

IfRFA presents: Black to the Future

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- Hello everyone, and welcome. We'll get started in just a minute. We're just letting folks virtually settle in. All right. The removal of the slide is designed to, for us to get started. So thank you everyone for joining us. I'm so excited for this event, I'm so excited that y'all can be here today I'm so excited for our guests, Etienne Toussaint and Bennett Capers, and our fantastic moderator and fellow, Itaff Bala. So I'll turn it over to them in a second, but I just wanna sort of situate this event a little bit to say that, you know, we're really excited at the Initiative for a Representative First Amendment, where I'm the Director, to sort of host events that sort of push our thinking of what constitutes the realm of the First Amendment. And that's one of the reasons I'm so excited to have this conversation today that's focused on sort of policing and the future of policing, specifically thinking from sort of an Afrofuturist lens, and how that Blackness, sort of experiences of Blackness more generally interact with the ways in which policing regulates our lives and our speech. So with that, I'm gonna turn it over to our fantastic guests and get out of the way, but we're so excited to have Itaff, who's one of our fellows, and now I guess a rising 2L at Case Western Reserve University School of Law, and working, spending her summer at Berkeley, hopefully learning all kinds of cool things about both the First Amendment and tech and policing, who will be sort of moderating our conversation, asking some questions. and then about, you know, probably with 15 minutes left, we'll sort of turn over to audience Q&A. So, yep. Thank you. Thank you again for joining us, and Itaff, take it away.

- Hello everybody. So I'm really excited to be here having this conversation with y'all. We got a lot of interesting discussions planned, so I'll just go ahead and jump on right to it and introduce our special guests. So first, we have Professor Etienne Toussaint. He was born and raised in the South Bronx, and is an assistant professor of law at the University of South Carolina School of Law, starting this fall, where he teaches various business law courses. His scholarship employs critical race theory and social and political philosophy to study community development, economic and environmental justice, contract law and legal history. He has a developing interest in the intersection of the First Amendment and critical race theory, inspired by the Trump administration and the violent response to the Black Lives Matter protests this last summer. He previously taught at UDC David A. Clarke School of Law, and at the George Washington University Law School. Professor Toussaint is also a graduate of MIT, where he earned a degree in mechanical engineering, and he went on to get a master's in environmental engineering at the Johns Hopkins University, and his JD at Harvard Law School. And today, we'll be discussing his piece, Blackness as Fighting Words, so please welcome Professor Toussaint . And next up, we have Professor Capers. So in fall 2020, he joined Fordham Law School where he teaches evidence, criminal law and criminal procedure. He's also Director of the Center on Race Law and Justice. He's a former federal prosecutor, and his academic interests include the relationship between race, gender, technology, and criminal justice. His articles and essays have been published or are forthcoming in, and this is a lot, so hold on tight. The California Law

Review twice, the Columbia Law Review, Cornell, Fordham, Michigan, Minnesota, NYU, and the UCLA Law Review, among others. He has thrice been voted Teacher of the Year, and is an elected member of the American Law Institute, Director of Research for the Uniform Laws Commission, and has served as Chair of the AALS Criminal Justice Section of, and Chair of the AALS Law and Humanities Section. Governor Cuomo has appointed him to serve on the Judicial Screenings Committee, and he's also served for several years as Commissioner on the New York City Civilian Complaint Review Board. He is the author of "Afrofuturism, Critical Race Theory, and Policing in the Year 2044", so please welcome Professor Capers. And it would be great for both of you to give a brief background on your piece so everyone gets kind of an idea of what they're about, and with this, we'll start with Professor Toussaint, and then we'll go back to the future and have Professor Capers talk about his piece before we move on to the questions.

