale Univ. Press 2015) (1903). Whether or not Du Bois could have anticipated it, that problem has bled into the twenty-first century and is particularly acute when it comes to policing.

ally ask themselves, especially when they read history books about the 1980s.

2. Technology

In addition to the societal changes discussed above, technology itself is likely to reduce crime. Indeed, extant and emergent technologies already point the way to how crime will likely be reduced. Surveillance has become commonplace, with surveillance cameras now the new normal,²⁰⁴ and jurisdictions increasingly are experimenting with surveillance drones and even “eye in the sky” technology, the latter allowing one camera to essentially conduct surveillance of an entire city.²⁰⁵ At the same time, facial recognition technology is improving,²⁰⁶ as is access to Big Data—that trail all of us have as a result of using (or being used by) social media and credit cards, streaming Netflix and surfing Google, getting traffic tickets, and simply being born.²⁰⁷ To give just one example, the information law enforcement will likely have access to at a click of a button from Facebook alone, which is used by nearly two billion people, is eye-opening.²⁰⁸ As the *Washington Post* recently reported, Facebook col-

²⁰⁴ For example, “New York City aggregates and analyzes data from approximately 3,000 surveillance cameras around the city and allows the police to scan license plates, cross-check criminal databases, measure radiation levels Washington, D.C., is in the process of consolidating over 5,000 cameras into one network called the Video Interoperability for Public Safety.” Capers, *Race, Policing, and Technology*, *supra* note 17, at 1271 (footnote omitted).

²⁰⁵ *Eye in the Sky*, RADIOLAB (June 18, 2015), <http://www.radiolab.org/story/eye-sky>. For a discussion of this technology and how it was used in just one city, Dayton, Ohio, see Capers, *Policing, Technology, and Doctrinal Assists*, *supra* note 17, at 741; see also Craig Timberg, *New Surveillance Technology Can Track Everyone in an Area for Several Hours at a Time*, WASH. POST (Feb. 5, 2014), https://www.washingtonpost.com/business/technology/new-surveillance-technology-can-track-everyone-in-an-area-for-several-hours-at-a-time/2014/02/05/82f1556e-876f-11e3-a5bd-844629433ba3_story.html (reporting on the use of this technology with a focus on its implementation in Dayton).

²⁰⁶ See Chris Burt, *Academic Researchers Develop Method for Improving Facial Recognition Accuracy with Poor Image Quality*, BIOMETRICUPDATE.COM (Sept. 24, 2018), <https://www.biometricupdate.com/201809/academic-researchers-develop-method-for-improving-facial-recognition-accuracy-with-poor-image-quality> (discussing expected advances in facial recognition technology); Matt Leonard, *Facial Recognition Improving ‘at Breakneck Speeds,’* GCN (Nov. 9, 2017), <https://gcn.com/articles/2017/11/09/iarpa-facial-recognition.aspx> (same).

²⁰⁷ For a discussion of how we are all now traceable in the Foucauldian sense, see Capers, *supra* note 144, at 675–76 (using French philosopher Michel Foucault’s argument about the state’s disciplinary power to discuss how “[n]ow, we are knowable” and traceable through a trove of data). For a discussion of how police can track locations using the data that “radiates” from phones and other smart devices, see Andrew Guthrie Ferguson, *The “Smart” Fourth Amendment*, 102 CORNELL L. REV. 547 (2017).

²⁰⁸ See Kaya Yurieff, *Facebook Hits 2 Billion Monthly Users*, CNN (June 27, 2017, 3:22 PM), <https://money.cnn.com/2017/06/27/technology/facebook-2-billion-users/index.html>.

lects ninety-eight data points on each of its users.²⁰⁹ The writer Sue Halpern put it this way:

Among this ninety-eight are ethnicity, income, net worth, home value, if you are a mom, if you are a soccer mom, if you are married, the number of lines of credit you have, if you are interested in Ramadan, when you bought your car, and on and on and on.²¹⁰

Given the fact that “soon it will be feasible and affordable for the government to record, store, and analyze nearly everything people do,”²¹¹ and that technology exists to allow all of us to “be known—not simply identified by name,” but also “revealed through a web of facts involving criminal records, personal history, and past location data,”²¹² it is easy to imagine that by the year 2044 the ability to commit crime in public without detection will be close to nil. This alone will make policing more efficient in terms of deterring criminal conduct and apprehending criminals.²¹³ The future may also include the widespread collection of DNA from newborn babies to further deter criminal activity and improve apprehension—this collection already being done to test for genetic abnormalities.²¹⁴ The future may include implanting microchips (already happening to employees)²¹⁵ in arrestees and other at-risk individuals to allow the

²⁰⁹ Caitlin Dewey, *98 Personal Data Points That Facebook Uses to Target Ads to You*, WASH. POST (Aug. 19, 2016), <https://www.washingtonpost.com/news/the-intersect/wp/2016/08/19/98-personal-data-points-that-facebook-uses-to-target-ads-to-you/>.

²¹⁰ Sue Halpern, *They Have, Right Now, Another You*, N.Y. REV. BOOKS (Dec. 22, 2016), <https://www.nybooks.com/articles/2016/12/22/they-have-right-now-another-you/>.

²¹¹ Elizabeth E. Joh, *The New Surveillance Discretion: Automated Suspicion, Big Data, and Policing*, 10 HARV. L. & POL'Y REV. 15, 15–16 (2016).

²¹² Andrew Guthrie Ferguson, *Big Data and Predictive Reasonable Suspicion*, 163 U. PA. L. REV. 327, 351 (2015).

²¹³ Indeed, such technologies combined with machine learning are likely to have salutary benefits in other ways, insofar as they free law enforcement officers to direct human resources to other unsolved crimes.

²¹⁴ See Elizabeth Cohen, *The Government Has Your Baby's DNA*, CNN (Feb. 4, 2010, 9:11 AM), <http://www.cnn.com/2010/HEALTH/02/04/baby.dna.government/index.html> (reporting that DNA is already being taken from most babies born in American hospitals in order to screen for genetic abnormalities). Extending this policy to facilitate apprehension seems the logical next step. This is to say nothing of the DNA evidence likely to be available through ancestry sites. A recent study suggests that “[w]ithin two or three years, 90 percent of Americans of European descent will be identifiable from their DNA” through databases, whether they have joined an ancestry search service or not. See Heather Murphy, *Most White Americans' DNA Can Be Identified Through Genealogy Databases*, N.Y. TIMES (Oct. 11, 2018), <https://www.nytimes.com/2018/10/11/science/science-genetic-genealogy-study.html>.

²¹⁵ In July 2017, the *New York Times* reported that Three Square Market, a Wisconsin-based technology company, was asking its employees to have a microchip “the size of a grain of rice injected between their thumb and index finger.” Maggie Astor, *Microchip Implants for Employees? One Company Says Yes*, N.Y. TIMES (July 25, 2017), <https://www.nytimes.com/2017/07/25/technology/microchips-wisconsin-company-employees.html>. More

state to trace the individuals to deter recidivism and to obviate the need for pre-trial detention.²¹⁶

And of course, these are just some of technologies law enforcement officers will have at their disposal. It is easy to imagine that facial recognition will soon be coupled with improvements in voice recognition and gait recognition,²¹⁷ that improvements to terahertz scanners will soon allow officers to not only detect illegal firearms remotely, but also remotely disengage them,²¹⁸ that dedicated short-range communications technology will obviate the need for police to conduct traffic stops,²¹⁹ that car chases will be a thing of the past since police will be able to stop vehicles remotely using electromagnetic pulses,²²⁰ and that neither traffic stops nor car chases may be necessary at all given the perfection of driverless cars.²²¹

than half of the employees consented. *Id.* For a lengthier discussion of how microchips may one day aid law enforcement, see Capers, *Techno-Policing*, *supra* note 17, at 495–96. More recently, it was reported that Swedish citizens are turning to microchip implants to replace ID cards. See Alexandra Ma, *Thousands of People in Sweden Are Embedding Microchips Under Their Skin to Replace ID Cards*, BUSINESS INSIDER (May 14, 2018, 8:09 AM), <https://www.businessinsider.com/swedish-people-embed-microchips-under-skin-to-replace-id-cards-2018-5>.

²¹⁶ See Jefferson Graham, *You Will Get Chipped—Eventually*, USA TODAY (Aug. 10, 2017, 9:17 AM), <https://www.usatoday.com/story/tech/2017/08/09/you-get-chipped-eventually/547336001> (arguing that it is only a matter of time before everyone is embedded with microchips).

