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Afrofuturism and the Law

Bennett Capers*

Abstract

Long before the film *Black Panther* captured the public's imagination, the cultural critic Mark Dery coined the term "Afrofuturism" to describe "speculative fiction that treats African-American themes and addresses African-American concerns in the context of twentieth-century technoculture." Since then, the term has been applied to speculative creatives as diverse as the pop artist Janelle Monae, the science fiction writer Octavia Butler, and the visual artist Nick Cave. But only recently have thinkers turned to how Afrofuturism might guide, and shape, law. This special issue, "Afrofuturism and the Law," features articles that explore the many ways Afrofuturism can inform a range of legal issues, and even chart the way to a better future for us all.

* * *

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 Butler¹

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. Delany²

In 2018, I dragged my husband with me to our local multiplex to see *Black Panther*. Dragged, because superhero movies do nothing for him. Or less than nothing. He finds the notion of someone being able to fly, shoot webs from their wrists, or turn into a giant green hulk when they get angry just too absurd.

With *Black Panther*, though, I wasn't going to let him off so easy. Months and months before it even came out, I saw an early trailer on YouTube, and heard Kendrick Lamar's beat. Then the voiceover began. *I have seen gods fly. I've seen men build weapons that I couldn't even imagine. I've seen aliens drop from the sky. But I have never seen anything like this!* I held my breath as Chadwick Boseman's Black Panther hurled himself through the air and landed effortlessly, panther-like, on a speeding car. Then I saw the images of Wakanda, his African

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¹ Octavia E. Butler, Positive Obsession, in *Bloodchild and Other Stories* 123, 134-35 (1995).

² Rachel Kaadzi Ghansah, Samuel R. Delany, The Art of Fiction No. 210, 197 *Paris Rev.* 25 (2011) (<https://www.theparisreview.org/interviews/6088/samuel-r-delany-the-art-of-fiction-no-210-samuel-r-delany>) (providing a transcript of and commentary on Ghansah's interview with Delany).

country. I mean, a superhero movie full of Black people? With Black people as heroes? With Black people with bad-ass technology? With a motherland—the country Wakanda—rich in natural resources, including the powerful metal vibranium (capable of storing and releasing kinetic energy), a country that had never been colonized or vanquished? And a Black person directing and writing? Afrofuturism itself on the screen? For the first time in my life, I considered pre-ordering tickets.

When I told my white friends I could hardly wait to see *Black Panther*, they nodded along, but I could tell they didn't quite get it. They were interested, but not the way a lot of Black people were interested. Maybe it was about teams and tribes. Maybe it was like whenever I'd see Serena and Venus play tennis, I'd always root for them. Or how, when I was growing up, my family would always gather around the television whenever there was a Black person on the screen, it was such a rare treat. Waiting to see *Black Panther* was like that, but it was also different. There was something else that excited me about seeing *Black Panther*. If, as the theorist V.Y. Mudimbe has argued, the West invented what we think of as Africa—at least the Africa of *Tarzan* and Joseph Conrad's *Heart of Darkness* and Saul Bellow's *Henderson the Rain King* and President's Trump "shithole" imagination—*Black Panther* offered a counter-narrative in which Africa reinvented itself.

So I dragged my husband to *Black Panther*. Picture me sitting in a packed movie theater, open-eyed, mouth agape, my heart like a roller coaster, holding it in rather than running to the restroom because I didn't want to miss a single thing. I'm tempted to say it was like Christmas and New Year's Eve and Juneteenth rolled into one. Or maybe it would be more accurate to say it was like every single time my family gathered around the tv, finally seeing ourselves. Like the rest of the audience, I wanted to give it a standing ovation afterwards. I wanted to stomp my feet and whistle.

In the end, of course, I was just one of the 72 million people who saw *Black Panther* during its opening weeks.³ To say the film tapped into a cultural need is an understatement. Black and brown people, including athletes and celebrities, began adopting the Wakanda greeting and shouting, "Wakanda forever!" And oddly enough, I still think of the California teen who was so "moved" when Michael B. Jordan's character Erik Killmonger took off his shirt and revealed his chiseled pecs that she bit down on her retainer, breaking it. Her orthodontist wrote on Tumblr: "[T]his tiny 17-year-old girl thirsting so goddamn hard she busted steel."⁴

Clearly I was one of many inspired by *Black Panther*. But I suspect I was the only one who saw it and thought back to my time as a federal prosecutor in the U.S. Attorney's Office for the Southern District of New York, and wondered how different the Office

³ Scott Mendelson, Box Office: "Black Panther" Just Missed the \$1.3B Mark, *Forbes.com*, Apr. 8, 2018 (<https://www.forbes.com/sites/scottmendelson/2018/04/08/box-office-chadwick-boseman-black-panther-1-3-billion-worldwide-disney-marvel/#141663866336>).

