NOTE

Thinking Outside of the "White Box": An Afrofuturistic Critique of *Terry* Stops

NINA-SIMONE EDWARDS*

ABSTRACT

What would the future look like if the privacy invasions that Black Americans are currently subjected to were not so normalized? This Note brings an Afrofuturistic perspective to the analysis of Terry *stops, putting forward an alternative legal paradigm that uplifts Black Americans, their privacy, and their experiences, rather than police practices. Part I of this Note looks to the past, drawing on Afrofuturism's tenant of reclamation, and assesses the development of vagrancy laws. Under these laws, vague legal standards allowed law enforcement to criminalize Black people after the end of slavery, punishing those who fell outside of the "white box," or the social norms ascribed to whiteness. This threat of state violence swallowed any meaningful expectation of privacy, carrying forward the legacy of enslavement.*

Part II then discusses the similarities between the violations of privacy found in vagrancy laws and violations of privacy found in the use of Terry *stops today.* Terry *stops, and the resulting threat of constant surveillance, have changed how Black Americans navigate public space. Like the vague standards in vagrancy laws, the requirement of "reasonable suspicion" to conduct a stop is weaponized by law enforcement to punish those outside of the "white box." Further, this Note argues that the current Constitutional threshold for assessing whether state action violates the Fourth Amendment—whether someone has a reasonable expectation of privacy—is deficient. It too is a function of the "white box," and fails to account for the Black American experience. Moreover, use of this standard maintains the status quo and fails to guarantee actual privacy. Part III then envisions what the law could look like under Afrofuturism; a future where we actually work to address the systemic harms imposed by* Terry *stops.*

TABLE OF CONTENTS

* Georgetown University Law Center, J.D. 2024; University of Tennessee at Chattanooga, B.S. 2019; Senior Communications and Technology Editor, *Georgetown Law Journal*, Volume 112; Managing Editor, *Georgetown Law Technology Review*, Volume 8. Thank you, Ayah Eldosougi, for the idea (and constant encouragement!) to look into vagrancy laws. I'm also so thankful for the *MCRP* team for professionally grounding my oft-random musings to make this Note publishable. This thanks is also in light of the fact that I was told that this particular Note is not good enough to be published given the subject matter. I will continue to envision an Afrofuture, and am blessed by this opportunity.

INTRODUCTION

> "Just bury me in the ocean, with my ancestors that jumped from the ships. . . 'cause they knew death was better than bondage."[1]

Eric Killmonger, the antagonist in *Black Panther*, delivers this incredible line in such a penetrating way that it invokes a question of a potential future: what would the United States be if the enslaved had jumped from the ships? Commentary on such impossibilities may seem futile, but Afrofuturism invites such wonderings about our past to inform possible futures. In fact, Afrofuturism requires simultaneously thinking about the past, present, and future in order to fully grasp race and power dynamics.[2]

For many, Afrofuturism begins and ends with *Black Panther*. Wakanda is the epitome of a reimagined future for Black lives, with technology and systems so otherworldly that Wakanda surpasses all other nations. However, Afrofuturism is more than just a comic

1. BLACK PANTHER (Marvel Studios 2018).

2. *See* Ngozi Okidegbe, *Of Afrofuturism, Of Algorithms*, 9 CRITICAL ANALYSIS L. 35, 36-37 (2022) ("Not only is it imperative to apply an Afrofuturist frame to reflect on and to envision ways to change this present reality; this approach is also in line with the Afrofuturist tradition. As Afrofuturist and writer Greg Tates has warned, it is important for conversations around Black futures to engage in the present and past . . . ."); *id.* at 37 ("Moreover, as Professor and Afrofuturist Lonny Avi Brooks has theorized, Afrofuturism has never exclusively relegated itself to consideration about the future, since surviving decades of oppression and attempts at annihilation have required Black people to simultaneously think in the past, the present, and the future Afrofuturism grows out of the rich Black intellectual and artistic traditions stemming from this positionality.").

book series; Afrofuturism is "an attempt to explore the perceived possibilities of what may be in futures where Black people are alive, thrive, and in power."[3] It is a fusion of imagination and technology that stretches "beyond the conventions of our time and the horizons of expectation, and kicks the box of normalcy. . . out of our solar system."[4] Afrofuturistic imaginings guide an enlightened view of the past in order to envision a liberated future. Afrofuturism is not only a paradigm but, for many, it can be a way of being.[5]

Artistic expressions of Afrofuturism span literature, music, visual art, and other creative forms, from Octavia Butler to Basquiat to Sun Ra. With an eye towards imagining Black lives outside of the hierarchies that exist today, Black people can instead be presented as powerful, enlightened beings unburdened by the heavy chains of race, a concept invented to label anyone who was not white as "other." Legal scholars such as Ngozi Okidegebe and Bennett Capers were conscious of these chains, and brought Afrofuturistic ideals to the law regarding criminal legal algorithms and citizen-police interactions.[6] Other scholars have joined Afrofuturistic concepts with the law as it pertains to time and housing.[7] Central to all Afrofuturistic conceptions, although not always explicitly mentioned, is the idea of privacy. Privacy is something that has been just out of reach for Black Americans since their forced arrival in the United States. Frederick Douglass describes the suffocating lack of privacy that enslaved people in the United States experienced: "At every gate through which we were to pass, we saw a watchman – at every ferry a guard – on every bridge a sentinel – and in every wood a patrol. We were hemmed in upon every side."[8] Enslaved people experienced this stifling encroachment that Douglass describes and it continued even when they were "freed." Even after the end of slavery, this hierarchy, built on Black Americans' perceived inferiority, was cemented with the idea of Black Americans as "other." "Prototypical whiteness" became the measuring stick that Black Americans were held against.[9] When they inevitably fell short, their privacy was violated.

This Note explores the privacy violations that Black Americans experience, from an Afrofuturist perspective. Privacy is deeply connected to the concept of space,

3. The project of Afrofuturism is, as Professor and Afrofuturist Philip Butler notes, "an attempt to explore the perceived possibilities of what may be in futures where Black people are alive, thrive and in power." *Id.* at 43 (citing Philip Butler, *Introduction* to CRITICAL BLACK FUTURES: SPECULATIVE THEORIES AND EXPLORATION 3 (Philip Butler ed., 2021)).

4. YTASHA L. WOMACK, AFROFUTURISM: THE WORLD OF BLACK SCI-FI AND FANTASY CULTURE 16 (2013).

5. Ytasha L. Womack, *Afrofuturism as Space and Being, in* AFROFUTURISM: A HISTORY OF BLACK FUTURES 21 (Kevin M. Strait et al. eds., 2023).

6. *See generally* Okidegbe, *supra* note 2; Bennett Capers, *Afrofuturism, Critical Race Theory, and Policing in the Year 2044*, 94 N.Y.U. L. REV. 1 (2019).

7. *See generally* Rasheedah Phillips, *Race Against Time: Afrofuturism and Our Liberated Housing Futures,* 9 CRITICAL ANALYSIS L. 16 (2022).

8. SIMONE BROWNE, DARK MATTERS 22 (2015) (quoting FREDERICK DOUGLASS, NARRATIVE OF THE LIFE OF FREDERICK DOUGLASS 103 (1845)).

9. *See id.* at 110, 162 (discussing how prototypical whiteness privileges whiteness, or those in relation or proximity to whiteness).

which is a constant theme in Afrofuturistic works. Some Afrofuturist works focus on outer space, whether this takes the form of images of Black people on spaceships,[10] apocalyptic fantasies with Black people as the protagonists,[11] or even the idea that Black people originated from Saturn.[12] Other Afrofuturist works focus on cyberspace and how technology could offer alternative futures.[13] Others address physical space; as stated by Ytasha Womack, Afrofuturism "tends to invoke freedom from walled-in spaces."[14] This Note explores this latter conception of space. American slavery and its legacy forced Black Americans into walled-in spaces that surveilled rather than enhanced privacy, assembled from built-to-last hierarchies that persisted beyond 1865. This Note traces this theme, detailing how this legacy of slavery has continued through vagrancy laws and is currently upheld through *Terry* stops.