²¹⁷ See Michael Dumiak, *Interpol's New Software Will Recognize Criminals by Their Voices*, IEEE SPECTRUM, (May 16, 2018), <https://spectrum.ieee.org/tech-talk/consumer-electronics/audiovideo/interpol-s-new-automated-platform-will-recognize-criminals-by-their-voice> (stating that Interpol is evaluating voice recognition software that would match voices from social media posts and phone calls to a database of voice recordings of criminals); Jim Giles, *Cameras Know You by Your Walk*, NEW SCIENTIST (Sept. 19, 2012), <https://www.newscientist.com/article/mg21528835-600-cameras-know-you-by-your-walk> (describing recent advances in automatic gait recognition).

²¹⁸ See Capers, *Techno-Policing*, *supra* note 17, at 497–98 (describing the implications of terahertz scanners that can distance scan for firearms).

²¹⁹ See Elizabeth E. Joh, Essay, *Discretionless Policing: Technology and the Fourth Amendment*, 95 CALIF. L. REV. 199, 199–200 (2007) (describing how the government could use wireless technology to gather data on a car's location and speed).

²²⁰ See Bruno Waterfield & Matthew Day, *EU Has Secret Plan for Police to 'Remote Stop' Cars*, TELEGRAPH (Jan. 29, 2014), <https://www.telegraph.co.uk/news/worldnews/europe/eu/10605328/EU-has-secret-plan-for-police-to-remote-stop-cars.html> (describing the development of a device to enable police to disable vehicles remotely); Victoria Woollaston, *End of the High-Speed Car Chase? Engineers Invent System That Disables a Vehicle's Engine Remotely Using Radio Beams*, DAILY MAIL (Dec. 4, 2013, 4:34 PM), <http://www.dailymail.co.uk/sciencetech/article-2518177/RF-Safe-Stop-disables-vehicles-engine-remotely-using-radio-beams.html> (describing how a British company is developing a similar device).

²²¹ See Orin Kerr, Opinion, *How Self-Driving Cars Could Determine the Future of Policing*, WASH. POST (June 16, 2017), <https://www.washingtonpost.com/news/voikh-conspiracy/wp/2017/06/16/how-self-driving-cars-could-determine-the-future-of-policing> (predicting that self-driving cars could be programmed to follow traffic laws, mitigating the

Furthermore, these technologies will also lead to a drastic reduction in the use of force by the police. Setting aside that surveillance cameras will reduce the need for the type of police-citizen interactions that too often function as pathways to blue on black violence,²²² the use of terahertz scanners could “immediately tell officers that a suspect is unarmed, . . . obviat[ing] the need for deadly force.”²²³ Access to Big Data would also tell officers whether a suspect has a history of nonviolence or escalation, further reducing the need to draw a weapon or use force.²²⁴ Future technologies will likely enable police to remotely disable weapons, reducing the need for deadly force.²²⁵ And of course, for those at-risk individuals and individuals on pre-trial release who already have temporary microchips implanted, the chips themselves can be disabling in a way to make the use of force unnecessary.²²⁶

For many individuals, and perhaps most whites,²²⁷ this future may seem dystopian, suggesting “the death of privacy”²²⁸ and George

need for police involvement); see also Jordan Blair Woods, Policing, Autonomous Vehicles, and Officer Danger (unpublished manuscript) (on file with author) (arguing that improvements to automobile technology will reduce dangers associated with police-civilian interactions, such as traffic stops and accident investigations).

²²² See Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125, 130 (2017) (arguing that many examples of the police’s deadly use of force begin as ordinary citizen-officer interactions such as traffic stops).

²²³ Capers, *Race, Policing, and Technology*, *supra* note 17, at 1279.

²²⁴ *Id.*

²²⁵ Smart guns that use technology to prevent anyone but the registered owner from using the gun are already on the market. See *5 Things to Know About Smart Guns*, POLICEONE.COM (Aug. 3, 2017), <https://www.policeone.com/police-products/firearms/articles/391099006-5-things-to-know-about-smart-guns/>. There is also technology that allows a firearm to be remotely disengaged. See Martha Mendoza, *With High-Tech Guns, Users Could Disable Remotely*, WASH. TIMES (May 21, 2013), <http://www.washingtontimes.com/news/2013/may/21/high-tech-guns-users-could-disable-remotely> (reporting on the development of a wireless controller that would allow gun owners to remotely disable their gun).

²²⁶ While this may still be years away, already there are efforts to use chip implants to alter a person’s mood. See Josiah Hesse, *There Is Now a Brain Implant that Can Control Emotions Wirelessly*, VICE (Aug. 16, 2015, 10:28 AM), https://www.vice.com/en_us/article/3bjaay/there-is-now-a-brain-implant-that-can-control-emotions-wirelessly-253 (detailing technology that uses light stimulation and direct application of pharmaceuticals in the brain via a wireless implant).

²²⁷ Of course, some whites will welcome greater surveillance. See, e.g., William H. Simon, *In Defense of the Panopticon 5* (Columbia Law Sch. Pub. Law & Legal Theory Working Paper Grp., Paper No. 14-412, 2014), <https://ssrn.com/abstract=2492211> (critiquing the conventional view that loss of privacy is a negative and arguing that panopticon-style surveillance has advantages with respect to transparency, distributional equality, and keeping the watchers in check).

²²⁸ See, e.g., A. Michael Froomkin, *The Death of Privacy?*, 52 STAN. L. REV. 1461 (2000) (arguing that the law should facilitate informational privacy since individuals are largely

Orwell's "big brother" run amok.²²⁹ But this is where Afrofuturism, Critical Race Theory, and changing demographics come in. A core tenet of Afrofuturism is that we embrace technology, especially technology that can disrupt hierarchies and contribute a public good.²³⁰ Critical Race Theory's commitment to substantive equality and to radical interventions provides further support for the conclusion that, in a majority-minority future, technology will be put to good use.²³¹ For starters, such technology will reduce crime, something people of color have disproportionately experienced as victims.²³² Second, it will aid in the apprehension of lawbreakers, thus ending the under-enforcement that currently exists in black and brown communities.²³³ Third, it will deracialize policing, long a concern among CRT scholars,²³⁴ and reduce the concomitant "micro-aggressions" black

incapable of resisting the state's and private sector's pervasive data collection processes); see also CHRISTOPHER SLOBOGIN, *PRIVACY AT RISK: THE NEW GOVERNMENT SURVEILLANCE AND THE FOURTH AMENDMENT*, at ix (2007) (describing mass surveillance as "an insidious assault on our freedom").

²²⁹ GEORGE ORWELL, *NINETEEN EIGHTY-FOUR* 3 (Alfred A. Knopf 1987) (1949). The specter of "big brother" has not escaped the Court. In *Florida v. Riley*, a case holding that helicopter surveillance of an individual's backyard was not a "search" within the meaning of the Fourth Amendment, Justice Brennan quoted a passage from *Nineteen Eighty-Four* in his dissent. 488 U.S. 445, 466 (1989) (Brennan, J., dissenting). For an interesting discussion of the Big Brother metaphor, see Daniel J. Solove, *Privacy and Power: Computer Databases and Metaphors for Information Privacy*, 53 STAN. L. REV. 1393, 1413–19 (2001).

²³⁰ As Afrofuturist scholar Ytasha Womack writes, "Afrofuturism is concerned with both the impact of . . . technologies on social conditions and with the power of such technologies to end the 'isms' for good and safeguard humanity." WOMACK, *supra* note 41, at 36.

²³¹ See *supra* notes 120–35 and accompanying text.

²³² For example, almost half of the homicide victims in the United States are black, even though blacks make up just 13.3% of the population. See Matthew Cella & Alan Neuhauser, *Race and Homicide in America, by the Numbers*, U.S. NEWS (Sept. 29, 2016, 6:42 PM), <https://www.usnews.com/news/articles/2016-09-29/race-and-homicide-in-america-by-the-numbers>.

²³³ See RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 19 (1997) (arguing that the "principle injury suffered by African-Americans in relation to criminal matters is not overenforcement but underenforcement of the laws"); Capers, *Race, Policing, and Technology*, *supra* note 17, at 1252–54 (discussing the failure of the state to provide communities of color equal protection of the criminal laws); Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715, 1716–22 (2006) (same).