- Fantastic. Well, good afternoon, everyone? I am honored to join this distinguished panel at my Alma mater, alongside my dear brother, Professor Bennett Capers, who is a true role model for me personally, and also a tremendous asset to the Academy on issues of race, criminal law, and social justice. I'm humbled to have this opportunity to share a few insights from my essay, "Blackness as Fighting Words", in which I explored the issue of police violence during peaceful public protest through the lens of the First Amendment. If I were to summarize the focus of the exploration in a single sentence, it would be this: are there aspects of the First Amendment to the US constitution that legitimate, promote, or in the worst case justify police violence during their encounters with public protestors? Let me begin by describing my own introduction to fighting words. Where I grew up in the South Bronx, the wrong words could turn an innocent sparring match on the playground into a full-out asphalt brawl. We were naive young Black boys enacting tropes of hyper-masculinity, so often we would form a circle around the contenders, laughing as they hurled jokes back and forth about the athletic ability or sneaker selection, but inevitably, as soon as someone uttered that dreaded phrase, "yo mama", the playful exchange always took a turn for the worse. We all knew there was no turning back at that point. In the Bronx, the phrase "yo mama" was fighting words. As a Black youth growing New York City in the 1990s, mastering the nuances of such fighting words is critical to maintaining friendships and keeping potential enemies at bay. However, during the presidency of Donald Trump, fighting words has seemingly taken on new meaning. Whereas the fighting words of my youth reflected bruised egos and differences of opinion, the fighting words of Donald Trump have normalized racist, sexist, homophobic, and xenophobic rhetoric that too often has fanned the flames of violence, especially between citizens and police. The resurgence of protests by Black Lives Matter activists and their rallying cry, "Black lives matter", has ushered a global reckoning with the meaning of this violence. This project then considers the implications of this generation's acclimation of Black humanity amidst the social tensions exposed during COVID-19. What has the Trump's administration's militarized response to public protest meant to a world still battling the scars of racial oppression? A wound laid bare by America's racially biased, aggressive, and supervisory culture of policing? I would argue that Black identity itself or Blackness, whether articulated by the pure speech of racial justice activists who affirm Black humanity, or embodied by the symbolic speech of Black bodies assembled in collective dissent in the public square, has become fighting words in the consciousness of America. A type of public speech unprotected by the constitution. What do I

mean by fighting words? Well, let me begin by clarifying a few points about the contours of freedom of speech in the United States. In 1989, US Supreme Court Justice William Brennan declared in *Texas V Johnson*, that if there is a bedrock principle under the First Amendment, it is that the government may not prohibit the expression of an idea, simply because society finds the idea itself offensive or disagreeable. Since 1791, White citizens of America had been empowered to peacefully march and demonstrate on public lands to petition the government for redress grievances. However, the constitution and its Bill of Rights have maintained a complex relationship with its minority citizens, beginning with the Africans who were enslaved as the chattel of many of the Constitution's writers, and continuing with their descendants who frequently live as nominally free, but substantively second-class citizens. Prior to the Civil War, enslaved Africans were prohibited from assembling for education, for leisure, for worship, or for collective expressions of dissent in the public square. Slave patrols, precursors to modern American policing, that comprise White men deputized to prevent rebellions by stopping any enslaved people who happen to be on the roads, searching them and preventing them from congregating, enforced these slave codes. When uprisings of the enslaved occurred, Black men and Black women were met with lashings, lynchings, and ultimately legal holdings that sought to perpetuate and justify their debasement. And even after slavery was abolished by the 13th Amendment, Black codes were enacted across the United States to restrict the freedom of Black citizens, from restrictions on their rights to assemble for leisure, to restrictions on their right to assemble for public protests. Although Black Americans were granted access to the Constitution's Bill of Rights during the Reconstruction Era, the rise of racial terrorism in the form of the KU Klux Klan, coupled with the refusal of law enforcement to protect Black lives from Klan's acts of violence stifled the First Amendment rights of Black people. As scholars such as Brandon Hasbro have argued, America's modern system of law enforcement then emerges as a badge and incident of slavery. In our modern age, little has changed, as we've all seen as the constitutional rights of Black and other minoritized protesters has increasingly come under attack. So where do fighting words come into play? It is important to remember that the rights granted by the First Amendment to the constitution are not unconditional. And here I wanna drop a footnote for later discussion because the notion of what rights citizens should be granted by the state or what rights are inherent and should be recognized, is absolutely central to critical race theory and the Afrofuturist project. In the United States, while the federal government cannot generally regulate speech based on its content, it can enact reasonable content-neutral restrictions on its time, place and manner. Additionally, some categories of speech are given limited or no protection under the First Amendment. For example, some kinds of speech are considered so harmful, so injurious by themselves, their very utterance tending to incite an immediate retaliation or breach of the peace, that they are deemed outside of the Constitution's protection. Such words are called fighting words. The fighting words doctrine originated in 1942 in the case of *Chaplinsky v. New Hampshire*. Mr. Chaplinsky, a Jehovah's Witness drew several complaints from the residents of Rochester, New Hampshire, after defaming various religious sects while proselytizing. After calling the City Marshall a quote, God damned racketeer, and a quote, damned fascist, end quote, Chaplinsky was arrested and convicted under a state law that made it a crime to address any offensive, derisive or annoying word to any other person who's lawfully in any street or other public square. Chaplinsky appealed his conviction and challenged the law, arguing that the city ordinance violated his