This Note's emphasis on American slavery and its impact on Black-American privacy further embodies one of Afrofuturism's central tenets: reclamation, or Sankofa. Sankofa, defined as going "back to the past" to "bring forward that which is useful," is a concept that "teaches us that we must go back to our roots in order to move forward."[15] Using an Afrofuturist perspective, this Note reaches back to the roots of those who were enslaved and reclaims "identities and perspectives that were lost as a result of the slave trade and colonialism."[16] This Note argues that the right to privacy was lost to Black Americans. In response to this loss, this Note hopes to bring forward an Afrofuturistic perspective of space and privacy, as well as a reclamation of that right.

Another element of Afrofuturism this Note draws on is the use of a visual representation to conceptualize social and racial hierarchies. In order to facilitate a visual representation of social and racial norms and hierarchies, all forms of prototypical whiteness will be placed inside a box, which will be called the "white box." Sara Ahmed, a feminist writer and independent scholar, understood whiteness as a "straight line" or a "straightening device" from which who does or does not belong is established.[17] Cheryl Harris, Critical Race Theorist and scholar, also envisioned a racial line between Black and white people: "Because whites could not be enslaved or held as slaves, the racial line . . . was extremely critical; it became a line of protection

10. *See* Womack, *supra* note 5, at 25.

11. *See generally* W.E.B. DU BOIS, THE COMET (1920); OCTAVIA BUTLER, PARABLE OF THE SOWER (1993).

12. Sun Ra was a prolific jazz musician who often stated that he came from Saturn. *See* Joann Stevens, *There Once was a Jazz Musician Who Came Here from Saturn,* SMITHSONIAN MAG. (July 29, 2014), https://www.smithsonianmag.com/smithsonian-institution/there-once-was-jazz-musician-saturn-180952112/.

13. *See* Womack, *supra* note 5, at 25.

14. *Id.* at 24.

15. Merry Byrd, *The Sankofa Spirit of Afro-futurisms in Who Fears Death and Riot Baby*, 12 FEMSPEC 45, 49 (2021); *About Sankofa*, STOCKTON UNIVERSITY, https://www.stockton.edu/sankofa/about.html#:~:text=Sankofa%20(SAHN%2Dkoh%2Dfah,Sankofa%20is%20a%20phrase%20that ("A Twi word from the Akan Tribe of Ghana that loosely translates to, 'go back and get it.').

16. *See* Capers, *supra* note 6, at 16; *see also* Kodwo Eshun, *Future Considerations on Afrofuturism*, 3 NEW CENTENNIAL REV. 287, at 301(describing a tenet of Afrofuturism as "a program for recovering the histories of counter-futures.").

17. *See* SARA AHMED, QUEER PHENOMENOLOGY: ORIENTATIONS, OBJECTS, OTHERS 121 (Duke University Press eds., 2006).

and demarcation . . . ."[18] Instead of thinking about whiteness as a straightening device or line, whiteness can also be seen as a box that one may step in or out of. The more "white" one is, the more they fit in the box.

A Black American may not immediately fit inside the box, given the color of their skin. However, characteristics, such as speech patterns, clothing, location, socioeconomic status, or education, may allow this person to place one foot or an arm in the box, which can possibly afford them some privacy. Following the Emancipation Proclamation, laws, such as the Black Codes and Jim Crow laws, embodied the idea of this "white box." They specified activity that would render anyone outside of the "white box" a criminal. This led to "[B]lackness meet[ing] surveillance" any time police officers encountered Black Americans.[19]

The idea of this "white box" stems from Afrofuturistic principles. Not only does it allow for easy visualization, but Afrofuturism encourages thinking "outside of the box." The colloquial phrase epitomizes Afrofuturism in that Afrofuturism forces thought and creativity outside of current norms and hierarchies. This Note thinks outside of the "white box" as it pertains to privacy, and, with an Afrofuturistic perspective, looks to the past to understand current policies that violate Black-American privacy. Even more, Afrofuturism, beyond identifying harms and hierarchies, seeks to disrupt those hierarchies. This Note looks at the potential disruption to the privacy violations that are identified.

Discussion

This Note provides an Afrofuturistic look at the current systemic harms of *Terry* stops, which are embedded with racism and rooted in the structural and legal origins of the United States. Throughout each section, the legal and historical analyses are guided by Afrofuturism and Afrofuturistic understandings of privacy. In assessing *Terry* stops, this Note brings in Afrofuturistic conceptions of space, and also relies on thinking outside of the "white box" and disrupting current hierarchies.

Part I focuses on the history of Black Americans and the impact of vagrancy laws immediately after "freedom" pursuant to Afrofuturism's tenet of reclamation. Although the central focus of this Note is developing an Afrofuturistic conception of privacy, the tenet of reclamation is threaded throughout that central focus to facilitate imaginings of an Afrofuture where Black Americans have meaningful privacy rights. Thus, this section focuses on early Black American history in order to ground us in an understanding of life after colonialism, life after "freedom," and the impact of being "freed" without any freedom to be left alone. Although vagrancy laws are not often included in the discussion of privacy and surveillance, the way they were utilized, particularly as part of the Black Codes, resulted in a wide array of privacy violations. Essentially, vagrancy laws targeted those outside of the "white box" and subjected them to particularly invasive practices. Thus, vagrancy laws played an important role in eroding Black Americans' access to privacy.

18. Cheryl Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1720-21 (1993).
19. *See* BROWNE, *supra* note 8, at 13.

Part II then discusses the similarities between the violations of privacy found in vagrancy laws and violations of privacy found in the use of *Terry* stops today. Although *de jure* racism was prohibited after the Civil Rights Act of 1964,[20] the racism and privacy violations of vagrancy laws have continued through *Terry* stops. Part II discusses the different violations of privacy resulting from *Terry* stops and the trauma that Black Americans experience based on these violations of privacy. This section then assesses how our current legal framework fails to correct these violations, contrasting the "reasonable expectation of privacy" standard to an Afrofuturistic understanding of privacy.

Based on this analysis of the privacy violations that Black Americans endure, Part III argues that *Terry* stops should be discontinued, and that Afrofuturism offers an alternative legal paradigm to meaningfully address privacy violations and achieve a real right to privacy for Black Americans. Given the disproportionate impact of *Terry* stops on Black Americans, and the vagueness of assigning criminality to those outside the "white box," this Note ultimately concludes that *Terry* stops should no longer be conducted.

I. VAGRANCY LAWS AND SYSTEMIC VIOLATIONS OF PRIVACY

In 1983, the Supreme Court held that vagrancy laws were unconstitutional due to vagueness.[21] However, the conclusion that these laws were unlawful should have been reached much earlier given the role that vagrancy laws played in violating the privacy of newly freed Black Americans. Part I briefly discusses the history of vagrancy laws. To fully understand the impact of vagrancy laws on the Black American experience, first, it is necessary to understand the history of American slavery and its impact on privacy. This Note then discusses different conceptions of "privacy," arguing that the pertinent definition to Afrofuturism is whether an individual can be let alone. Under this definition, this Note argues that slavery eroded any meaningful right to privacy, and that vagrancy laws continued this legacy. Vagrancy laws and their use within the Black Codes violated the privacy of newly freed Black Americans.