²³⁴ See, e.g., BUTLER, *supra* note 192, at 191–200 (discussing federal takeovers of local police departments as a way to deracialize policing from a CRT perspective); CYNTHIA LEE, *MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM* 180–81 (2003) (discussing how racial bias impacts the reasonableness requirement for assertions of self-defense by police officers); Capers, *supra* note 144, at 656 (observing the racialization of policing from personal experience); Carbado, *supra* note 141, at 967–68 (arguing that the Supreme Court constructs and reifies race through its Fourth Amendment jurisprudence); L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035, 2040–41 (2011) (contending that courts must

and brown individuals are subjected to as a result of such policing.²³⁵ After all, cameras and terahertz scanners—absent human intervention²³⁶—do not suffer from the unconscious racism or implicit biases Critical Race Theorists have written about.²³⁷

There are two more reasons why an Afrofuturism and CRT-informed future is likely to embrace surveillance technology in particular; reasons that have everything to do with the role surveillance has played in the lives of black and brown people. At a time when blue on black police violence seems constant—from Michael Brown, to Eric Garner, to Sandra Bland, to Philando Castillo, to Tamir Rice²³⁸—and at a time when whites calling the police on black and brown people for simply engaging in routine activities seems an everyday occurrence,²³⁹ surveillance cameras have functioned as a tool of survival, as a way of making racism and inequality real, as a godsend, and as proof.²⁴⁰ The latter point is especially significant, given this country's history of not

reconsider the behavioral assumptions underlying Fourth Amendment stop-and-frisk doctrine to deracialize the consequences of such policies).

²³⁵ I borrow this term from CRT scholar Peggy Davis, who uses it to describe the ways in which minorities are repeatedly subjected to “stunning, automatic acts of disregard” that in turn lead minorities to view the legal system as biased. See Peggy C. Davis, *Law as Microaggression*, 98 YALE L.J. 1559, 1576 (1989).

²³⁶ Algorithms are only as reliable as their inputs and can reflect the biases of their programmers. See, e.g., CATHY O'NEIL, *WEAPONS OF MATH DESTRUCTION: HOW BIG DATA INCREASES INEQUALITY AND THREATENS DEMOCRACY* 25 (2016) (noting, for example, that “a host of assumptions, some of them prejudicial,” are embedded in sentencing algorithms); see also Claire Cain Miller, *When Algorithms Discriminate*, N.Y. TIMES (July 9, 2015), <https://www.nytimes.com/2015/07/10/upshot/when-algorithms-discriminate.html> (noting that algorithms “can reinforce human prejudices”).

²³⁷ See Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322–23 (1987), for a discussion of unconscious racism and the largely unconscious behaviors underlying American racial discrimination. See also I. Bennett Capers, *The Under-Policed*, 51 WAKE FOREST L. REV. 589, 605 (2016) (discussing implicit biases that associate black and brown skin with criminality, while associating whiteness with law-abidingness); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1494–95 (2005) (exploring the pervasiveness of implicit bias against racial minorities and potential legal solutions through the regulation of media consumption); Richardson, *supra* note 234, at 2042–55 (describing how implicit biases operate and impact policing).

²³⁸ For a discussion of these victims of police violence, see Capers, *supra* note 144, at 686–87.

²³⁹ See *supra* note 197.

²⁴⁰ Capers, *Race, Policing, and Technology*, *supra* note 17, at 1246 (arguing that the recent widespread availability of video images of police violence has functioned as “an education” for many Americans, making claims of police violence true). Consider a recent example. In New York, a white woman called the police and accused a nine-year-old black boy of groping her while she was shopping, saying the boy “grabbed my ass.” Four days later, a playback of surveillance footage showed the child merely “turning to someone behind him and his backpack brushing [the woman’s] backside as she leaned over the counter.” After seeing the video, the woman apologized. Jeffery C. Mays & Sean Piccoli, *A White Woman, Teresa Klein, Called the Police on a Black Child She Falsely Said Groped*

permitting people of color to testify against whites, and the subsequent history of not believing them when they did.²⁴¹ It is why the CRT scholar Lolita Buckner Innis describes a camera as equivalent to a “white witness.”²⁴² Thus, while whites may think of the increase in surveillance cameras as intrusive, for many people of color, cameras function as necessary proof.

The other reason black and brown individuals are likely to embrace mass surveillance is because it will be a welcome change from the race-based surveillance, or “racial tax,”²⁴³ that comes with being black or brown in this country. Right now, “black and brown folk are more likely to be watched by the police, stopped by the police, and frisked by the police.”²⁴⁴ Black and brown people are treated as “panoptic sort,”²⁴⁵ “always already suspect,”²⁴⁶ and routinely subjected to “heightened scrutiny,”²⁴⁷ to repurpose a legal term. At the same time, white Americans enjoy a surfeit of privacy. The CRT scholar Cheryl Harris famously noted how whiteness itself is like property: valuable.²⁴⁸ What she left out is that part of its value lies in the right to claim privacy, to even take entitlement to privacy for granted, as a “right.” Put differently, the oft-claimed “right to pri-

Her, N.Y. TIMES (Oct. 12, 2018), <https://www.nytimes.com/2018/10/12/nyregion/woman-calls-police-black-boy-brooklyn.html>.

²⁴¹ See I. Bennett Capers, *Evidence Without Rules*, 94 NOTRE DAME L. REV. 876, 889–92 (2018) (discussing studies showing how race continues to impact credibility determinations); George Fisher, *The Jury's Rise as Lie Detector*, 107 YALE L.J. 575, 671–74 (1997) (discussing the history of competency rules barring testimony of nonwhite persons); Sheri Lynn Johnson, *The Color of Truth: Race and the Assessment of Credibility*, 1 MICH. J. RACE & L. 261, 267–75 (1996) (tying together the historical exclusion of nonwhite witnesses and the systemic lack of credibility attributed to nonwhite defendants and witnesses).

²⁴² Lolita Buckner Inniss, *Video Surveillance As White Witness*, AIN'T I A FEMINIST LEGAL SCHOLAR TOO? (Sept. 30, 2012), <http://innissfls.blogspot.com/2012/09/video-surveillance-as-white-witnesses.html> (“[P]rivate people often lose in battles of opposing narratives with public people about what has occurred. In such cases, video surveillance becomes a mostly neutral, unlikely to lie, legitimizing witness.”).

²⁴³ KENNEDY, *supra* note 233, at 159 (arguing that the race-dependent policing permitted by courts places a burden upon people of color that white people do not experience).

²⁴⁴ Capers, *Race, Policing, and Technology*, *supra* note 17, at 1290 (showing how police subject people of color to surveillance even when engaging in innocent activities).

²⁴⁵ This is a play on Oscar Gandy's term about database marketing. See generally OSCAR H. GANDY, JR., *THE PANOPTIC SORT: A POLITICAL ECONOMY OF PERSONAL INFORMATION* 1 (1993) (describing how businesses and the state use surveillance technology in order to monitor individuals, develop profiles, and sort individuals by presumed economic or political value).

²⁴⁶ Frank Rudy Cooper, *Always Already Suspect: Revising Vulnerability Theory*, 93 N.C. L. REV. 1339, 1363 (2015) (observing that “when it comes to men of color, we are always already suspect”).

²⁴⁷ Capers, *Race, Policing, and Technology*, *supra* note 17, at 1290.

²⁴⁸ Harris, *supra* note 144, at 1713–14.

vacy”²⁴⁹ and “right to be let alone”²⁵⁰ has never been distributed equally.²⁵¹ For black and brown people, race-neutral surveillance—what I have elsewhere called “soft surveillance”²⁵² and Mary Anne Franks calls “democratic surveillance”²⁵³—also has the added benefit of equalizing privacy.²⁵⁴ To state this differently, black and brown people, given the choice between a cop on the street—a Detective McFadden, if you will, whose stop of two African-Americans for repeatedly looking in a store window (“they didn’t look right to me”²⁵⁵) resulted in the Court’s endorsement of stop-and-frisk in *Terry v. Ohio*²⁵⁶—and the choice of race-neutral surveillance, will welcome the latter. This is not to suggest that black and brown Americans will blindly assume the neutrality of surveillance technologies. Experience, the ultimate teacher, shows that technologies can reflect and replicate preexisting biases.²⁵⁷ However, precisely because black and brown people have experienced these biases, they will be vigilant in scrubbing technologies for bias and routinely subjecting them to audits along the lines of what CRT scholar Robin Lenhardt calls “race

²⁴⁹ See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890) (defining and arguing for a right to privacy).

²⁵⁰ See *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (describing the Fourth Amendment as conferring, “as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men”).

²⁵¹ See KHIARA M. BRIDGES, *THE POVERTY OF PRIVACY RIGHTS* 45–55 (2017) (arguing that the law deprives poor mothers, especially poor mothers of color, of privacy rights altogether).

²⁵² Capers, *Race, Policing, and Technology*, *supra* note 17, at 1244.