freedom of speech under the First Amendment. However, in a unanimous opinion, the Supreme Court held that Chaplinsky's "fighting words", incited an immediate breach of the peace and consequently they were deemed unprotected speech under the First Amendment's freedom of speech clause. The court considered Chaplinsky's words, "Of such slight social value that any benefit that may be derived from them "was clearly outweighed by the social interest "in order and morality." Although Chaplinsky has never been overruled, the Supreme Court narrowed its scope in later decisions. Still, in matters involving public protests where the perceived racist actions of police officers, the fighting words doctrine raises important questions about the limits of constitutional protection for Black and other minoritized citizens. Some courts have overturned convictions based upon local laws prohibiting the interruption of policing work with offensive language, affirming a sense that the First Amendment protects a significant amount of verbal criticism and challenge directed at police officers. However, other courts have held that public expressions of dissent to law enforcement can constitute fighting words. Even more, some state and local governments have responded to such concerns by simply limiting the range of public speech that can be criminalized to only include fighting words, effectively granting police officers discretionary authority to determine what kinds of activities or public speech amounts to criminal conduct. In other words, legislatures have bypassed wrestling with the racial tensions between law enforcement and minoritized communities by avoiding acknowledgement of the prevalence of implicit racial bias among police officers altogether. Rather than question why police officers routinely use pepper spray, tear gas, rubber bullets, and other violent policing tactics in response to peaceful public protest about racial injustice. the doctrine threatens to punish people who anger police officers with their free speech. As a result in my opinion, a sense of confusion remains, especially regarding public speech that decries racism at the hands of the police. Could the phrase "Black lives matter" and similar expressions of speech that affirm the dignity of Black lives, or decry the injustice of institutional racism be deemed fighting words by police officers, because they disturb the peace? Here, I will set a second footnote, both critical race theory and the Afrofuturist lens would urge us to question, what do we mean by peace, and for whom? The difficulty that courts have faced in determining whether the constitution protects public protests of perceived racist policing suggests to me that the notion of anti-racist speech as fighting words is still up for debate. Perhaps one reason for a such ambiguity arises from the very concept of disorderly conduct, which I would argue is an inherently racist idea in the United States. When anti-racist speech threatens the commonplace nature of police supervisory authority, even when delivered in response to unjustified yet ubiquitous police aggression, it is reasonable to presume that police officers will perceive such language as fighting words that incite an immediate breach of the hierarchical social order. Another reason for the ambiguity of anti-racist speech as fighting words arises from the criminalization of disobedience to police orders. Not only do citizens struggle to determine when policing tactics are lawful, but they also face the risk of bodily harm, or even worse death, if they disobey a police order to challenge perceived unlawful conduct. Further, civil rights lawsuits alleging violations of constitutional rights by police officers must confront, as we all have learned, the blue wall of silence, the weaponry of indemnification policies and police unions, and the protective shield of the qualified immunity defense. Maybe it is the very idea of Blackness as something other than property that becomes fighting words in the eyes of American

exceptionalism, a type of symbolic speech so harmful to White supremacy, so capable of inciting imminent lawless action, so disruptive of order maintenance policing, that it is deemed a peril to the veil of White supremacy that looms over the American constitutional order, and consequently is prohibited from the public square. Maybe this explains why police officers arrive to BLM protests with guns and tanks and shields and gas long before the first stone has been thrown, or the first rallying cry has been sung. The very utterance of the phrase "Black lives matter" tends to incite imminent violence and unbridled rage from police in the city streets across America, because if Black lives truly matter, well, so much our so-called social order must be called into question. If the words "Black lives matter" and the peaceful assembly of protestors also encapsulates the righteous indignation of minoritized citizens. Discussions of Black Lives Matter by activists and scholars evoke what Cornell West calls "The prophetic pragmatism of the Black radical tradition." Here, I would drop a third footnote, if CRT reveals our current version of political economy as merely a genre of modernity, one shaped by a Western conception of what it means to be human, then in an Afrofuturist discourse about liberty we must ask, what does it mean to be free? This dynamic to me reflects unresolved tensions in the First Amendment's treatment of race relations in America. Such tensions, masked by seemingly neutral constitutional constructs, rationalize the iron fist of the penal state in response to peaceful public protests, smothering the constitutional rights of Black and other minoritized citizens by legitimating violence, not to quell social disruption, but rather to reinforce social control. In closing, I believe these racial tensions in the First Amendment reveal three insights that are important to the ongoing discourse on policing in America. At first unresolved racial tensions in the First Amendment, focusing here on ambiguities in the fighting words doctrine perpetuate the racially-biased, aggressive, and supervisory culture of American policing. Such challenges are laid bare when peaceful assemblies of BLM protestors who petition the government for redress of racial grievances are deemed disturbances of the peace by police officers and met by violence police force. Actions that implicate the fighting words doctrine, and call into question the contours of unprotected speech. Importantly, such discretionary authority reveals the misplaced focus of the fighting words doctrine, or the First Amendment more generally, on the inability of the recipient of fighting words to restrain themselves from violence, and not on the actual substance of the words spoken. This framing renders the police officers as judge, jury, and executioner, when it comes to interpreting the meaning of Black and Brown protest speech. Second, such unresolved tensions in the First Amendment, as conveyed by racially biased and aggressive police culture, casts a dark shadow over the liberty of Black and other minoritized citizens who experience racism at the hands of police, yet avoid acts of protest for fear of bodily harm or arrest, resulting in a chilling effect on free speech. To be sure, modern courts rarely enforce convictions based on the usage of fighting words to disturb the peace, notwithstanding does the existence of a legal regime that threatens to criminalize anti-racist public speech if it harms its target and insights an immediate breach of the peace, even if such arrests are routinely unenforced by courts, constitute a culture of suppression that silences descent with fear of police retaliation. A rule of law driven by fear of the police not only distorts the ideals of liberty that underscores liberal democracy, but it is also eerily reminiscent of the culture of slave patrols that threatened the lives of defiant Black Americans in Antebellum America. Third and finally, unresolved racial tensions in the fighting words doctrine illuminates the embeddedness of racism in American policing