A. History of Vagrancy Laws

Vagrancy laws, similar to many other American laws, originated in England. In the fourteenth century, English lawmakers passed the Statute of Labourers that encompassed the crime of vagrancy.[22] Vagrancy laws restricted people who were unemployed and did not own land; they functioned as a means of economic control. In a ploy to control the labor shortages, for example, "the runaway serf . . . became a

20. The Civil Rights Act of 1964, 42 U.S.C. §2000d, prohibits discrimination in public places based on race, color, religion, sex and national origin. Pub. L. 88-352. This means that, although the Civil Rights Act did not use language regarding the right to privacy or being let alone, people were given the right to privacy as it pertains to race, religion, sex and national origin because they were able to be let alone and were not able to be disturbed or discriminated against on these bases.

21. *See* Kolender v. Lawson, 461 U.S. 352 (1983).

22. *See* Robin Yeamans, *Constitutional Attacks on Vagrancy Laws*, 20 STAN. L. REV. 782, 782 (1968).

vagrant and his wandering and loitering became his crime."[23] In this way, vagrancy laws functioned to criminalize the poor and non-elite.

This element of criminalizing a subset of society made its way to America in the 1700s. By the mid-nineteenth century, almost every state had enacted a form of vagrancy law.[24] These functioned in different ways; according to an 1811 Maryland statute, for example, poor people were restricted from moving to another county.[25] A New York law from the 1820s made anyone caught wandering around in a "tavern," "market-place," or even "the open air" a vagrant, and therefore criminal.[26] In Pennsylvania, if you came from a city and did not immediately find a job, you were deemed a vagrant.[27] These vagrancy laws impacted anyone who was homeless, poor, or found "wandering" or "idle."[28] They ultimately criminalized the "mere appearance of socially objectionable habits of life."[29]

The definition of who was a vagrant, and thus, who could be subject to criminalization, was broad and therefore malleable. One statute stated: "[A]ny person who wanders or strolls about in idleness, or lives in idleness, who is able to work, and has no property sufficient for his support" was a vagrant.[30] Black's Law Dictionary gives a similar definition of vagrant: "A wandering, idle person; a strolling or sturdy beggar. [This is] a general term, including, in English law, the several classes of idle and disorderly persons, rogues, and vagabonds, and incorrigible rogues."[31] Due to potential vagueness, some statutes were more specific about who was included, such as prostitutes, known thieves, drunkards, and beggars.[32] Other statutes specified that anyone who loitered and failed to give a "good account" to police officers when requested were also classified as vagrants.[33] Still, these laws lacked an objective standard compared to other criminal laws. One can be classified as a thief by stealing, or a murderer by killing. To be classified as a vagrant, however, there is no specific requirement of anything that one must be doing. In fact, these laws seemed focused on what a person was *not* doing, or more accurately, what it *looked* like someone was doing. If someone was *not* working, or looked like they were not working, they were a vagrant. The vagueness of these laws, and how easily bendable they were by law enforcement, were of particular benefit after the enslaved were freed.

23. *See* T. Leigh Anenson, *Another Casualty of the War. . . Vagrancy Laws Target the Fourth Amendment*, 26 AKRON L. REV. 493, 494-95 (1993).

24. *See generally* Kristin O'Brassill-Kulfan, *The United States' long history of criminalizing homelessness*, NYUPRESS (Jan. 14, 2019), https://www.fromthesquare.org/the-united-states-long-history-of-criminalizing-homelessness/.

25. *See id.*

26. *See id.*

27. *Id.*

28. *See id.*

29. *See* Karen M. Tani, *Constitutionalization as Statecraft: Vagrant Nation and the Modern American State*, 43 L. & SOC. INQUIRY 1646, 1647 (2018).

30. *See* Yeamans, *supra* note 22, at 783.

31. *Vagrant*, BLACK'S LAW DICTIONARY (10th ed. 2014).

32. *Id.*

33. *See id.*

B. From "Enslaved" to "Vagrants": No Right to be Let Alone

Before 1865, most Black people in the United States were enslaved. After enduring an unimaginably horrific transatlantic journey to the United States, they were stripped of every recognizable part of themselves. Families were separated, individuals experienced unspeakable sexual violence, and physical and emotional brutality became a part of their everyday lives. Who they were before enslavement became obsolete in the eyes and hands of the white Americans who saw them as less than human.

When enslaved, the idea of privacy is laughable, no matter how it is defined. There are a number of definitions of "privacy." It can be defined as the right to personal autonomy.[34] Other definitions center around ideas of dignity.[35] The very first legal scholars of privacy law conceptualized the idea of privacy as the right to be let alone.[36] This definition is consistent with Afrofuturistic ideals, in particular, the idea of having space, room, and freedom from "walled-in spaces."[37] These themes focus on the idea of being let alone and not being bothered. Privacy as the right to be let alone is therefore the definition used in this Note, referred to herein as "Afrofuturistic privacy."

Unfortunately, the enslaved had no conception of Afrofuturistic privacy; they were constantly under the watchful eyes of their master. They were not allowed to explore who they wanted to be or express themselves outside of what their masters allowed. They were not allowed to be let alone: "Slavery deprived the enslaved of any legal rights or autonomy and granted the slave owner complete power over the Black men, women, and children legally recognized as his property."[38] There was no freedom, personal autonomy, or dignity.

Although Black Americans theoretically gained their own privacy rights once freed, these rights were swallowed by the Black Codes. Black Codes were laws that were enacted in 1865 and 1866 with the intent to further white supremacy.[39] The laws were designed to replace the "social controls" of American slavery that the Emancipation Proclamation and Thirteenth Amendment ended.[40] Vagrancy laws

34. *See Right to privacy*, BLACK'S LAW DICTIONARY (10th ed. 2014). But there are multiple definitions of privacy. *See, e.g., infra* notes 35-36.

35. "From Kant to Rawls, a central strand of Western philosophical tradition emphasizes respect for the fundamental dignity of persons, and a concomitant commitment to egalitarianism in both principle and practice." Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373, 1423 (2000) (citing IMMANUEL KANT, THE METAPHYSICS OF MORALS 73-74, 231-32 (Mary Gregor ed. & trans., Cambridge Univ. Press 1996) (1797); JOHN RAWLS, A THEORY OF JUSTICE (rev. ed. 1999)).

36. *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890) ("Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual what Judge Cooley calls the right 'to be let alone.'").

37. *See* Womack, *supra* note 5, at 24.

38. EQUAL JUSTICE INITIATIVE, SLAVERY IN AMERICA: THE MONTGOMERY SLAVE TRADE 15 (2018).

39. *See Jim Crow Laws*, HISTORY.COM (Feb. 28, 2018), https://www.history.com/topics/early-20th-century-us/jim-crow-laws. Jim Crow laws, enacted in the 1880s, worked to further the same goal. Jim Crow laws legalized racial segregation and worked to continue the marginalization of Black Americans that the Black Codes started. *See id.*

40. *Black code*, BRITANNICA (Dec. 30, 2022), https://www.britannica.com/topic/black-code.

were no exception. The vagrancy laws enacted in this era declared any unemployed Black American without a permanent residence or "found unlawfully assembling themselves together either in the day- or nighttime"[41] to be a vagrant. They were then subject to fines, arrested, or "hired out . . . to any person who [would] . . . pay said fine . . . ."[42] Thus, we see how vagrancy laws were deployed in order to maintain racial hierarchies.

Vagrancy laws created a "white box" that included normative behaviors like being employed or having a home, in addition to being white. These laws were used in America, after slavery, in a way that enabled the "white box." If a person was not white, or was not behaving in a way that a white person or police officer thought they should,[43] their behavior was outside of the "white box," given the label of criminal, and their privacy was thus violated through the use of these laws. This is the antithesis of Afrofuturistic ideals of space and room—the right to one's own mind, body, and space. Black Americans cannot thrive, or be in power, if they are constantly subject to systems that hold them hostage—either in body, thoughts, or physical space. Black Americans were not fully allowed to just be, and then further not allowed to be let alone under vagrancy laws. They were constantly watched, scrutinized, and questioned.