²⁵³ Mary Anne Franks, *Democratic Surveillance*, 30 HARV. J.L. & TECH. 425, 488 (2017) (arguing that the rise of mass surveillance democratizes surveillance and serves as an opportunity for mainstream society to recognize the historical surveillance of marginalized groups).

²⁵⁴ Technology can help redistribute privacy and undo privilege, long a concern of CRT scholars. See, e.g., Charles R. Lawrence III, *The Fire This Time: Black Lives Matter, Abolitionist Pedagogy and the Law*, 65 J. LEGAL EDUC. 381, 387 (2015) (“A racial justice law must redistribute privilege. It must redistribute both the land and the fruit that has been plundered, and the status or human dignity that has been denied by the ideology used to justify that plunder.”).

²⁵⁵ Brief for Petitioner at 6, *Terry v. Ohio*, 392 U.S. 1 (1968) (No. 67), 1967 WL 93600, at *6 (quoting Detective McFadden).

²⁵⁶ 392 U.S. 1 (1968). For a discussion of the role race played in *Terry*, see Devon W. Carbado & Cheryl I. Harris, *Undocumented Criminal Procedure*, 58 UCLA L. REV. 1543, 1574 (2011); Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 967–68 (1999).

²⁵⁷ See, e.g., O’NEIL, *supra* note 236, at 25–26, 146 (showing how sentencing algorithms and e-score models reproduce biases). See Dorothy E. Roberts, *Race and the New Reproduction*, 47 HASTINGS L.J. 935, 937–44 (1996), for a discussion of how even reproductive technologies replicate racial hierarchies, and an argument that reproduction technologies can reinforce racial hierarchies and preferences rather than disrupt them.

audits”²⁵⁸ and CRT fellow traveler Sabeel Rahman calls “citizen audits.”²⁵⁹

There is one final thing to say about the turn to technology and race. Critical Race Theorists have long invoked the trope of using the master’s tools “to dismantle the master’s house.”²⁶⁰ What I am suggesting here is on par with using the tools of technology to dismantle the very foundation of racism this country’s house was built on. This is CRT and Afrofuturism in action.

3. Policing

Thus far, I have discussed how advances in policing technologies consistent with Afrofuturism and CRT will do much to reduce crime, as will wealth redistribution and the expansion of the social safety net that is likely to occur when people of color exercise majority control. Still, even with these changes, some crime will persist, necessitating some form of policing. However, what police departments will look like and how they will police crimes will likely be very different. Consider the size of police departments. As the foregoing discussion of technologies might already suggest, by the year 2044, technology will make much police work as we know it unnecessary, resulting in far smaller police departments. In addition, consistent with changes in demographics, most of the police officers that remain will likely be people of color, including at leadership levels. Indeed, in a future informed by Afrofuturism and Critical Race Theory, the racial makeup of rank and file officers will not be the only demographic change. Given Afrofuturism’s and CRT’s commitment to disrupting hierarchies not only along lines of race, but also along lines of gender, class, and sexuality, police departments will more likely reflect the full range of the country’s diversity.

These demographic changes are also likely to impact police-citizen interactions. The widespread addition of women and people of different sexualities, for example, will reduce the likelihood of “mas-

²⁵⁸ R. A. Lenhardt, *Race Audits*, 62 HASTINGS L.J. 1527, 1534 (2011) (proposing that jurisdictions conduct race audits, a voluntary evaluative measure for identifying racial inequality).

²⁵⁹ K. Sabeel Rahman, *From Civic Tech to Civic Capacity: The Case of Citizen Audits*, 50 PS: POL. SCI. & POLS. 751, 751 (2017), <https://doi.org/10.1017/S1049096517000543> (describing citizen audits as the “organized, strategic use of participatory monitoring techniques to hold government actors accountable”).

²⁶⁰ See, e.g., Paul Butler, Essay, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 680 (1995) (“Through jury nullification, I want to dismantle the master’s house with the master’s tools.”). Interestingly, the source of the trope posited the opposite, that the master’s tools can never destroy the master’s house. See AUDRE LORDE, *The Master’s Tools Will Never Dismantle the Master’s House*, in SISTER OUTSIDER 110, 110–12 (1984).

culinity contest[s].”²⁶¹ Changes in police training will also likely impact police-citizen interactions. For starters, a future informed by Afrofuturism and CRT is likely to insist that police training emphasize the caretaking role of policing,²⁶² and to insist that recruits are screened for both explicit and implicit biases and undergo empathy training in the form of virtual reality simulations—more advanced but not unlike the virtual reality (VR) simulations that now exists in laboratories at Stanford and Barcelona.²⁶³ Such VR training will allow officers to “experience” being different—for example, male or female, gay or straight or questioning or trans, documented or undocumented, white or Asian or black or Latino, Muslim or Christian—and having to interact with the police.²⁶⁴

In addition, the criminal procedure protections afforded individuals will be different, impacting not only citizen-police interactions but also prosecutions themselves. In a future informed by Afrofuturism and CRT, the Supreme Court, as well as lower courts, are more likely to reflect the full diversity of the population along a variety of lines, including race, sex, class, and disability.²⁶⁵ In this future, a diverse Supreme Court—now led by Chief Justice Sonia Sotomayor—will likely hew to precedent allowing nontargeted surveillance in public.²⁶⁶ However, rather than solely relying on the notion that there can be no expectation of privacy for what is know-

²⁶¹ See Cooper, *supra* note 140, at 674–75 (“[P]olicemen may sometimes enact command presence in order to stage masculinity contests and boost their masculine esteem.”).

²⁶² For a discussion of the community caretaking role in policing, see Debra Livingston, *Police, Community Caretaking, and the Fourth Amendment*, 1998 U. CHI. LEGAL F. 261.

²⁶³ See *More or Less Human*, RADIOLAB (May 17, 2018), <https://www.wnycstudios.org/story/more-or-less-human> (discussing a lab in Barcelona where virtual reality (VR) allows individuals to experience different bodies and finding that the brain quickly accepts these new bodies). For more on Stanford’s lab, including its use of VR to increase cross-racial empathy, see *Examining Racism with Virtual Reality*, VIRTUAL HUMAN INTERACTION LAB (last visited Nov. 7, 2018), www.vhil.stanford.edu/projects/2016/examining-racism-with-virtual-reality/.

²⁶⁴ See, e.g., Cole Zercoe, *How Virtual Reality Could Transform Law Enforcement*, POLICEONE.COM (Dec. 7, 2017), <https://www.policeone.com/policing-in-the-video-age/articles/467266006-How-virtual-reality-could-transform-law-enforcement>. CRT scholars have long argued for such switching exercises (or cross-dressing or shape-shifting) to reduce biases. See LEE, *supra* note 234, at 217–25 (discussing the impact of having juries consider different genders, sexual orientations, and racial identities of defendants when evaluating the reasonableness of their actions); I. Bennett Capers, *Cross Dressing and the Criminal*, 20 YALE J. L. & HUMAN. 1, 3–5 (2008) (arguing for imaginative cross-dressing in order to correct the implicit biases of decisionmakers).

²⁶⁵ See *supra* Section III.A.

²⁶⁶ For a discussion of the range of cases permitting public surveillance, from *Katz v. United States*, 389 U.S. 347 (1967), through *United States v. Jones*, 565 U.S. 400 (2012), see Capers, *Crime, Surveillance, and Communities*, *supra* note 17, at 965–69. Most recently, in *Carpenter v. United States*, the Court expressly noted that it was not calling into question

ingly exposed in public,²⁶⁷ they will likely add an additional justification for allowing this practice: Such surveillance reduces unequal policing and thus furthers the goal of equality, now incorporated in the Fourth Amendment.²⁶⁸ In short, it will be a technology-friendly Court. By the same token, the Court is likely to shift their interpretation of the Fourth Amendment when it comes to more routine police-citizen encounters. As just mentioned, the overarching goals of equality and nondiscrimination will likely be read into the Fourth Amendment, in particular its reasonableness clause. Moreover, rejecting the approach of the current Court, which insists that rights can be waived voluntarily even if unknowingly,²⁶⁹ the future Court is likely to insist that all citizens be informed of their rights, even the right to say no and walk away.²⁷⁰ And a Court informed by CRT is certainly likely to curtail the ability of officers and noncriminal justice actors to use “arrest as regulation”²⁷¹ and curtail the discretion officers currently enjoy, a discretion reflected in a host of cases such as *Pennsylvania v. Mimms*,²⁷² *Maryland v. Wilson*,²⁷³ *Whren v. United States*,²⁷⁴ *United States v. Armstrong*,²⁷⁵ *Atwater v. Lago Vista*,²⁷⁶ and

nontargeted public surveillance techniques, such as surveillance cameras. 138 S. Ct. 2206, 2220 (2018).