culture more generally. As critical race theorists have taught us, this culture not only constructs and reconstitutes the social order by perpetuating stereotypes of minoritized communities as sites of disorder that require constant supervision, but it also degrades the dignity of Black and minoritized Americans by treating them as second class citizens, unworthy of private autonomy, while hindering the broader policing goal of minimizing crime. If I could ask one question of Afrofuturists, it would be this. What does human dignity mean in a future version of these United States that has been wrested away from a racist, misogynist, and settler colonialist vision of human being? Taken together, I think these insights suggest that until we as a nation wrestle with the racial subtext of modern policing, a culture woven into law that silences the public protests of citizens in violation of their First Amendment rights, and rationalizes violence at the hands of law enforcement, Black America will remain at peril to the veil of White supremacy that looms over the American constitutional order. Importantly, I know this is not a call to transgress race, or usher in an era of post-Blackness. In other the scholarship I note the importance of embracing the cultural specificity of Blackness to dislodge the perceived neutrality of Whiteness, nor is this an attempt to centralize Black identity or Black performativity as something to be pitied. As professor Imani Perry eloquently retorted, I must turn the pity and gaze back upon any offer it to me, because they cannot understand the spiritual majesty of joy in suffering. Rather simply, this project for me, seeks to bear witness to the absurdity and perversity of state-sponsored violence of any and all affirmations of Black humanity, and beckons America to a moral reckoning, a willingness to embrace anger, embrace rage, embrace the normality of fighting words, and use it as a catalyst for change.

- So, I suppose I'm up next. So I wanna start off by thanking Kendra and the other organizers for inviting me, and Iltaff for that great introduction, and I just have to say I'm so excited to be in conversation with Etienne and his exploration of Blackness as fighting words. I will say in full disclosure, I'm not a First Amendment person, I'm a policing person, but just being at this event has gotten me thinking more about the intersections between the First Amendment and policing. So, for some years now, I have been thinking and writing about police technologies, especially with respect to their potential to make policing more efficient and transparent, and also the potential to de-racialize policing and make it more egalitarian. So my plan today is to revisit some of my thinking, and build upon it. So specifically, I want to build upon the article I wrote, it feels like a decade ago, I guess it was just a few years ago, titled Afrofuturism, Critical Race Theory, and Policing in the Year 2044. So that project was inspired by projections that by the year 2044, the United States will tip from being majority White, to be majority minority. So the projects that have allowed me to ask what the future could look like in 2044 when people of color make up the majority. And really in the ensuing years when people of color obtain political and economic power to sort of match their numerical power. And more specifically, how could some of the problems we've been wrestling with from mass incarceration, to overcriminalization, to police violence, be addressed when people of color hold the keys to both the courthouses and the prisons? Equally important, how could people of color harness technology to make policing both more efficient, and more egalitarian? So to answer these questions, I looked to see how artists, cyber theorists, and speculative scholars of color, IE: Afrofuturists and critical race theorists, have imagined the future. And with that said, I'm not gonna spend a lot of time in my brief time talking about Afrofuturism or critical race theory. I'm