Nonetheless, newly-freed Black people obtained rights, such as the right to seek their own employment or participate in the political process.[44] As new citizens, they should have also been afforded the same right to privacy that white Americans had. Yet, their privacy was violated through the Black Codes. Although they were no longer under the constant, watchful eyes of their masters, Black Americans were quickly subjected to a new watchful eye: law enforcement who could enforce the Black Codes and vagrancy laws. A previously enslaved person could become a criminal if seen walking along a street. When a police officer questioned their employment status or where they were going, that private time and space was disrupted and violated by that interaction. Thus, even with the new rights and privileges they should have been afforded as freed citizens, Black Americans still did not fully have the right to be let alone. They instead were forced to live, after centuries of shackles, in fear that they would be "caught" doing anything that was seen as "unlawful assembling" or being "idle."[45] This was a strain that Black Americans should not have had to live with. These laws were used to perpetuate racist ideals and disrupt the privacy of Black individuals. The private, alone space that those previously enslaved gained was now violated if they were able to be seen as a vagrant. Likewise, the private, intimate

41. *Id.*

42. *Id.*

43. Or, if the white person simply wanted to exhibit their racism by using vagrancy laws to make a Black American a "criminal" for innocent activity.

44. *See The African American Odyssey: A Quest for Full Citizenship*, LIBRARY OF CONGRESS, https://www.loc.gov/exhibits/african-american-odyssey/reconstruction.html#:~:text=After%20the%20Civil%20War%2C%20with,former%20owners%2C%20seek%20their%20own (last visited Jan. 13, 2024).

45. Black Americans were routinely hired for the lowest paying jobs, thus, increasing the chance that they would be found "idling" while searching for a better job. *See, e.g.*, Jacqueline Jones, *Black Workers Remember*, THE AM. PROSPECT (Nov. 30, 2000), https://prospect.org/features/black-workers-remember/.

time and space a previously enslaved person wanted to spend with other Black Americans was now violated.

This section embodies the Afrofuturistic concept of reclamation or Sankofa in its focus on early Black American history, and importantly, this tenet allows us to better understand later privacy violations during the civil rights movement. During this period, police officers continually used vagrancy laws to disrupt privacy throughout history and the laws were an especially useful tool during the civil rights movement against Black Americans throughout the South.[46] For example, in 1958, a group of Montgomery ministers were eating a meal in the privacy of one of the minister's homes when they were arrested for "vagrancy."[47] This demonstrates how early American history was replicated, and how law enforcement continued to use vagrancy laws as a tool to violate the privacy of Black people.[48]

These laws are typically thought of as laws that only suppress vagrancy, but racism allowed Black Americans to easily fall within the laws' vague definitions. Nonetheless, it may still be difficult to understand the scope of privacy violations that vagrancy laws generated. To better elucidate and link the idea of privacy to vagrancy, consider this example: Imagine you and your colleagues decide to walk outside during your lunch break. You are enjoying a private discussion about the outcome of a client meeting, when this discussion is suddenly disrupted by a police officer asking you, what are you doing? Why are you standing there? Should you be somewhere else? He keeps asking you questions, like where do you work? Do you have a job? You do not feel as though you have to answer, so you are arrested for being a vagrant.

Your privacy was violated here by this officer. You no longer had the right to be let alone. You no longer had the dignity of being able to carry on a conversation without interruption or questioning. Your autonomy was stripped away when your hands were in handcuffs, but the officer's interrogation had you questioning your autonomy anyway. In this way, we see how vagrancy laws can undercut a sense of autonomy and privacy, and how they serve to punish those outside the "white box."

This Note's focus on vagrancy laws does not take away from the impact of other Black Codes (and, eventually, Jim Crow laws), or suggest they were not also powerful tools in maintaining systems of white supremacy. Rather, the goal of this Note is to add to this scholarship. Vagrancy laws have traditionally been the focus of scholarship related to labor, homelessness, and, in general, vagrants. However, the impact of vagrancy laws on the Black community was unique. Vagrancy laws punished Black Americans for being Black, and for no longer being enslaved. Afrofuturism gives us a lens to view vagrancy laws for what they were in order to look to a future that centers Black people. Further, the role that vagrancy laws played contributes to our understanding of *Terry* stops: Black American Afrofuturistic privacy is violated by police officers today through *Terry* stops.

46. *See* Risa L. Goluboff, *Before Black Lives Matter*, SLATE (Mar. 2, 2016, 12:21 PM), https://slate.com/news-and-politics/2016/03/vagrancy-laws-and-the-legacy-of-the-civil-rights-movement.html.

47. *Id.*

48. *Id.*

II. *TERRY* STOPS V. AFROFUTURISTIC PRIVACY

Terry v. Ohio established *Terry* stops as a way for police officers to confirm their suspicions of criminal activity without violating the Fourth Amendment.[49] However, vagrancy laws and *Terry* stops are similar in that neither one of them is explicitly codified as a way for police officers to violate Black-American privacy.[50] Additionally, both vagrancy laws and *Terry* stops may also impact other Americans, making it even more difficult to proclaim the impact on Black Americans. However, it is clear that both vagrancy laws and *Terry* stops constrain how Black Americans can navigate space. Afrofuturism's focus on space guides an understanding of the way that *Terry* stops are currently impacting and violating Black Americans.

This section will discuss Afrofuturism's role in first, understanding the racial hierarchies that persisted after the Civil Rights Act of 1964, and specifically in analyzing *Terry* stops. This section will then broadly discuss *Terry* stops, and the privacy violations that occur during the stops, before discussing a different aspect of privacy emphasized by the trauma that Black Americans have from previous encounters with the police or fear of future encounters. This will lead to a discussion of the reasonable expectation of privacy and how that relates to the privacy violations of *Terry* stops.

A. The Prohibition of Explicit Racism, the Continuation of Implicit Racism

Although certain discriminatory acts are prohibited, in order for victims to have recourse in a court of law, those acts must fall within conventional understandings of discrimination.[51] As this Note discusses, an Afrofuturistic perspective broadens the conventional understanding of discrimination to envelop all of the experiences of a Black American. This section, per the tenet of Sankofa, examines the initial laws prohibiting discrimination before moving forward towards an Afrofuture.

In the 1960s, following outrage and a number of protests and imprisonment, the Civil Rights Act of 1964 and the Voting Rights Act of 1965 ended the reign of Jim Crow laws.[52] The explicit racism seen in the Black Codes and Jim Crow Laws were no longer allowed. This included the explicit forms of privacy violations that occurred because of those laws. White Americans were no longer able to violate someone's privacy on the basis of their race, as this would be seen as discrimination.[53] After the enactment of the Civil Rights Act, there was a shift from laws that explicitly

49. *See* 392 U.S. 1, 30 (1968).

50. The law itself does not explicitly state that this violation of privacy (Black American privacy in particular) is legal or should occur.

51. *See supra* note 20. These conventional understandings are found and outlined in the Civil Rights Act of 1964.

52. *See Jim Crow Laws Created 'Slavery' By Another Name,* NAT'L GEO., https://www.nationalgeographic.com/history/article/jim-crow-laws-created-slavery-another-name (last visited Jan. 14, 2024).

53. For example, if a White restaurant owner wanted to expel some Black patrons because they were Black, this explicit form of discrimination was no longer allowed. However, despite never specifically mentioning the right to privacy, invading someone's space while they are eating by expelling them from the establishment and disrupting their right to be let alone constitutes a violation of privacy and is therefore prohibited.

violated the privacy of Black Americans to laws and practices that implicitly allowed the same.