²⁶⁷ See *Katz*, 389 U.S. at 351 (“What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.”).

²⁶⁸ See I. Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 HARV. C.R.-C.L. L. REV. 1, 35–37 (2011) (arguing that the Fourth Amendment should be read as incorporating equality concerns). Others have also argued for such an incorporation. See, e.g., Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 805–10 (1994); Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1266 (1992).

²⁶⁹ See, e.g., *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973) (ruling that consent to a search need not be knowing).

²⁷⁰ See Capers, *supra* note 144, at 708–09 (imagining a jurisprudence that celebrates rights and stresses the importance of officers making citizens aware of their rights, such as their right to refuse consent). Recall too that CRT was formed out of an insistence that rights matter. See *supra* notes 114–16 and accompanying text; see also Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 416 (1987) (recounting the story of CRT’s split from CLS over the importance of rights, and arguing that for blacks, “the attainment of rights signifies the due, the respectful behavior, the collective responsibility properly owed by a society to one of its own”).

²⁷¹ See generally Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809 (2015) (discussing how a host of actors—including public housing officials—rely on arrests as a regulatory tool).

²⁷² 434 U.S. 106 (1977) (granting officers unfettered discretion, under the Fourth Amendment, to order drivers out of the vehicle following a legitimate traffic stop).

²⁷³ 519 U.S. 408 (1997) (extending *Mimms* to give officers discretion to also order passengers out of the vehicle).

²⁷⁴ 517 U.S. 806 (1996) (holding that pretextual stops are permissible under the Fourth Amendment so long as the stop itself is based on probable cause for an actual traffic violation).

Utah v. Strieff.²⁷⁷ For the same reason, the Court will likely revive the preference that warrants be secured from neutral and detached magistrates,²⁷⁸ especially since technology itself will eliminate the need for many of the current exceptions to the warrant requirement.²⁷⁹ As far as prosecutions, what few trials are necessary will not quite be “trial by machine,”²⁸⁰ but they may approximate it, since this too will eliminate the biases that tend to permeate trials in the present, including prosecutorial biases,²⁸¹ even in the face of seemingly neutral Rules of Evidence and other protections.²⁸²

Up to now, I have argued that crime will be reduced, but I have said little about the types of crimes that might persist. This is in part because technological interventions and shifts in norms will likely play a role in reducing the frequency of certain crimes. For example, the widespread availability of sex robots,²⁸³ the legalization of sex work,²⁸⁴ the move towards positive sex norms (a feature of CRT and

²⁷⁵ 517 U.S. 456 (1996) (requiring plaintiffs to meet the exacting burden of establishing that similarly situated individuals of a different race were treated differently, and that such different treatment was motivated by a discriminatory purpose).

²⁷⁶ 532 U.S. 318, 323 (2001) (allowing officers to exercise discretion in deciding whether to arrest for “minor criminal offenses” and misdemeanors).

²⁷⁷ 136 S. Ct. 2056 (2016) (holding that, notwithstanding the exclusionary rule, what an officer discovers during a stop, even an unconstitutional stop, may still be admissible).

²⁷⁸ See Cynthia Lee, *Reasonableness with Teeth: The Future of Fourth Amendment Reasonableness Analysis*, 81 Miss. L.J. 1133, 1136 (2012) (arguing that ideally the Court would “return to a robust embrace of the warrant preference”).

²⁷⁹ See Capers, *Policing, Technology, and Doctrinal Assists*, *supra* note 17, at 730–33 (arguing that the ready availability of platforms like FaceTime and Google Docs already eliminates the need for recourse to the exigency exception in most cases, and eliminates entirely the need for the automobile exception).

²⁸⁰ See Andrea Roth, *Trial by Machine*, 104 GEO. L.J. 1245, 1248 (2016) (discussing the potential benefits of “mechanized” adjudication).

²⁸¹ See Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 16–17 (1998) (“[B]ecause prosecutors play such a dominant and commanding role in the criminal justice system through the exercise of broad, unchecked discretion, their role in the complexities of racial inequality in the criminal process is inextricable and profound.”).

²⁸² See Capers, *supra* note 241 (discussing the importance of recognizing the impact of unregulated “evidence,” such as race, in trial outcomes); Gonzales Rose, *supra* note 131, at 2244 (calling for application of CRT to the law of evidence because evidence law and practice perpetuates racial subordination).

²⁸³ For more on the future of sex robots, see Jenny Kleeman, *The Race to Build the World’s First Sex Robot*, GUARDIAN (Apr. 27, 2017, 12:30 AM), <https://www.theguardian.com/technology/2017/apr/27/race-to-build-world-first-sex-robot>.

²⁸⁴ See Adrienne D. Davis, *Regulating Sex Work: Erotic Assimilationism, Erotic Exceptionalism, and the Challenge of Intimate Labor*, 103 CALIF. L. REV. 1195, 1201 (2015) (imagining a regulatory approach “that takes professional sex (prostitution and other forms) seriously as work, while simultaneously confronting the real and high vulnerability its workers’ experience”); see also Kamala Kempadoo, *Introduction: Globalizing Sex Workers’ Rights*, in GLOBAL SEX WORKERS: RIGHTS, RESISTANCE, AND REDEFINITION 3, 8

Afrofuturism)²⁸⁵ and most importantly the norm of sex equality and respect will likely contribute to the reduction of sexual assault crimes.²⁸⁶ Domestic violence is likely to see a similar reduction, given that gender equality and parity will be standard in a future informed by Afrofuturism and CRT, as will the availability of housing and employment, thus facilitating the ease with which individuals can enter and exit unwanted relationships.²⁸⁷ Gun violence will also have declined. Black and brown leaders, recalling firsthand the scourge of gun violence in the 1990s and persisting for decades, will have long enacted gun control legislation barring the possession of firearms outside the home,²⁸⁸ and will support technology to detect, disable, and confiscate such weapons outside of the home.²⁸⁹ And of course, since wealth will be more evenly distributed, and since displays of wealth will be frowned upon—keeping up with the Joneses, and the fascination with “bling” will be viewed as a curious relic of the 1980s

(Kamala Kempadoo & Jo Doezema eds., 1998) (arguing that recognizing sex work as work can empower and demarginalize sex workers).

²⁸⁵ See Melissa Murray, *Marriage as Punishment*, 112 COLUM. L. REV. 1, 62 (2012) (arguing for a “space for sexual liberty that embraces the prospect of nondeviant, nonmarital sex”); cf. I. Bennett Capers, *Real Women, Real Rape*, 60 UCLA L. REV. 826, 858–59, 871–72 (2013) (arguing for a reform to rape shield laws to reflect a sex-positive goal). For examples of sex-positivity in Afrofuturist work, see TROUBLE ON TRITON, *supra* note 38 (featuring communes where people live on the basis of sexual preference); OKORAFOR, *supra* note 73 (featuring a strong female protagonist who seeks sexual pleasure despite having experienced circumcision); MONÁE, THE ARCHANDROID, *supra* note 74.

²⁸⁶ There may even be love. What motivates Janelle Monáe’s Afrofuturist albums *Metropolis* and *The ArchAndroid* is the love that develops between an android and a human. MONÁE, METROPOLIS, *supra* note 74; MONÁE, THE ARCHANDROID, *supra* note 74.

²⁸⁷ See Crenshaw, *supra* note 139, at 1245–46 (discussing how most women at battered women’s shelters face structural barriers such as poverty and discrimination in housing and employment that prevent them from creating alternatives to abusive partnerships).

²⁸⁸ To be sure, the passage of gun control legislation will be a controversial issue even when the country is majority minority. African-Americans in particular will recall a long history when guns were necessary to protect themselves from racial violence, and will recall as well that many early gun control efforts were initiated with the goal of disarming blacks. See, e.g., Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 318–19 (1991) (exploring Second Amendment issues in the context of the African-American experience, including a historical inability to rely on the state for protection against white supremacist violence).