⁴ Lauren Messman, A "Thirsty" Black Panther Fan Broke Her Retainer Watching Michael B. Jordan, *Vice*, Mar. 7, 2018 (<https://www.vice.com/en/article/kzpj9m/black-panther-fan-broke-retainer-watching-michael-b-jordan-vgtrn>).

would be if Black and brown people had power—Black Power!—like Blacks had power in *Black Panther*. I was probably the only one thinking about how the United States is projected to tip from being majority-white to majority-minority in 2044.⁵ I was probably the only one, too, who walked out of *Black Panther* and thought what Afrofuturism might have to say about law. I am a law professor after all, and see law in everything.

I've opened this introduction this way in part because, at bottom, Afrofuturism is grounded in storytelling, but also because this background explains the genesis of “Afrofuturism, Critical Race Theory, and Policing in the Year 2044,” an article I published in the *New York University Law Review* a few years ago.⁶ And that article, in turn, provides an origin story for this special issue of *Critical Analysis of Law*. You see, when I wrote “Afrofuturism, Critical Race Theory, and Policing in the Year 2044,” my hope was that it would spur others to explore the intersection of Afrofuturism and the law. I even mentioned this ambition in that article: that there would “one day be Afrofuturist articles considering a range of legal issues,” from affirmative action to voting rights issues and more.⁷ So in a way, when Markus Dubber and Simon Stern invited me to guest edit a special issue of *Critical Analysis of Law*, and suggested something on Afrofuturism, it was as if the ancestors were looking on and smiling. I'm particularly proud of the amazing group of scholars we have assembled—Rasheedah Phillips, Ngozi Okidegbe, Etienne Toussaint, and Alex Zamalin—to engage with Afrofuturism and the law.

Of course, this still leaves open an essential question: What *is* Afrofuturism? The term itself is usually traced to the cultural critic Mark Dery, who in 1994 published the influential article “Black to the Future.”⁸ Dery coined the term to describe a trend he was seeing, “speculative fiction that treats African-American themes and addresses African-American concerns in the context of twentieth-century technoculture.”⁹ This Afrofuturist movement, Dery argued, was different in that it addressed “African-American signification that appropriates images of technology and a prosthetically enhanced future” to imagine people of color in the future.¹⁰ Dery also noted that Afrofuturism satisfied an odd logic;

⁵ 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.

⁶ I. Bennett Capers, Afrofuturism, Critical Race Theory, and Policing in the Year 2044, 94 N.Y.U. L. Rev. 1 (2019).

⁷ *Id.* at 5.

⁸ 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 (Mark Dery ed., 1994).

⁹ *Id.* at 180.

¹⁰ *Id.*

given that a recurring theme in mainstream science fiction was alien abductions and domination, the very existence of Blacks in America, originating as it did with abduction and domination, was “sci-fi.”¹¹ In a very real sense, Dery observed, Afrofuturist artists were “the descendants of alien abductees.”¹²

Of course, as Alex Zamalin points out in his essay in this volume, examples of Afrofuturism can be found earlier than the period Dery noted. Edward Johnson’s 1904 novel *Light Ahead for the Negro*, in which the African-American protagonist time travels to a more egalitarian future, is but one example. An even earlier 1857 novel, Martin Delaney’s *Blake; or the Huts of America*, involving an alternative history for American slaves, is arguably another. Still, Dery was recognizing something more cohesive in the 1990s, which saw artists ranging from Sun Ra to Octavia Butler to Parliament Funkadelic to Samuel Delaney engaging with race, narrative, and technoculture. And since then, this engagement has only grown. A range of contemporary artists can now be put in the category of Afrofuturists. Think of the music of Janelle Monáe or Kamasi Washington. Or in literature, the science fiction of Nnedi Okorafor, Tochi Onyebuchi, or even Colson Whitehead. In the visual arts, there is Wangechi Mutu and Nick Cave, to name a few. That said, with the blockbuster film *Black Panther*, Afrofuturism arguably went mainstream, with features on Afrofuturism appearing in the *New York Times*, the *Washington Post*, and other mainstream media.¹³