happy to talk more about that in the Q&A, but suffice it to say, that they both have some principles for Afrofuturism, and embrace of technology for both Afrofuturism and CRT, a goal of disrupting hierarchies along lines of race, gender, sexuality, class, whatever, that lend themselves well to my project of imagining policing in the year 2044. So in my article, I suggest that in a future informed by Afrofuturism and critical race theory, technology itself would likely contribute to reduction in crime. So consider the technologies we already have, and the future technologies we can imagine. So for existing and emerging technologies, think of the likely exponential increase in the use of surveillance cameras and eye-in-the-sky technology. Think of the perception of facial, perfection, I'm sorry. Think of the perfection of facial recognition technology and other biometric technologies. Think of the likely instantaneous access to big data, the use of remote scanners to detect unlawful weapons, the widespread availability of short range communication devices to obviate the need for traffic stops, or even the availability of self-driving cars that obviate the need for traffic stops. Think of the potential likely collection of DNA data of every newborn, or machine learning. All of this I argue, can contribute to deterring criminal activity and improving apprehension. So first things first, it's just imagining what the future holds as we embrace more technology. I also make the argument that such technologies can even reduce unequal policing. And, you know, I'm just gonna focus right now on unjustified police violence, especially, as it impacts Black and Brown communities. So, increased surveillance alone is likely to deter some police conduct violence, but it can more importantly document police violence on the backend. And even more importantly, I argue in my paper that technology has the potential to reduce the use and need for excessive force. So scanners, for example, could tell police whether a suspect is armed or not. Facial recognition technology combined with access to big data could tell the police whether somebody has a history of nonviolence or not, and thus reducing the risk of escalation. We could even imagine technologies that allow police to disable weapons from a distance. Beyond this, I argue that technologies might be our best hope of overcoming the human biases we all know about. So we can imagine technologies that move us closer to real reasonable suspicion, so that looks encounter stop-and-frisks could turn on actual reasonable suspicion, rather than the proxy of race. Or even to borrow from Etienne of the proxy of Blackness as, you know, fighting words. So as I've written in my article, you know, you can imagine weapon scanners potentially telling the police that a bulge in a Black teenager's pocket is nothing more than an old fashioned cell phone, but that the White tourist who looks like he's from Texas really does have a gun. Facial recognition technology with access to big data could tell the police that the Brown driver repeatedly circling the block, in fact works in the neighborhood, and is probably looking for a parking space. And that the clean cut guy sitting in the park bench, is in fact a registered sex offender too close to the playground. So in a way, that's not intrusive. It would tell the police whether somebody is a troublemaker casing a neighborhood, or a student returning home with a bag of Skittles and an iced tea, a burglar about to commit a home invasion robbery, or a Harvard professor entering his own home, a thug with a gun or a police chief, or a trespasser attempting to get into the Capitol building, or a US Senator, a mugger looking for his next victim, or future US Attorney General. And all of these are based on actual cases. It would also tell them that the White kid from Jersey who's driving around Harlem is not there to score drugs, but to see his Black girlfriend. So the technologies I'm referring to, I think could be embraced in a future informed by Afrofuturism and critical race theory. These technologies that

I'm referring to are likely to be consistent with Afrofuturism's embrace of technologies that disrupt hierarchies along lines of race and gender, and they can certainly help de-racialize policing, and the kind of, you know, discretion, that has long been a concern of critical race theory. So I'm gonna say a few words right here about policing and technology, because usually this is where I get pushback from audience members. And the first pushback I usually get, is why should we trust technology, when the technologies we have seem to replicate and even exacerbate, current racial inequalities? And people like to refer to facial recognition technology, or risk assessment algorithms. And, you know, I concede that point. Let's be honest, the current state of technology has a race problem, which is not surprising. Bias in, bias out. And I also readily acknowledge that technology has been anything but an innocent bystander when it comes to things like mass incarceration. So there's a cultural critic and digital artist by the name of Nettrice Gaskins who says, historically people of color have been casualties of technologically-enabled systems of oppression. A quote that I like. And I also like a quote from Ruha Benjamin, the sociologist and futurist at Princeton, who's coined the term, "The new Jim code", a play on Michelle Alexander's, "The New Jim Crow", to warn that technologies can perpetuate and exacerbate inequalities, especially when they have the veneer of being free from human influence and bias. But none of this suggests that bias technology is inevitable. And biases can be identified and eradicated, or at least minimized. And I'm happy to talk more about this when we get to questions. So, but I will say, like just common sense. Cameras do not automatically have implicit biases, or suffer from unconscious racism, but people do. So that addresses the first pushback I tend to receive. Point two is this: my project is not only about imagining technologies that have been purged of biases, it's also about imagining more diverse people at the table in creating technology, and in saying, what kind of technology do we want? It's about imagining a bottom-up approach to technology, rather than a top-down approach. It's about imagining the benefits that will flow, or could flow, when racial minorities have the agency to actually produce technology, create code, recode, drop a remix. So to again, borrow from Ruha Benjamin, what interests me is thinking about how technoscience can be appropriated and re-imagined for more just ends. Point three is this: I know I'm suggesting more surveillance and more of the technologies at the time and Black and Brown people are already heavily surveilled. I know this project may sound privacy-diminishing, but what's often missing in discussions of privacy is that privacy has never been equally distributed. What excites me about my project is it has the potential to redistribute privacy, such that those who have historically enjoyed a surfeit and abundance of privacy will enjoy a little less, and those people who look like me, and I'll say Etienne, who've always been subjective to hard surveillance by police, will face less. So at least it'll go from higher of surveillance by police to soft surveillance by cameras. So, I know I'm leaving a lot of questions unanswered. I admit that in my paper. It sort of concludes with an acknowledgement that I'm leaving a lot of questions unanswered, such as how do we map a way to this future? How do we make sure Black and Brown America does not simply replicate the inequality in policing that exists now, how do we guard ourselves against resistance from people who want to maintain the status quo? How do we prepare for the long game? These are questions I left open in 2018 when the article was published, and these are questions I'm still thinking about now. And I will add another question, prompted by this whole event, how do we think about the future of policing and the First Amendment? Which is another reason I'm so glad I'm in this conversation with Etienne. So I'm hoping we will