²⁸⁹ African-Americans have long been at the forefront of arguing for greater gun control outside of the home, as numerous scholars have noted. See Michael B. de Leeuw et al., *Ready, Aim, Fire?* District of Columbia v. Heller and Communities of Color, 25 HARV. BLACKLETTER L.J. 133, 138 (2009) (noting that “the most stringent gun control ordinances have been adopted in municipalities where a majority of the electorate is non-white”); see also JAMES FORMAN JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA 47–77 (2017) (discussing the push for tough gun control measures by African-American community leaders in the 1970s in Washington, D.C.).

culture and hip-hop—there will be far fewer property crimes. All of this will render cases like *Rummel v. Estelle*, in which the Court held that a sentence of life for a recidivist petty criminal who committed check fraud in the amount of \$120.75 was not cruel and unusual punishment,²⁹⁰ and *Ewing v. California*, affirming a sentence of twenty-five years to life in prison for a recidivist drug addict who stole three golf clubs to feed his habit,²⁹¹ as historical curiosities in more ways than one. Even a case like that of Martin Shkreli, convicted for defrauding shareholders,²⁹² will be viewed with curiosity, because such greed will be perplexing. Corporate fraud will also be rarer; the power of multinational corporations long ago would have been put in check.²⁹³

But there is another reason I have said little until now about crimes in the year 2044 and beyond, and that is because in a future informed by Afrofuturism and Critical Race Theory, what behavior is considered criminal will likely be far different. People of color, recognizing that defining criminal behavior has always been raced²⁹⁴ and classed,²⁹⁵ are likely to revisit a whole range of current crimes. Not

²⁹⁰ 445 U.S. 263, 265 (1980).

²⁹¹ 538 U.S. 11, 18, 30–31 (2003).

²⁹² See Stephanie Clifford, *Martin Shkreli Sentenced to 7 Years in Prison for Fraud*, N.Y. TIMES (Mar. 9, 2018), <https://www.nytimes.com/2018/03/09/business/martin-shkreli-sentenced.html>.

²⁹³ Given that blacks in this country were long treated as mere property and forced labor for capitalism, it is perhaps not surprising that one of the recurring themes in Afrofuturism is battling capitalists and capitalism. See, e.g., BUTLER, *supra* note 63 (featuring enslaved people fighting back against their captors); JAMES HANNAHAM, DELICIOUS FOODS (2015) (featuring enslaved people who are exploited on a farm with brutal working conditions); MONÁE, METROPOLIS, *supra* note 74 (telling the story of an android rebelling against its corporate owners). This was also a theme in one of the earliest Afrofuturist comic books, *Hardware*, published by Milestone Media. See Dery, *supra* note 2, at 182 (describing how in *Hardware*, a black scientist uses technology to wage war against his multinational employer). CRT scholars have also critiqued the role of capitalism in maintaining subordination. See, e.g., Richard Delgado, *Rodrigo's Equation: Race, Capitalism, and the Search for Reform*, 49 WAKE FOREST L. REV. 87, 94–98 (2014) (lamenting law's inability to rein in capitalism); Francisco Valdes & Sumi Cho, *Critical Race Materialism: Theorizing Justice in the Wake of Global Neoliberalism*, 43 CONN. L. REV. 1513, 1518 (2011) (critiquing “social structures of accumulation” and their link to entrenching racial inequality).

²⁹⁴ See, e.g., Dorothy E. Roberts, *Democratizing Criminal Law as an Abolitionist Project*, 111 NW. U. L. REV. 1597, 1599 (2017) (noting that the “criminalization of black people” has a long history, including the reinterpretation of laws in order to punish “black women’s childbearing and blame black mothers for the disadvantages their children suffered owing to structural racism”).

²⁹⁵ See, e.g., Kaaryn Gustafson, *The Criminalization of Poverty*, 99 J. CRIM. L. & CRIMINOLOGY 643 (2009) (mapping the criminalization of welfare recipients); Priscilla A. Ocen, *The New Racially Restrictive Covenant: Race, Welfare, and the Policing of Black Women in Subsidized Housing*, 59 UCLA L. REV. 1540 (2012) (arguing that the welfare and policing institutions restrict housing access for poor black women).

only will marijuana be legal, but other recreational drugs—absent reasonable risk of harm to the public—will be decriminalized as well.²⁹⁶ Indeed, to the extent drug use causes self-harm, public health agencies will take the lead in responding, Afrofuturists and Critical Race Theorists having long ago established that criminal punishment, to say nothing of the “raced” War on Drugs,²⁹⁷ was a crude, ineffective, and sometimes counter-effective tool for addressing drug addiction.²⁹⁸ More importantly, a future informed by Afrofuturism and Critical Race Theory is likely to de-criminalize a wide swath of what are currently known as “quality of life” crimes, since as CRT scholars have pointed out, those “crimes”—from loitering laws to curfew laws (both of which recall Black Codes²⁹⁹ with merely the word “black” removed)—primarily exist to enable, through the veneer of discretion, the police to maintain hierarchies by targeting outgroups along lines of race, gender, and sexuality.³⁰⁰ An Afrofuturist and CRT future is also likely to decriminalize a number of *malum prohibitum* crimes—

²⁹⁶ See Dwight L. Greene, *Forward: Drug Decriminalization: A Chorus in Need of Masterrap's Voice*, 18 HOFSTRA L. REV. 457 (1990) (exploring ideological reasons for drug decriminalization and the need to listen to affected communities in formulating policies).

²⁹⁷ See Benjamin D. Steiner & Victor Argoshy, *White Addiction: Racial Inequality, Racial Ideology, and the War on Drugs*, 10 TEMP. POL. & C.R. L. REV. 443, 444 (2001) (describing the War on Drugs as a “raced war” designed to further criminalize disenfranchised communities).

²⁹⁸ See Richard Delgado, *The Wretched of the Earth*, 2 ALA. C.R. & C.L. L. REV. 1 (2011); Greene, *supra* note 296, at 470 (discussing drug criminalization's counterproductivity). Afrofuturists such as George Clinton and Erykah Badu have even embraced drug use. See Roberto Hernandez, *A Q&A with Erykah Badu*, CULTURE MAG. (June 3, 2010), <https://culturemagazine.com/a-q-a-with-erykah-badu>; Brian Hiatt, *George Clinton on Drugs, Recording with Kendrick and 50 Years of Funk*, ROLLING STONE (Nov. 10, 2014, 2:31 PM), <https://www.rollingstone.com/music/music-features/george-clinton-on-drugs-recording-with-kendrick-and-50-years-of-funk-238245>.

²⁹⁹ Confederate states responded to losing the Civil War by enacting Black Codes—creating crimes like “vagrancy” that could be used against the newly freed blacks—which in turn facilitated a type of re-enslavement: incarceration and convict leasing. For more on the Black Codes, see EDWARD MCPHERSON, *THE POLITICAL HISTORY OF THE UNITED STATES OF AMERICA DURING THE PERIOD OF RECONSTRUCTION 29–44* (De Capo Press 1972) (1875); see also Rhonda V. Magee, Note, *The Master's Tools, From the Bottom Up: Responses to African-American Reparations Theory in Mainstream and Outsider Remedies Discourse*, 79 VA. L. REV. 863, 895 (1993) (discussing the proliferation of Black Codes following Reconstruction and how they “secured a system of feudal peonage”); Gary Stewart, Note, *Black Codes and Broken Windows: The Legacy of Racial Hegemony in Anti-Gang Civil Injunctions*, 107 YALE L.J. 2249, 2257–63 (1998) (discussing the history of Black Codes and their continuing legacy through vagrancy and other laws).

³⁰⁰ To put this differently, many quality of life crimes, including jaywalking, loitering, and obstruction of pedestrian traffic, exist to broaden police discretion, which in turn has the effect of increasing unequal, and often racialized, policing. See Dorothy E. Roberts, *Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775, 780–81 (1999).

such as cutting hair without a license,³⁰¹ or selling “loosies”³⁰²—as best addressed through norms. In other words, a future informed by Afrofuturism and CRT will recognize that sometimes it makes sense “to keep the law at bay.”³⁰³

While these are some of the current “crimes” that are likely to be decriminalized in the year 2044 and beyond, other behavior currently deemed outside the purview of criminal law will promptly be brought within its ambit.³⁰⁴ Mere “words,” when grounded in hate, in some instances will be criminalized, and will certainly be sufficient for permitting the responsive use of non-deadly force.³⁰⁵ Discrimination on the basis of race, sex, national origin, religion, sexuality, or disability—i.e., following a customer in a store because of race, paying an employee less because of sex, banning a passenger from a flight because of perceived national origin or religion—will not only be actionable civilly, but also subject to criminal prosecution.

Finally, in a future informed by Afrofuturism and Critical Race Theory, punishment will be handled differently. Even now, there are few black or brown individuals who have been untouched by this

³⁰¹ See Austin, *supra* note 138, at 1799–80 (noting that the “black community,” at least, has long accepted “hustling,” or engaging in ““a wide variety of unconventional, sometimes extralegal or illegal activities, often frowned upon by the wider community but widely accepted and practiced in [black urban enclaves]””) (alteration in original) (quoting BETTYLOU VALENTINE, *HUSTLING AND OTHER HARD WORK: LIFE STYLES IN THE GHETTO* 23 (1978)).