When President Lyndon B. Johnson signed the Civil Rights Act of 1964, he wanted to "close the springs of racial poison."[54] Unfortunately, racial disparities and discrimination continued because racist policies were operating under a "patina of colorblindness."[55] Without fully dismantling the "gains of past discrimination,"[56] there was no guarantee that the Black American would experience any form of equality, let alone equity. By outlawing only intentionally and explicitly racist laws, Congress did not outlaw intentionally and explicitly racist *outcomes*, including intrusive privacy invasions. Thus, "[e]vidence of intent to create the racial disparity—like the 'white only' sign—became the principal marker of discrimination, not the racial disparity itself, nor the absence of people of color."[57] Many believed that with the death of Jim Crow, came the death of racism.[58] However, racial disparities transformed into new forms that were not as explicit, but had the same racist effect. Racial hierarchies, and their impact, persisted, but in new forms.

In addition to highlighting ideas of racial hierarchies, privacy, and space, an Afrofuturistic perspective emphasizes the importance of embracing the past to envision a future.[59] Afrofuturism as a paradigm accepts and uplifts Black people and attempts to give them power including, as this Note argues, the space and privacy that they deserve. At present, ideas of Black American privacy during police encounters are not easily understood. As this Part will detail, not only do Black Americans experience more police encounters than individuals of other races, but the trauma that Black Americans endure, even without having direct interactions with police officers, is unending. In an Afrofuture, we can imagine a world where Black Americans have the space, privacy, and freedom they need, especially in encounters with police. However, at this present time, *Terry* stops are one of many ways that Black Americans experience privacy violations. These privacy violations are best seen when viewed through an Afrofuturistic perspective that centers Black voices and their experiences, while envisioning the disruption of the current hierarchies that allow for *Terry* stop privacy invasions.

John Fiske examines these racial and social hierarchies and makes a distinction between the surveillance of white versus Black Americans: "Street behaviors of white men . . . may be coded as normal and thus granted no attention, whereas the same activity performed by Black men will be coded as lying on or beyond the boundary of the normal, and thus subject to disciplinary action."[60] Fiske is speaking about the

54. Ibram Kendi, *The Civil Rights Act was a victory against racism. But racists also won*, (July 2017, 3:18 PM), THE WASHINGTON POST, https://www.washingtonpost.com/news/made-by-history/wp/2017/07/02/the-civil-rights-act-was-a-victory-against-racism-but-racists-also-won/.

55. *Id.*

56. *Id.*

57. *Id.*

58. *See id.*

59. *See* Ytasha L. Womack, *I Came to Africa on a Spaceship, in* AFROFUTURISM: A HISTORY OF BLACK FUTURES 50 (Kevin M. Strait et al. eds., 2023) ("Afrofuturism's central symbol is a 'looking back to go forward.'").

60. John Fiske, *Surveilling the City: Whiteness, the Black Man, and Democratic Totalitarianism*, 15 THEORY, CULTURE & SOCIETY 67, 71 (1998).

"white box" here. Anything outside of the "white box," such as certain street behaviors, was "coded" as criminal by vagrancy laws, and *Terry* stops do the same today. Although *Terry* stops are used disproportionately against all minority groups, this Note focuses on the plight against Black Americans and their privacy.

This narrowed focus is informed by Afrofuturism, but on a smaller scale than what has been done in previous scholarship. Professor Bennett Capers has written legal scholarship imagining a future of policing "informed by Afrofuturism."[61] He envisions lower crime rates and a change in "police-citizen interactions," where there is an emphasis on the "caretaking role of policing."[62] While Professor Capers adeptly incorporates Afrofuturism into a more complete vision of the future—with a large focus on crime, policing, and technology—here, there is a sole focus on *Terry* stops. In a similar way to Professor Caper's imaginings of the future of policing and crime informed by Afrofuturism, this Note, particularly the following section, considers only one area of policing, by bringing in Afrofuturistic tenets and definitions to fill out the perspective.

B. Terry stops

In *Terry v. Ohio*, the Supreme Court held that if a police officer observes conduct from which he may conclude that criminal activity is afoot, he is entitled to conduct a search.[63] There are a few caveats,[64] but generally, this type of stop, known as a *Terry* stop, fully relies on a police officer's assessment of the situation and their assumption that there may be criminal activity afoot. Should the police officer have reasonable suspicion that there may be criminal activity, a police officer can conduct a *Terry* stop without violating the Fourth Amendment.

Although a *Terry* stop is different from a full search and seizure, the Court in *Terry v. Ohio* refused to draw a line between a *Terry* stop and a seizure (and between a frisk, which typically follows the stop should an officer determine that one is necessary,[65] and a search). According to the Court, the Fourth Amendment still applies even if a full search and seizure–police officers going through an individual's property and then taking possession of that property–does not occur.[66] For a *Terry* stop, which

61. *See* Capers, *supra* note 6, at 30.

62. *See id.* at 49. Deborah Livingston defines this caretaking role as, "a wide range of everyday police activities undertaken to aid those in danger of physical harm, to preserve property, or 'to create and maintain a feeling of security in the community.'" Debra Livingston, *Police, Community Caretaking, and the Fourth Amendment*, 1998 U. CHI. LEGAL F. 261, 272 (2015).

63. *See* 392 U.S. 1, 30 (1968).

64. *Id.* The majority specifies that the police may believe that the person they are dealing with is armed and dangerous. Further, the police, in the course of investigating, identifies himself as a policeman and makes inquiries. The holding also specifies that this is all conducted because the policeman may fear for his own or others' safety and is entitled to protect everyone in the area. In order to do so, he may "conduct a carefully limited search of the outer clothing of such persons" to discover any weapons. *Id.*

65. Both the stop and the frisk fall under the definition of the *Terry* stop. However, although the term stop-and-frisk is often used to describe *Terry* stops, a stop can be done without a frisk. A frisk is a patdown of one's outer clothing. *See generally Stop and Frisk,* LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/stop_and_frisk (last visited Jan. 14, 2024).

66. *See Terry,* 392 U.S. at 16-20.

is supposed to be brief and nonintrusive (because it is not considered a full search or seizure) a warrant is not required; however, police officers must have reasonable suspicion that criminal activity is afoot before conducting the stop.[67]

Unfortunately, even without a full and thorough search, privacy violations still occur. In a similar fashion to the vagrancy laws within the Black Codes, *Terry* stops do not fully allow Black Americans the right to be let alone. Afrofuturistic conceptions of privacy and space do not fit within the privacy violations that *Terry* stops allow. Vagrancy laws focused on whether a Black American was employed or had a home; now, police officers may invade the privacy of Black Americans under the guise of "reasonable suspicion" of criminal activity. Viewing the invasion of privacy that *Terry* stops allow through an Afrofuturistic lens not only highlights the importance of the idea of space for a Black American, but the fact that the existing hierarchies and structures invite such invasions. *Terry* stops continue the privacy invasions that were done in the past, but with constitutional protections[68] that work to minimize any claims against the practice. In an Afrofuture, Black Americans will not have to endure the privacy invasions that they experience because of *Terry* stops. An understanding of Black American Afrofuturistic privacy and space will necessitate a new legal standard, one that can ensure that the currently legal privacy violations no longer occur. Further, an Afrofuture is one where the law uplifts Black Americans, their privacy, and their experiences, rather than police practices.

Sadly, the current reality is one where, as Charles Epp et al. state, "*Terry* stops outperform other forms of government control in the 'degree of coercive intrusion.'"[69] These stops disproportionately occur at higher rates for racial minorities.[70] Even when stopped, white Americans often do not experience the "intrusive, arbitrary inquiries"[71] that are well-known to racial minorities.

An analysis of traffic and *Terry* stops helps illuminate the impact of the *Terry* legal paradigm. [72] In a study of nearly one hundred million traffic stops across the United States, Black drivers were around twenty percent more likely to be stopped than white drivers.[73] The same study also found that Black drivers were searched almost twice as

67. *See Terry*, 392 U.S. at 30; *see also* LEGAL INFORMATION INSTITUTE, *supra* note 65.