Still, none of this quite answers the question: What *is* Afrofuturism? I have already mentioned Dery’s definition. But other scholars have added other, complementary definitions. For example, Alondra Nelson, an Afrofuturist scholar, describes Afrofuturism as a way of covering discussions about race, identity, alienation, and the aspirations of the Black community in a utopic future.¹⁴ 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?” Afrofuturist scholar Ytasha Womack defines Afrofuturism as “the intersection between Black culture, technology, liberation and the imagination, with

¹¹ Id. at 180.

¹² Id.

¹³ See, e.g., Alex Fitzpatrick, It’s Not Just *Black Panther*. Afrofuturism Is Having a Moment, *Time*, Apr. 20, 2018 (<http://time.com/5246675/black-panther-afrofuturism>) (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 (<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).

¹⁴ Soho Rep., Afrofuturism, YouTube, Nov. 30, 2010 (<https://www.youtube.com/watch?v=IFhEjaal5js>).

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."¹⁵

In my own work, I have embraced these definitions, but also identified particular themes that can be found throughout most of what we think of as Afrofuturism. The first theme is that people of color in fact have a future. (Given that until recently, people of color have either been invisible, or at most bit players, in most mainstream visions of the future—think *Minority Report* or *Star Wars* or *A Clockwork Orange* or even *1984*—this theme itself is a radical assertion.)¹⁶ Beyond that, Afrofuturist works share a commitment to disrupting racial, sexual, and economic hierarchies and categories. Just on the point of gender alone, Alondra Nelson has described Afrofuturism as a “feminist space.”¹⁷ And the Afrofuturist Ytasha Womack calls Afrofuturism “a free space for women, a door ajar, arms wide open.”¹⁸ Beyond this are themes of alienation from a pre-capitalistic way of living, and reclamation of “approaches, methodologies, and ways of thinking that predate slavery and colonization.”¹⁹ More broadly, and as I put it in my earlier article, 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, it offers a vision of what could be in the future.”²⁰

In that earlier article, after limning these themes, I used Afrofuturism to explore what the law of policing might be in the United States in the year 2044, when the country is slated to tip from being majority-white to majority-minority, and really in the ensuing years when people of color may wield the majority of political and economic power. Given that “Afrofuturism has been proposing ways forward for decades,”²¹ how might problems of over-policing and racialized policing change “when people of color hold the keys to the courthouses and the prison?”²² What does Afrofuturism say about what is likely to be decriminalized, and what “innocent” acts may one day be deemed criminal? Or about how the criminal procedure protections in the U.S. Constitution—the Fourth, Fifth, and Sixth Amendments—might be interpreted? Or about abolitionism, for that matter? These are the questions I attempted to answer.

¹⁵ Lanre Bakare, Afrofuturism Takes Flight: From Sun Ra to Janelle Monáe, *Guardian*, Aug. 7, 2014 (<https://www.theguardian.com/music/2014/jul/24/space-is-the-place-flying-lotus-janelle-monae-afrofuturism>) (quoting Womack).

¹⁶ For more on the historic absence of people of color in mainstream visions of the future, see Capers, *supra* note 6, at 11-14.

¹⁷ Ytasha L. Womack, Afrofuturism: The World of Black Sci-Fi and Fantasy Culture 109 (2013) (discussing, in an interview with Nelson, Afrofuturism as a feminist space).

¹⁸ *Id.* at 100.

¹⁹ Capers, *supra* note 6, at 17.

²⁰ *Id.*

²¹ Amah-Rose McKnight-Abrams, The New Afrofuturism, *Vice: Garage*, Feb. 9, 2018 (https://garage.vice.com/en_us/article/437wq3/the-new-afrofuturism).

²² Capers, *supra* note 6, at 6.