³⁰² Individual cigarettes are often referred to as “loosies.” The reference to selling loosies is deliberate. It was in attempting to arrest Eric Garner for selling loosies that officers placed him in a chokehold, and held him in a chokehold even as he managed to say, “I can’t breathe.” Garner died as a result of asphyxiation. See Susanna Capelouto, *Eric Garner: The Haunting Last Words of a Dying Man*, CNN (Dec. 8, 2014, 7:31 PM), <https://www.cnn.com/2014/12/04/us/garner-last-words/index.html>.

³⁰³ Austin, *supra* note 138, at 1808 (rejecting the argument that the state should assist the informal economy in black communities and advocating that the government not regulate informal economic activity at all).

³⁰⁴ Of course, the power of the State to decide what to criminalize is almost unlimited. So long as constitutional rights are not infringed on, almost anything can be criminalized. Or decriminalized. For a discussion of the breadth of police power, see Markus Dirk Dubber, *“The Power to Govern Men and Things”: Patriarchal Origins of Police Power in American Law*, 52 *BUFF. L. REV.* 1277 (2004).

³⁰⁵ “Mere words,” including hate speech, have long been deemed insufficient to justify non-deadly force; they have similarly been deemed insufficient to constitute legally adequate provocation. Perhaps unsurprisingly, CRT scholars have criticized this protection of hate speech. See, e.g., Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, in MATSUDA ET AL., *supra* note 199, at 17, 38 (arguing for a “range of legal interventions, including the use of tort law and criminal law,” to combat racist hate speech). At least one CRT scholar has specifically argued for a contextual standard in the context of racist hate speech. See Camille A. Nelson, *(En)raged or (En)gaged: The Implications of Racial Context to the Canadian Provocation Defense*, 35 *U. RICH. L. REV.* 1007, 1051 (2002).

country's race to incarcerate,³⁰⁶ or who do not know firsthand that imprisonment comes with weighty collateral consequences.³⁰⁷ Afrofuturists, as utilitarians, will ensure that punishment, when imposed, serves a public good that exceeds its cost.³⁰⁸ There will be algorithmic sentencing, but it will be individually tailored. For example, someone who violates the law by engaging in an economic crime—all the more offensive given wealth redistribution and the norm against excessive wealth³⁰⁹—might have most of his assets forfeited. An individual who engages in the relatively rare crime of violence—a “heat of passion” killing, for example—might be punished, but the core of that punishment will likely be treatment and therapy to work through anger issues, as well as restorative justice, perhaps in the form of sessions with survivors of the victim. Moreover, while prisons—long known to be criminogenic, essentially finishing schools for criminals³¹⁰—will not necessarily be abolished, they will be a last

³⁰⁶ See Ta-Nehisi Coates, *The Black Family in the Age of Mass Incarceration*, ATLANTIC (Oct. 2015), <https://www.theatlantic.com/magazine/archive/2015/10/the-black-family-in-the-age-of-mass-incarceration/403246> (describing the devastating effects the carceral state, fueled by racist rhetoric, has on the black community). As Regina Austin has written, even when people of color have not felt the impact of mass incarceration directly, they feel its impact on the community as a whole: “Differences that exist between black law-breakers and the rest of us are sometimes ignored ‘The black community’ acknowledges the deviants’ membership, links their behavior to ‘the community’s’ political agenda, and equates it with race resistance.” Austin, *supra* note 138, at 1774.

³⁰⁷ See Coates, *supra* note 306.

³⁰⁸ Paul Butler has written persuasively about a hip-hop theory of punishment that blends elements of retribution with utilitarianism. See Paul Butler, *Much Respect: Toward a Hip-Hop Theory of Punishment*, 56 STAN. L. REV. 983 (2004). However, in this future informed by Afrofuturism and CRT, any theory involving retribution will have for the most part fallen out of favor.

³⁰⁹ Again, this future assumes a commitment to economic parity. For a discussion of CRT and economic issues, including the offshoot movement, ClassCrits, see Angela P. Harris, *From Precarity to Positive Freedom: ClassCrits at Seven*, 44 SW. L. REV. 621, 625 (2015). Harris argues that for ClassCrits, a movement which grew out of CRT, the goal of economic justice is not only to surface class issues, “but rather an egalitarian program of redistribution of wealth, power, and property.” *Id.*; see also Charles R.P. Pouncy, *Institutional Economics and Critical Race/LatCrit Theory: The Need for a Critical “Raced” Economics*, 54 RUTGERS L. REV. 841, 843 (2002) (urging the adoption of “an economics compatible with the goals of eliminating unearned privilege and unjust power distributions”).

³¹⁰ See Todd R. Clear et al., *Coercive Mobility and Crime: A Preliminary Examination of Concentrated Incarceration and Social Disorganization*, 20 JUST. Q. 33, 55 (2003) (finding that once rates of incarceration reach a certain level, the effect is to increase crime in communities); Martin H. Pritikin, *Is Prison Increasing Crime?*, 2008 WIS. L. REV. 1049, 1108 (concluding that prison “punishment—at least as it is realized in modern-day America, through the pervasive utilization of incarceration—may be causing more crime than it is preventing”).

resort.³¹¹ This is because a future informed by CRT and Afrofuturism “would recognize that ‘punishment’ does not follow from ‘crime’ in the neat and logical sequence offered by discourses that insist on the justice of imprisonment.”³¹² Perhaps most importantly, no matter what form the sentence takes, judges will always ask: Is society better off—society meaning everyone; law-abiders and lawbreakers alike—if the defendant receives this particular type of sentence, or not? And the goal of rehabilitation, or rather welcoming back into the fold, will always be the prime directive.³¹³ Of course, in the year 2044 and the immediate years following, a few individuals will continue to insist that rehabilitation does not work. To those individuals, it may be tempting to retort, “Prison didn’t work but we kept doing that for decades.” But in reality, the better response would be, “Wait and see.” This is because a future informed by Afrofuturism and CRT will make sure rehabilitation works. Perhaps, needless to say, given the prime directive of rehabilitation, criminal records will be routinely expunged upon sentence completion. And perhaps, needless to say, the practice of imposing collateral punishments, something CRT scholars have long opposed,³¹⁴ will be retired.

³¹¹ As Angela Y. Davis reminds us, although prisons now seem natural and inevitable, in fact their history is recent. ANGELA Y. DAVIS, *ARE PRISONS OBSOLETE?* 9, 42 (2003). Just as prisons or penitentiaries were created as a more humane response to corporal punishment, it is possible to imagine a turn to other systems that can one day serve as an alternative to prison, and indeed render prison unnecessary in all but extreme cases. Davis writes that a “more complicated framework may yield more options than if we simply attempt to discover a single substitute for the prison system. The first step . . . would be to let go of the desire to discover one single alternative system of punishment that would occupy the same footprint as the prison” *Id.* at 106; see also Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 430 (2018) (describing the Movement for Black Lives’ policy vision of ending prisons as they exist today); Paul Butler, *The System is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1477 (2016) (advocating for eventual prison abolition); Dorothy E. Roberts, *Constructing a Criminal Justice System Free of Racial Bias: An Abolitionist Framework*, 39 COLUM. HUM. RTS. L. REV. 261, 284 (2007) (arguing for abolition of mass incarceration and a dramatic reduction of prison populations).

³¹² DAVIS, *supra* note 311, at 112.

³¹³ See Austin, *supra* note 138, at 1775 (offering a vision with “an explicit goal of the restoration of some (but not all) lawbreakers to good standing in the community by treating them like resources, providing them with opportunities for redemption, and fighting for their entitlement to a fair share of the riches of this society”).

³¹⁴ See, e.g., Ifeoma Ajunwa, *The Modern Day Scarlet Letter*, 83 FORDHAM L. REV. 2999 (2015) (comparing collateral consequences to a “scarlet letter”); Gabriel J. Chin, *Race, the War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER RACE & JUST. 253 (2002) (proposing reforms to mitigate collateral consequences); Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789 (2012) (comparing collateral consequences to the common law punishment of “civil death”); Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457 (2010) (proposing solutions to decrease the disproportionate burden collateral consequences have

Lastly, any discussion of punishment in the year 2044 and beyond, when black and brown people have political and economic power to match their numerical numbers, would be incomplete without some mention of capital punishment, which several CRT scholars argue exists in the present solely because of race.³¹⁵ Suffice it to say that black and brown legislators, knowing from numerous studies that capital punishment has always been tainted by racial discrimination and discrimination against other outgroups, and recognizing that the death penalty might one day be tainted against whites who by 2044 are a minority, will take steps to ensure the abolishment of the death penalty. The Supreme Court will also be eager for the right case to come along so that they can reverse their decision in *McCleskey v. Kemp*,³¹⁶ which turned a blind eye to race-based punishment. In his dissent, Justice Brennan referred to “a fear of too much justice.”³¹⁷ The public will be eager to see who abolishes the death penalty first: legislators or the Court.