talk more about that during the Q&A. I'm also hoping we will talk a little bit about the storming of the US Capitol on January 6th. Somehow that seems to be in the background of everything that we're talking about today. But I will say the first step to thinking about all of these questions, at least for me, is thinking about the long game. If we said to every Black and Brown, and White parent out there, your children and grandchildren are going to live in a very different world, one that is far more diverse, where they have the potential to make the world a better place, where they truly have the ability to create a new country, where they have the ability to create and harness the technologies they want, how would we prepare our children and grandchildren differently? Like how would we prepare them now, to be ready to inherit that future? So that's my big question. So I will end there, and I'm looking forward to this conversation.

- All right, thank you so much. Speaking of questions, I do have about four of them prepared. And if we have some time at the end, we can always try and throw some other ones in from the audience, or if you'll have other things. So this first one, the first question here is about protesting, and it's directed more towards professor Capers, And this was inspired by last summer's anti-police brutality demonstrations, and how White protesters were visibly treated differently than Black protestors. And it's interesting to think about what this dynamic looks like in this very colorful future that you described, and especially with January 6th and all of those events that you've mentioned as well. So for you, what do you think the right to protest looks like in the future through your lens?

- So, and when you say the future, I'm gonna jump ahead to my imagined future, 2044 and beyond, again, when you know, the script has flipped, people of color have numerical power, economic power, social capital power, what have you. So let me say upfront that in my article, even though the focus is on policing, one thing I do say in the article, is I try to encourage, I throw out something where I'm encouraging other scholars out there to apply Afrofuturism to other areas of the law. So I'm loving that Etienne is, you know, willing to engage in, not only a First Amendment scholar, but also talking about Afrofuturism, because I would love to see like how an Afrofuturist sort of imagines the First Amendment, including the fighting words doctrine, and how that might be different. Especially if they imagine a future where the Supreme Court looks different and you know, Justice Sotomayor is now Chief Justice Sotomayor, and the Supreme Court is made up of, you know, justices who are very diverse in terms of race, sex, class, disability, everything. But that being said, I think if I imagine sort of a future of protest in this imaginary world, this future world, I also have to bring up technology. So again, if we're thinking about people of color harnessing technology, we are also sort of thinking about how that technology might be more egalitarian when it's being used by the police, and also, you know, useful when it's being used by other people. So, if I can say something about technology in my answer, I'll say, you know, again, I've already mentioned we tend to view often technology, especially surveillance as a negative, but we have to remember, it also brought us the power of sousveillance, the power to look back, to record what we see, the Harvard critical race theory scholar, Lolita Buckner, in his calls, the equivalent of a White witness, like somebody to vouch for people of color, and said that's what really happened. And, you know, so I think tech has pluses and minuses. I just wanna emphasize that. And clearly with

the protests we saw last summer, we saw the government using technology. We saw them using drones to surveil and track protesters, we saw presumably the use of facial recognition technology, but we also saw technology being wielded by protestors and the media, and other everyday citizens to record police behavior during those protests. So one immediate thought is, on the policing end, and on protest end, everybody will be recording everyone, and that in itself might be a positive, because that's gonna reduce sort of like effed up behavior on both sides. And also create a record for review later on. But the other thing I have to say is, in my future world, keep in mind, there are fewer police officers, defunding the police has sort of happened. There's more income inequality, they're actually fewer things to protest. So it's sort of interesting imagining a future world, like what happens, you know, how bad are protests gonna be when there are fewer police and fewer things to protest? Which might seem kind of Pollyanna-ish, but that's the world I'm envisioning. And the last thing I will say, is my hope in this future world is that people of color, and I promise this is my longest answer to any of your questions, I hope, my hope is in the future world, people of color who've experienced unequal policing, will now be champions of equal policing. So the goal of critical race theory is eradicating sort of racial subordination. It's not enacting racial comeuppance. Similarly with Afrofuturism, it's imagining a future free of hierarchies along multiple lines, you know? So I think all of that will sort of benefit sort of how we think of protest, and rather if we even need protests going forward. Sorry to be long-winded.