68. *Terry v. Ohio* found that *Terry* stops are not a violation of the Fourth Amendment ("Such a search is a reasonable search under the Fourth Amendment . . . .") which means that police officers can conduct *Terry* stops without violating the Constitution, barring any exceptions or violations of the rules of *Terry* stops. *See id.* at 31.

69. CHARLES R. EPP, STEVEN MAYNARD-MOODY & DONALD HAIDER-MARKEL, PULLED OVER 2 (2014) [hereinafter PULLED OVER].

70. *See id.* (citing Robin Engel and Jennifer Calnon, *Examining the Influence of Drivers' Characteristics during Traffic Stops with Police: Results From a National Survey*, 21 JUSTICE QUARTERLY 49-90 (2004)).

71. PULLED OVER, *supra* note 69, at 3. "In a police stop the driver (or pedestrian) is arrested for the duration of the stop, is not free to leave, and is sometimes subjected to the most searching of inquiries, ranging from intrusive questions (What are you doing in this area?) to a physical pat-down, a search of the vehicle, or handcuffing." PULLED OVER, *supra* note 69, at 2.

72. "In a traffic stop setting, the *Terry* condition of a lawful investigatory stop is met whenever it is lawful for the police to detain an automobile and its occupants pending inquiry into a vehicular violation. The police do not need to believe that any occupant of the vehicle is involved in criminal activity." *Terry Stop/Stop and Frisk*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/terry_stop/stop_and_frisk.

73. *See Research Shows Black Drivers More Likely to Be Stopped by Police,* NYU (May 5, 2020), https://www.nyu.edu/about/news-publications/news/2020/may/black-drivers-more-likely-to-be-stopped-by-police.html.

often as white drivers, even though they were less likely to be carrying illegal contraband than their white counterparts.[74] In 2022, fifty-nine percent of recorded *Terry* stops were conducted on Black people in New York City.[75] From 2003-2022, ninety percent of people stopped were people of color—Black people were stopped almost eight times more than white people.[76] These statistics demonstrate the effect racial bias has on a police officer's decision to stop citizens.[77]

However, racial bias cannot, legally, be the only reason for a *Terry* stop.[78] Generally, selective enforcement is violative of the Equal Protection Clause and Due Process Clause,[79] but, this standard is also malleable. If a police officer can offer another, legitimate reason for the stop, such as the vicinity to a high crime area, a violation of traffic laws, or the fact that the defendant was running, for example,[80] they likely have the requisite suspicion to continue with a stop.[81] Thus, even if race is a factor, a constitutional violation is hard to prove. An officer's justification, valid or not, does not mean that racial profiling—the targeting of individuals for suspicion of crime based on one's race[82] —has not occurred during the stop, nor does it stop any privacy violations.

Police officers' discretion to racially profile Black Americans when conducting *Terry* stops has led to the disproportionate targeting of Black Americans.[83] When Black Americans operate outside of the "white box," police officers label their behavior as criminal. It is this racial profiling that leads to privacy violations, which are

74. *Id.*

75. *See Stop-and-Frisk Data,* NYCLU, https://www.nyclu.org/en/stop-and-frisk-data (last visited Nov. 21, 2023).

76. *See A Closer Look at Stop-and-Frisk in NYC,* NYCLU, https://www.nyclu.org/en/closer-look-stop-and-frisk-nyc (last visited Nov. 26, 2023) [herein referred to as *Closer Look*].

77. *Id.*

78. It is important to briefly mention *Whren v. United States*. In that case, police officers stopped a truck to warn them about traffic violations but observed plastic bags with drugs in the petitioner's hands when the officers approached the vehicle. Whren v. United States, 517 U.S. 806 (1996). It was found that a traffic stop may occur if there is probable cause to believe that there is a traffic law violation, regardless of any other intent that a police officer may possess. *Id.* at 806. "We think these cases foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved. We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." *Id.* at 813. Thus, here, I am not referencing the Fourth Amendment, but the Equal Protection Clause. Further, *Whren* was about a traffic stop and the Court analyzed probable cause, which is not necessary for a *Terry* stop.

79. *See, e.g.,* State v. Soto, 734 A.2d 350, 552 (N.J. Super. L. Div. 1996).

80. *See* Illinois v. Wardlow, 528 U.S. 119, 119 (2000); *see also Whren*, 517 U.S. at 806 (the Court found that an officer may stop a suspect if there is probable cause that they violated traffic laws, even if they have some other intent behind the stop).

81. *See* source cited and accompanying text, *supra* note 78.

82. *Racial Profiling: Definition*, ACLU, https://www.aclu.org/other/racial-profiling-definition (last visited Oct. 21, 2023)("the discriminatory practice by law enforcement officials of targeting individuals for suspicion of crime based on the individual's race, ethnicity, religion, or national origin.").

83. *See* sources cited, *supra* notes 75-76; *see also Case Study: New York's Stop-and-Frisk Policies*, CATALYSTS FOR COLLABORATION, https://catalystsforcollaboration.org/case-study-floyd-v-city-of-new-york/(discussing *Floyd v. City of New York*, where "the Police Department utilized a policy of 'racial profiling' to routinely stop blacks and Hispanics who would not have been stopped if they were white. . .").

inherently more frequent and intrusive than the stops that white Americans experience.[84] Black Americans, at the mercy of police officers, are forced to answer questions or endure a pat-down search based on a police officer's own racial biases.[85] Although there may be other reasons besides race that motivate police officers, race often does play a significant factor.[86]

Charles Epp et al. masterfully describe the privacy violations that Black Americans face at the hands of police officers as a result of racial profiling:

> Accompanying these harms is the invasion of privacy imposed by the officer's questions and searches. To the question "Why are you in this neighborhood? Most people will think with considerable justification, "Why is that any business of yours?" But when the questioner is a police officer, they will offer an answer while feeling their privacy invaded and their dignity eroded. Patting down a person's body in search of a weapon or a bag of drugs or rifling through the contents of a vehicle only on the basis of the hope that by chance some such searches will turn up contraband are even deeper intrusions of privacy and assaults on dignity.[87]

No one wants their "dignity eroded,"[88] so individuals may be wary of police encounters that could lead to an invasion of privacy. Does a Black American truly have the right to be let alone if they believe that they are never truly let alone by police officers? If they alter their activities and conduct based on the fear of being stopped, is this privacy? A Black American that lives with this fear, and alters their activities, is not given personal autonomy because they no longer have the capacity to choose their own course of action. Even if privacy is only defined as dignity, Black Americans are not given full honor or respect if they are constantly seen as potential criminals.

Terry stops have a material impact on Black Americans' sense of privacy. In a 2019 study conducted on Black male trauma related to police violence, participants described how they altered their behavior when their behavior was outside of the "white box."[89] One of the participants of the study described that many Black people

84. *See* text accompanying *Closer Look, supra* note 76. Further, according to a 2020 ACLU report of D.C., Black people are often stopped when engaged in innocent conduct, and are more likely to be searched: "The vast majority of people who experienced the least justifiable subset of stops were Black. For example, MPD officers made 11,045 stops that did not end in a warning, ticket, or arrest, a category that almost certainly includes stops of people who were engaged in innocent conduct. Of the people who experienced these stops, 86% were of Black people. And of the people who were searched during one of these stops, 91% were Black." *ACLU Analysis of D.C. Stop-and-Frisk Data Reveals Ineffective Policing, Troubling Racial Disparities*, ACLU, https://www.aclu.org/press-releases/aclu-analysis-dc-stop-and-frisk-data-reveals-ineffective-policing-troubling-racial (last visited Nov. 1, 2023).