Of course, this was my own distillation of Afrofuturism, and my own attempt to put Afrofuturism and the law in conversation, focusing on one of the most intractable problems of our time, policing. That said, one of the things that most excited me about being asked to guest edit this special issue of *Critical Analysis of Law* was seeing what others would bring to the table in their engagement with Afrofuturism and the law. I especially wanted to bring together thinkers from a variety of disciplines. Alex Zamalin is an Associate Professor of Political Science and Director of the African American Studies Program at University of Detroit Mercy. Ngozi Okidegbe is an Assistant Professor of Law at Cardozo Law School, where she teaches Criminal Procedure, Evidence, and Law and Technology. Etienne Toussaint is an Assistant Professor of Law at University of South Carolina Law School, where he teaches contracts, secured transactions, and other courses relating to business law and critical theory. Rasheedah Phillips has spent a decade working in poor and minority communities, and is currently the Managing Attorney of the Landlord-Tenant Housing Unit at Community Legal Services of Philadelphia. She is also the founder of The AfroFuturist Affair, Black Quantum Future Collective, and a founding member of the Metropolarity Queer Scifi Collective. I was curious to see how thinkers in different disciplines would engage the topic of Afrofuturism and the law, and what interesting conversations would ensue from their various approaches.

There are two more things to say before turning to their essays. First, in addition to wanting to hear from thinkers in different fields, I also wanted to hear from younger voices. It is called *Afrofuturism*, and these writers are the future. Second, I wanted to give writers free rein to engage with Afrofuturism and the law as they saw fit, and in whatever form they saw fit. Like Afrofuturism itself, I wanted this special issue to be experimental, creative, and forward-looking. But I also wanted the contributors to surprise me. And they did.

In “Afrofuturism as Reconstitution,” Alex Zamalin notes that while, at first glance, Afrofuturism and law may seem odd bedfellows, “fundamentally at odds, on opposing sides of the conceptual spectrum,” in fact there is a long history of commonality. Through a survey of the several classic texts of Afrofuturist fiction, Zamalin demonstrates how these texts critique modes of thinking embedded in the legal system. He then argues that Afrofuturism can be defined as a process of reconstitution. As he puts it, “Afrofuturism isn’t simply of significance as a cultural relic of the past or the present.” Rather, “it is a generative frame of engagement that demands our attention in expressing strategies, standpoints, arguments and modes of thinking that can help reconstitute law in emancipatory ways.”

In her essay “Race Against Time: Afrofuturism and Our Liberated Housing Futures,” Rasheedah Phillips illustrates this point—that Afrofuturism can help reconstitute law in emancipatory ways. Specifically, she argues that examining the “temporal structures, times, and rhythms of the law and legal systems can inform legal perspectives, legal rights and the impact of future law-making on poor and historically marginalized communities.” She turns to her practice in housing law to illustrate how time governs every aspect of her work, and how time is “condensed, public memory is erased, community temporalities are disrupted, and access to temporal domains of the future are foreclosed or proscribed by

government entities.” She then gestures to how Afrofuturism as a praxis and a tool might “extend, preserve, expand, and protect community time and space” to in fact create “liberated housing futures.”

Ngozi Okidegbe also engages with time. In “Of Afrofuturism, Of Algorithms,” Okidegbe revisits a frequent target of her scholarship: predictive algorithms that are used by judges throughout the United States to determine whether an arrestee is likely to miss a court appearance or commit another crime, and thus should be denied bail or subjected to a high or otherwise strict bail; and on the sentencing end, to determine the likelihood of recidivism as a factor in setting a sentence. On their face, these predictive algorithms are already about time. But Okidegbe invokes Afrofuturism to think about time more broadly, and about a path into a future where Black and other marginalized people not only have a seat at the table in determining which inputs go into algorithms, but even in the “dismantling of the criminal legal system as we know it and its reconstitution into one that seeks to ensure the well-being and safety of all.”

Finally, in “For Every Rat Killed,” Etienne Toussaint uses time to look backward to his own childhood, and the trauma of “grasping for better.” He asks whether “capitalism’s competitive and individualistic culture—a spirit that thrives on the exploitation of the weak to further capital accumulation of the strong—not only normalizes violence as a mechanism for social mobility but [also] sews divisions.” And he asks whether Afrofuturism can help us envision a “technofuture free of the structures of racial oppression that predominate modern life.” He imagines a new vision, “the vision of our grandmothers.”

As I mentioned earlier, it was my hope that in giving the contributors free rein, they would find new ways to show Afrofuturism’s potential to reimagine, and reshape, the law. And of course, to reshape the future itself. Because at the heart of it, Afrofuturism is about imagining better, more egalitarian futures. And since the law shapes our present, and polices our future, we need more conversations about Afrofuturism and the law. Hopefully this special issue of *Critical Analysis of Law* is a worthy contribution to that end.