- No, it's okay. We love long-winded answers here. So thank you. Our next couple of questions get a little spicier. So this first one has to do with respectability politics, and how a lot of conversations about policing involve a very Whitewashed perspective of what behavior is appropriate, quote-unquote. And it sounds like respectability politics both supports Blackness being seen as fighting words, or is the go-to logic for proving why a victim deserves to be treated like a human being. So, this one's more so for Professor Toussaint . How do we look critically at police interactions with Black people without using respectability politics? And what does that conversation look like?

- Yeah, that's an excellent question. Thank you so much for asking it. I think it begins by clarifying both the role and purpose of police officers, doing so in conversation with communities in democratic discourse, and then using insights from those conversations to drive policy and reform, even when reform, And this is perhaps a hard pill to swallow for some, even when reform means abolishing some kinds of policing as we know it. You know, currently, and this is how many of us experienced policing growing up, we understand police as individuals who show up in our communities to enforce the law, to promote peace, to further "civility", to remove unwanted or dangerous people or kinds of behaviors. And to begin to disentangle how some of those dimensions are connected to respectability politics, I think we also, I think we need to connect issues of race to issues of political economy. You know, because racism does not exist by itself. And I think this is a really important point, because it means, when some people say, we need to have a moral reckoning, we need to have some conversations about race, and if only everyone can understand how bad racism is, we can move past some of the issues that we face. The reason why that falls flat, and most people don't see that as the final solution is because there's a tight connection between racism and our political economy, which

some might describe as sort of a racial capitalist economy. There are ways in which racialism serves to perpetuate modes of labor exploitation, modes of property expropriation in subordinated communities, modes of policing that serve economic goals, and so I think that is an important conversation to have. And I think that then would pull us into a much larger and more imaginative, and perhaps more radical conversation that begins to change challenge the economic conception of man, that sort of shrouds how we understand US political economy. And for this, I think it is important, although many politicians would have us not dive into history using lenses like critical race theory of the 1619 Project as just two examples. I think it's really important that we revisit history, because we will see that this economic conception of man that is the or predominant framing of what it means to be human in these United States, you know, is a more recent invention, so to speak, right? It came about during the enlightenment period, supplanting what was then a more theological conception of what it means to be human. And I only raise these because I think then that conversation allows us to question, a lot of our conversations around policing use economic language like efficiency, cost maximization or minimization. And there are other conceptions that are equally important to democracy that should also be on the table. Words like equity, words like dignity, words like morality, that are harder to find fit into that economic, sort of secularized framing of a human being, thinking about human being as a kind of praxis. And so I think having that more imaginative and broader conversation, one that might even push back on capitalism as we know it, so to speak, right? And think about the ways that capitalism as we know it, perpetuates what many would call a genre of human being, right? One vision of what it means to live in relation to one another. I think then we can get a little bit deeper on the conversation about respectability and social order, and peace and freedom, and think a little more imaginatively. I think in that conversation, technology could be used as a lever for good, but unless we go to that point, we're gonna continue to run into challenges where technology continues to just reify the same conversations that we're having.

- Thank you for that. I actually, since we have a few minutes left, I'm really curious to hear Professor Caper's thoughts on this as well, and then we can maybe try and squeeze in one more question. So, please go ahead.

- So that was such a great answer from Etienne. I will just add to the aspect on respectability politics. I think it's sort of interesting how much that, it seems like there's already been a shift in just the last few years. You know, when we think about the response to George Floyd, it's sort of interesting how, even though the police were responding to the idea that he had a \$20 bill that wasn't legitimate, there wasn't the same demonization that we are used to with respect to Black and Brown people who are victims of police violence. And I think already people are like, okay, well everybody deserves, to go to what Etienne was saying, sort of dignity, it doesn't matter whether you're middle class, it doesn't matter whether you're Henry "Skip" Luis Gates, like anybody deserves basic dignity. I will also add, I think one thing that might be contributing to moving the needle on this is just we have become a society that polices so much, that it is hard for anybody to sort of have sort of this respectability. Not anybody, but basically Iltaff, one in three Americans has been arrested at some point. So it's very hard now, like almost everybody has the sort of taint of being arrested. So I think the idea like, oh well, this person

doesn't deserve protection because this person has a criminal history, might also fall to the wayside. simply because now, anybody has a criminal history.

- All right, thank you. So for our last question, I'm gonna shift gears here and talk a little bit about critical race theory and gender differences, and the fact that a lot of conversations about policing and police brutality is centered around Black men. And as someone who is not a man, and for others who aren't men in the room, I'm interested in hearing about how both of you thought about other genders when you were writing your pieces or imagining the future.