85. *See, e.g., Stop-and-Frisk Data, supra* note 75.

86. *See, e.g, supra* notes 73-76 and accompanying text discussing stop and frisks.

87. PULLED OVER, *supra* note 68, at 5-6.

88. *See id.*

89. Jocelyn R. Smith Lee & Michael A. Robinson, *"That's My Number One Fear in Life. It's the Police": Examining Young Black Men's Exposures to Trauma and Loss Resulting from Police Violence and Police Killings*, 45 J. BLACK PSYCH. 143, 161 (2019) [hereinafter *Examining Trauma*]. The phrase "white box" originates from this Note.

in his community, in fear of police encounters, decided to remain inside.[90] Instead of exercising their right to be let alone outside, or their right to exercise their privacy and personal autonomy while outside, Black Americans changed what they were doing to avoid police officers.

One study participant stated that "[P]eople shouldn't have to be scared in their communities. Especially the people that's not doing anything wrong . . . . So everybody don't come outside anymore . . . . 'Cause you can get locked up just for walking down the street."[91] Another study participant stated: "They keep strippin' us and diggin' on our private areas for what? Like we don't, we don't even do nothin'. We don't sell no drugs or nothing. Like it's crazy. It's just harassment."[92] Another study participant reported that when he sees the police, he'll keep walking, "But if I see them backing up, I'ma run, 'cause I already know what's on their mind."[93] And another stated: "What if it was me? . . . That's why I stay in the house. All the time."[94]

As one study participant expressed, fear should not be rampant in the community—especially from those meant to serve the community.[95] The intrusiveness of being grabbed or patted down simply for *being*, in addition to the fear of that intrusiveness, should not be the norm. Yet, that is the current reality. Whether they are forced to run, stay in the house, or endure intrusive searches, Black Americans are forced to change their behavior in order to avoid having their privacy invaded—both physically and emotionally.

This is more than just abstract or potential harm: "The potential harm of surveillance comes from its use as a tool of social control."[96] This social control impacts Black Americans: without even encountering the police, Black Americans are subjected to unwarranted scrutiny and are unable to make choices without fear of intrusive governmental searches.[97] This lack of freedom is a disguised privacy violation. Black Americans are not let alone when they are scrutinized, afraid, and have to change their actions; thus, they are denied meaningful privacy. When fear becomes a "way of life" due to police encounters, there is no freedom to just *be* in the space and privacy that a Black American should enjoy.[98]

---

90. *Id.* at 161.
91. *Id.* at 161.
92. *Id.* at 162.
93. *Id.* at 167.
94. *Id.* at 168.
95. *Id.* at 161.
96. INT'L JUST. & PUB. SAFETY NETWORK, PRIVACY IMPACT ASSESSMENT REPORT FOR THE UTILIZATION OF FACIAL RECOGNITION TECHNOLOGIES TO IDENTIFY SUBJECTS IN THE FIELD 1, 2 (2011).
97. *See Examining Trauma*, *supra* note 89, at 162, 168. See also a study where participants felt afraid to leave their homes because they were scared and paranoid because they would "never know what's going to happen . . ." with police officers. STOP AND FRISK: THE HUMAN IMPACT, CENTER FOR CONSTITUTIONAL RIGHTS 6 (2012). "For generations, black and brown parents have given their children 'the talk'—instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger—all out of fear of how an officer with a gun will react to them." Utah v. Strieff, 136 S. Ct. 2056, 2070 (2016).
98. "Many people explained how having been stopped by police had changed the way they conducted their daily lives. For example, people described changing their clothing style and/or hairstyles, changing their routes or avoiding walking on the street, or making a habit of carrying around documents such as ID, mail, and pay stubs to provide police officers if stopped. One person noted, for instance, that she carries ID with

It is especially important to understand and center this Black experience to fully view and understand *Terry* stops from an Afrofuturistic perspective. It is impossible to work towards a future where Black Americans thrive and are in power without an understanding of the ways that current social and racial hierarchies impact Black Americans. Particularly as it pertains to privacy violations, Afrofuturism calls for an in-depth look at the Black experience and how that experience is affected by laws and policies, such as *Terry* stops. By highlighting certain traumatic experiences, this Note critiques the privacy violations that *Terry* stops allow. In an Afrofuture, Black Americans would not have to alter their lives. Fear would not run rampant in a future where the current hierarchies that empower reasonless stops and frisks are no more. Not only would the Black experience and trauma be considered, but, as Professor Capers expressed, policing would have a more care-focused approach.[99] In contrast, brutality, violence, and pain embody the core of present-day policing.[100] Nonetheless, an understanding of the Black experience can not only guide critiques but also legal analyses, such as the analysis, *infra,* on the reasonable expectation of privacy.

C. A "Reasonable Expectation of Privacy"

When evaluating the *Terry* stop, the Supreme Court did not analyze whether there was a reasonable expectation of privacy for the petitioners. The concept was mentioned, but the case revolved around the reasonableness of the police officer's actions. This section discusses the reasonable expectation of privacy that the Supreme Court introduced in 1967, as well as an Afrofuturistic reasonable expectation of privacy.

As stated by the Court, "'the Fourth Amendment protects people, not places,' and wherever an individual may harbor a reasonable 'expectation of privacy,' he is entitled to be free from unreasonable governmental intrusion."[101] When analyzing potential Fourth Amendment violations, courts often determine whether there is a reasonable expectation of privacy. This Note identifies privacy violations of *Terry* stops and proffers a different understanding of privacy altogether; thus, Afrofuturistic conceptions may not easily fit into the traditional reasonable expectation of privacy analysis. *Terry* stops are generally reasonable under the Fourth Amendment,[102] but this Note, in viewing *Terry* stops Afrofuturistically, finds a privacy violation that is not

her even when she is just out walking the dog. Several people expressed sadness, frustration or anger that they believed these adaptations were necessary." STOP AND FRISK: THE HUMAN IMPACT, CENTER FOR CONSTITUTIONAL RIGHTS 7 (2012) (citations omitted).

99. *See* Capers, *supra* note 6, at 49.

100. *See, e.g., Eric J. Miller, Knowing Your Place: The Police Role in the Reproduction of Racial Hierarchy,* 89 GEO. WASH. L. REV. 1607, 1608 (2021).

101. *See Terry,* 392 U.S. at 9; U.S. CONST. amend. IV.

102. *See Terry v. Ohio,* 392 U.S. 1, 31 (1968) ("A police officer's right to make an on-the-street 'stop' and an accompanying 'frisk' for weapons is, of course, bounded by the protections afforded by the Fourth and Fourteenth Amendments. The Court holds, and I agree, that, while the right does not depend upon possession by the officer of a valid warrant, nor upon the existence of probable cause, such activities must be reasonable under the circumstances as the officer credibly relates them in court.") (Harlan, J. concurring). Justice Harlan makes a distinction that he affirms based on the "present facts," emphasizing that there may be *Terry* stops that are not properly conducted. *Id.* at 34.

adequately addressed by the current legal paradigm. The premise that *Terry* stops are permissible as long as there is reasonable suspicion of a crime fails to correct the violations described above. This Note now asks whether the constitutional cornerstone of the Fourth Amendment—if an individual has a reasonable expectation of privacy—can play a role.

The concept of a reasonable expectation of privacy first arises in Justice Harlan's concurrence of *Katz v. United States.*[103] There, Justice Harlan sets forth a two-prong test: "first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"[104] The expectation is often easily subjective–whether you, personally, have an expectation of privacy–but the expectation must also be objectively reasonable such that society would believe that your circumstances should be private.[105] If there is a reasonable expectation of privacy, generally, a search warrant is required before police officers may conduct the search.[106] The use of a listening device outside of a phone booth,[107] a phone being searched incident to an arrest,[108] the use of sense-enhancing technology that is not generally in public use,[109] and accessing cell-site location information data,[110] are all examples of searches where there was a reasonable expectation of privacy that made the search unconstitutional. The analyses that found these searches to be unconstitutional does not necessarily mean that Black Americans will have a reasonable expectation of privacy during *Terry* stops.