CONCLUSION

The ambition of this Article has been to imagine policing in the year 2044 and beyond when whites are no longer a majority in this country; black and brown people are. But it has not just imagined any black and brown future. It has imagined a future informed by Afrofuturism and Critical Race Theory.

To be sure, important questions remain. How do we prepare for this brown and black future? Or more specifically, how do we prepare for policing in the year 2044 and beyond? And how do we make sure a black and brown America does not simply replicate the inequality in policing that exists now?³¹⁸ Just beneath the surface of these questions

on people of color); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1291 (2004) (highlighting the impact of collateral consequences on communities).

³¹⁵ See, e.g., Roberts, *supra* note 311, at 272–75.

³¹⁶ 481 U.S. 279 (1987). In *McCleskey*, the Court accepted as true a longitudinal study that concluded that defendants charged with killing white victims were 4.3 times as likely to receive a death sentence as defendants charged with killing black victims, even after taking into account 39 nonracial variables. *Id.* at 297. However, the Court declined to disturb the imposition of the death penalty against McCleskey, or indeed the death penalty system itself. *Id.* at 308.

³¹⁷ *Id.* at 339 (Brennan, J., dissenting) (responding to the majority’s fear that redressing racial disparities would open the door to claims of other types of discrimination, such as sex, which Justice Brennan described as “a fear of too much justice”).

³¹⁸ As James Forman has documented, this is precisely what happened in Washington, D.C., and other majority-black cities, though as he explains, it was largely in response to the failure of state governments and the federal government to provide wider aid. See FORMAN, *supra* note 289; see also Darren Lenard Hutchinson, *Who Locked Us Up? Examining the Social Meaning of Black Punitiveness*, 127 YALE L.J. 2388 (2018) (reviewing

are others still. Given that “power concedes nothing without a demand,”³¹⁹ and given the fact that efforts to limit democratic participation by minorities seem to be at full-throttle,³²⁰ how do we ensure that a majority-minority country will even matter? Add to this another question: Given the very constructedness of race, how do we ensure that whiteness itself is not simply redefined—with the goal of preserving racial privilege—to include more people so that whites maintain majority status?³²¹ Put differently, how do we ensure that white privilege (or gender, class, or sexuality privilege), like the “mythic multi-headed hydra,”³²² is not simply reconfigured? Do we counter this with a racial alchemy of our own, our own race construction, to build and nurture bonds of interests with whites, such that racial phenotypes become less important than a particular way of viewing the world?

Other questions linger still. How do we make a reality what CRT scholars and fellow travelers have long called for, a *Third Reconstruction*³²³ that would “merge ‘we’ and ‘they’ while eliminating

FORMAN, *supra* note 289) (explaining how Forman’s book can be reconciled with an understanding of the criminal justice system as a manifestation of white supremacy).

³¹⁹ Frederick Douglass, *West India Emancipation*, Speech Delivered at Canandaigua, N.Y. (Aug. 4, 1857), in *LIFE AND WRITINGS OF FREDERICK DOUGLASS*, *supra* note 178, at 426, 437.

³²⁰ See, e.g., Jonathan Blitzer, *The Motives Behind the Trump Administration’s New Census Question on Citizenship*, NEW YORKER (Mar. 29, 2018), <https://www.newyorker.com/news/daily-comment/the-motives-behind-the-trump-administrations-new-census-question-on-citizenship> (discussing how a citizenship question was motivated to chill the democratic participation of recent immigrants); Astead W. Herndon, *Complaints of Voter Suppression Loom Over Georgia Governor’s Race*, N.Y. TIMES (Oct. 11, 2018), <https://www.nytimes.com/2018/10/11/us/politics/georgia-voter-registration-kemp-abrams.html> (discussing the Georgia Secretary of State’s decision to stall more than 53,000 voters’ applications, disproportionately impacting minority applicants, just as Stacey Abrams vied to become the first black woman to be elected governor in the United States).

³²¹ For example, one can imagine whites allowing some current nonwhites to “become white” in order to increase their numbers and maintain majority status. On the malleability of whiteness as a category, see HANEY LÓPEZ, *supra* note 133, at 1–2, for a discussion of the complicated issues in determining who is “white”; NOEL IGNATIEV, *HOW THE IRISH BECAME WHITE* (1995), for a discussion of the process by which “whiteness” is constructed; DAVID R. ROEDIGER, *WORKING TOWARD WHITENESS: HOW AMERICA’S IMMIGRANTS BECAME WHITE* (2005), for the same; Ariela J. Gross, “*The Caucasian Cloak*”: *Mexican Americans and the Politics of Whiteness in the Twentieth-Century Southwest*, 95 GEO. L.J. 337 (2007), for a discussion of how Jim Crow practices were upheld in part by leveraging Mexican-Americans’ nominally white identity; Kevin R. Johnson, “*Melting Pot*” or “*Ring of Fire*”? *Assimilation and the Mexican-American Experience*, 85 CALIF. L. REV. 1259 (1997), for a discussion of the complexities of Latinx assimilating and passing as white.

³²² Stephanie M. Wildman & Adrienne D. Davis, Essay, *Language and Silence: Making Systems of Privilege Visible*, 35 SANTA CLARA L. REV. 881, 895 (1995).

³²³ See, e.g., Butler, *supra* note 311, at 1474–78 (joining other scholars and activists in calling for a Third Reconstruction to address institutional racism and inequality); Harris,

the role that whiteness and blackness play in determining who belongs and who does not”?³²⁴ A Third Reconstruction that could forge “a world in which the theory of race ha[s] been debunked once and for all, and universal humanity and brotherly love would reign as the supreme values undergirding our Constitution, our communities, and our lives”?³²⁵ And to quote a few Afrofuturists, how do we ensure “one nation under a groove”?³²⁶ and “embrace diversity”?³²⁷ without resorting to a “motherfuckin’ pussy riot”?³²⁸

In short, how do we ensure a vision that, consistent with Afrofuturism and CRT, aspires to “make America what America must become”³²⁹—“fair, egalitarian, responsive to needs of all of its citizens, and truly democratic in all respects, including its policing”?³³⁰ The answer I offer may seem inadequate to some, but it is the only honest answer: This Article offers a vision of the future. Another article—about resistance, about the long game—must chart a route there. But rest assured, America will become majority minority. The year 2044 is coming. After all, nothing, not even the technoculture of Afrofuturism, can stop time. What else? “Oh, and you’ll need sunglasses, really cool sunglasses.”³³¹

supra note 133, at 765 (identifying CRT as, in many ways, being engaged in a project of reconstruction and finishing “the unfinished revolutions of the First and Second Reconstructions”); Tracey Meares, *A Third Reconstruction?*, BALKINIZATION (Aug. 14, 2015), <https://balkin.blogspot.com/2015/08/a-third-reconstruction.html> (calling for a Third Reconstruction grounded in equality and structural change).

³²⁴ Lisa A. Crooms-Robinson, *Is the Third Time the Charm? Reconstructing Personhood and Reimagining “We the People,”* 43 HUM. RTS., no. 2, 2018, at 2, 5.

³²⁵ Rhonda V. Magee Andrews, *The Third Reconstruction: An Alternative to Race Consciousness and Colorblindness in Post-Slavery America*, 54 ALA. L. REV. 483, 501 (2003).

³²⁶ FUNKADELIC, *One Nation Under a Groove*, on ONE NATION UNDER A GROOVE – REMASTERED EDITION (Charly Acquisitions 2016) (1978).

³²⁷ BUTLER, *supra* note 37, at 181.

³²⁸ MONÁE, DIRTY COMPUTER, *supra* note 64.

³²⁹ JAMES BALDWIN, *THE FIRE NEXT TIME* 24 (1963) (“[G]reat men have done great things here, and will again, and we can make America what America must become.”).

³³⁰ I. Bennett Capers, *Crime, Legitimacy, and Testifying*, 83 IND. L.J. 835, 880 (2008).

³³¹ WOMACK, *supra* note 41, at 2.