- Yeah, I'll just share briefly. It's such an important point. It's an important point, not only for policing, but also thinking about the First Amendment. Because I think in many ways, the concept of speech, right? Whether it's pure speech or symbolic speech, is gendered in the United States. The notion of what it means to speak freely, I would argue, stemming from, you know, the constitution's origins and the First Amendment, was written through the lens of a dominant White male gaze. And so I think when we talk about, you know, policing the public square, almost on an unconscious level, in ways that we don't fully grasp, our minds immediately shift to thinking about a male experience of speech in that public gaze. When we think about policing speech, we think about encounters between men. And to be sure, yeah, there's a large percentage of police officers that are men, but I think that also pulls in dimensions of masculinity that become enacted in speech and communication between police officers and citizens. But I think it is an incredible point to raise and to think about, because the experience of women or the experience of different genders is silenced. Certainly in my piece, it was something that I thought about. And I thought a little bit about the way masculinity colors the way that police officers, and in particular male police officers interpret hostility, interpret defiance, interpret fighting words, so to speak, from citizens, right? And so the ways that gender and masculinity shapes how police officers interpret whether there has been a disturbance is incredibly important, but I think it's also important on the flip side, right? How do women experience that? Whether it's a female police officer, or a female citizen. And so I think it's an incredibly important point, you know, stemming from Kimberly Crenshaw's thinking about the intersectionality of these issues, and I hope that we continue to discuss it.

- And I will say, so I sort of take on a little bit gender issues and sexuality issues and class issues in my piece. You know, as I say in my piece, there's a reason why Alondra Nelson describes Afrofuturism as a feminist space. And of course there's a similar commitment, I think, you can find in CRT. So in my future world, there's lots of diversity on police forces, and police forces sort of look more like the country does, and they also sort of receive training on biases, there's virtual reality simulations where they get to experience being different. That being said, I don't mean to suggest that I think if you add a few Black or Brown people to police forces, they're gonna be transformed. Or if you add more women to police forces, they're gonna be transformed. All of those people could engage in police abuses, all of those people could participate in sort of the blue wall of silence. But I do think if we imagine like a whole scale, like re-imagining policing, then we can sort of capture sort of what we are interested in. There's one last thing I will say, just because it's something I was not thinking about when I wrote my piece, but I'm thinking about it now, because in my piece, the word policing is in the title. And now I'm

wondering, well, if we imagine a future where Black and Brown people really do have control, might they even retire the term 'police' or 'policing', given that the police owe their sort of existence, their lineage to sort of slave patrols, to subordination. It might be that in this imaginary idealized future world, we're just creating whole new forms of ways of keeping everybody safe. Ways of public safety. It might just be simply changing the name, or it might be something more dramatic than that. But given the baggage that even the term police has, it might be in my future world we're not gonna be saying police, we might be saying something else.

- All right, thank you so much. So, we are really running short on time, and I wanna be respectful of everyone's time. But there was one question that I wanted to ask from the Q&A real quick, and this question is what will be the future for the intersection of Afrofuturism and First Amendment scholarship, if and when different states succeed in banning critical race theory and make case law and jurisprudence about it? So I know we don't have a lot of time, but if y'all could just give your thoughts briefly, that would be great.

- I'm gonna let Etienne go first.

- Yeah, so I guess to speak specifically to your question, if and when there are bans on teaching or discussing critical race theory, I think Afrofuturism as a discourse, I think will help us to think creatively about what that looks like in the future, and perhaps help to warn us about the dangers of going down that route, but also help us to imagine a very different future where critical race theory is a welcome part of schools of learning, experiences of public discourse. And so I see Afrofuturism continuing to play an important role there. I think also Afrofuturism, in so doing, I think Afrofuturism also provides a different, and especially when we get to a point, as Professor Capers says, where we are majority minority, helps us to think about a future where culture can help to shape how we think about and experience our political economy and the choices that we make. And perhaps how critical race theory plays a role in articulating what those different choices, or different policies, or different approaches would look like in practice.

- And I would just second what Etienne said.

- All right, thank you all so much. So that brings us to right at time. Again, thank you everyone for participating. This was amazing. I'm sorry we didn't get a chance to get through all of the questions, but yeah, thank you so much, and I'll go ahead and turn it to Kendra in case they have any last words before we close.

- Nope, just seconding Ittaff and thanking Professor Toussaint and Professor Capers for coming and joining us, and for all of y'all for listening. You know, in true IFRFA advertisement fashion, I have dropped the Twitter account and the newsletter link in the chat, so feel free to sign up, and also to follow, we've retweeted Professor Toussaint and Professor Capers to follow them on Twitter, if you wanna hear more about the work that they're developing. And thank you everyone, and have a happy Juneteenth to those celebrating.

- Thank you so much.

- Thank you.