1. The Public Nature of Stops

One argument regarding why *Terry* stops do not require a reasonable expectation of privacy analysis could be the public nature of the stops. However, the privacy violations that many Black Americans experience during *Terry* stops–the vulnerability, and the erosion of dignity–is precisely why there should be a renewed focus on the reasonable expectation of privacy for Black Americans in those scenarios.

It has been argued that "[t]here can be no privacy in that which is already public."[111] The idea of having a reasonable expectation of privacy when walking down

103. Katz v. United States, 389 U.S. 347, 360-61 (1967) (Harlan, J. concurring).

104. *Id.* at 361.

105. *Id.*

106. There are exceptions such as a search incident to arrest, consent, border searches, or exigent circumstances. *See Fourth Amendment*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/fourth_amendment (last visited Nov. 1, 2023).

107. *Katz*, 389 U.S. at 347.

108. *See* Riley v. California, 573 U.S. 373, 373 (2014).

109. *See* Kyllo v. United States, 533 U.S. 27, 27 (2001).

110. *See* Carpenter v. United States, 585 U.S. 296, 296 (2018).

111. Melvin v. Reid, 297 P. 91, 93 (Cal. App. 4th 1931); *see also* Forster v. Manchester, 189 A.2d 147, 149-50 (Pa. 1963) ("A person who *unreasonably* and seriously interferes with *another's interest in not having his affairs known to others*, or his likeness exhibited to the public is liable to the other.") (alteration in original) (citation omitted); Daily Times Democrat v. Graham, 162 So. 2d 474, 478 (Ala. 473 (1964) ("On the public street, or in any other public place, the plaintiff has no right to be alone, and it is no invasion of his privacy to do no more than follow him about. Neither is it such an invasion to take his photograph in such a place, since this amounts to nothing more than making a record, not differing essentially from a full written description of a public sight which anyone present would be free to see.").

the street directly conflicts with the idea that there is no privacy in public. This concept has guided opinions in cases where plaintiffs attempted to sue using a privacy tort;[112] because the incident was in public, nothing up until the alleged privacy violation had been private.[113] *Gill v. Hearst* is an example where plaintiffs attempted to sue because they believed that there was an invasion of privacy when a picture taken of them was published in a magazine.[114] Since the picture was taken in public, "the photograph did not disclose anything which until then had been private, but rather only extended knowledge of the particular incident to a somewhat larger public than had actually witnessed it at the time of occurrence."[115]

Another case involving a public picture found that there was a right to privacy due to the private nature of the photograph. When the appellee took her children to a fair, she went with them to the "Fun House."[116] As she was leaving the Fun House, her dress was blown up by air jets, exposing her from the waist down.[117] A photographer snapped a picture of the appellee in that moment, and published the picture on the front page of the appellant's newspaper.[118] Although it was argued that she was in public and did not have a right to privacy, the level of embarrassment and obscenity afforded the appellee the right: "To hold that one who is involuntarily and instantaneously enmeshed in an embarrassing pose forfeits her right of privacy merely because she happened at the moment to be part of a public scene would be illogical, wrong, and unjust."[119]

The appellee in that moment was vulnerable when she was exposed from the waist down. The person that walked out after appellee could have been wearing pants; thus, not everyone would have been vulnerable in the same way while in the Fun House. If she was photographed while her dress was down, the case probably would have come out in a similar fashion as *Gill v. Hearst*. However, it was the fact that her exposure was made public when the picture was published that protected her right to privacy.

The vulnerability that the appellee experienced is the same vulnerability that Black Americans experience when they encounter police officers. As seen throughout this Note, Afrofuturism centers analyses with the Black experience as the focal point. An Afrofuturistic perspective aids in understanding and reclaiming the history and impact of Black enslavement. Further, centering the trauma that many Black Americans experience due to police encounters is critical for a perspective like Afrofuturism that emphasizes Black empowerment. An Afrofuturist paradigm illustrates this analogy by bringing to the forefront the importance of race in these conversations.

112. The four privacy torts are intrusion on seclusion, public disclosure of private facts, false light, and appropriation. *See Invasion of Privacy*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/invasion_of_privacy (last visited Nov. 13, 2023).

113. *See* Gill v. Hearst Pub. Co., 253 P.2d 441, 444 (1953).

114. *See id.* at 442.

115. *See id.* at 445.

116. Daily Times Democrat v. Graham, 276 Ala. 380, 381 (Ala. 1964).

117. *Id.* at 381.

118. *Id.* at 381.

119. *Id.* at 383.

For Black Americans, their race is their version of the appellee's dress: it exposes Black Americans to a barrage of unwanted scrutiny and judgment. While the appellee could claim that she had a reasonable expectation in her undergarments not being exposed, for Black people, there does not need to be undergarment exposure or a picture taken for them to feel exposed—they may feel exposed every time a police car drives by or an officer is near. Now, not every police encounter is a privacy violation, just as not every public picture taken is a privacy violation. However, the impact of the intrusions, as discussed in Part II, Section II, is what amounts to a privacy violation. Unfortunately, this violation (and thus, a Black American's reasonable expectation of privacy) may not withstand recent legal understandings of privacy, discussed below, in public places.

2. Recent Understandings of Privacy

While the 2018 Supreme Court case *Carpenter v. United States* expanded the legal understanding of unreasonable surveillance,[120] and is useful in curbing long-term surveillance, it does not necessarily help protect against the potential privacy violations of *Terry* stops. Nonetheless, there is potential for the *Carpenter* holding to extend to the privacy violations that this Note discusses.

In *Carpenter v. United States*, the Supreme Court discussed the fact that "a person does not surrender all Fourth Amendment protection by venturing into the public sphere."[121] To support this proposition, the Court cited *Katz v. United States*, which stated that "what a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection."[122] This is followed by a sentence that may offer hope for privacy protection in public places: "But what he seeks to preserve as private, even in an area accessible to the public, *may* be constitutionally protected."[123] In *Carpenter*, the Court applied the conception of a reasonable expectation of privacy to the digital space, interrogating whether a person had a right to privacy in their cell site location data that catalogued their public movements.[124] Although the Court discussed privacy in the public space, they were referring to long-term surveillance in public by law enforcement (where law enforcement would "secretly monitor and catalogue every single movement of an individual[] for a very long period.").[125] The Court cites the concurrence in *United States v. Jones* when discussing this, confirming that long-term surveillance would not survive a reasonable expectation of privacy analysis and would thus be unconstitutional.[126] However, short-term surveillance would: "[R]elatively short-term monitoring of a person's movements on public streets accords with expectations of privacy that our society has recognized as

120. Carpenter v. United States, 585 U.S. 296 (2018).
121. *See Carpenter*, 585 U.S. at 310.
122. *See Katz*, 389 U.S. at 351.
123. *See id.* (emphasis added).
124. *See Carpenter,* 585 U.S. at 296.
125. *See Carpenter,* 585 U.S. at 310.
126. *See Carpenter,* 585 U.S. at 310.

reasonable."[127] Thus, even recent cases would not easily extend a finding of a reasonable expectation of privacy for *Terry* stops, which are a form of short-term monitoring.

Nonetheless, there is at least a subjective expectation of privacy–the first prong of Justice Harlan's two-part test. Black Americans will subjectively believe that they have an expectation of privacy when encountering the police. They do not expect to be treated like criminals in every situation, forced to comply with officers based on some loose form of suspicion. The second prong of Justice Harlan's test may be more difficult to meet: this expectation may not be one that society would recognize as reasonable given the public nature of *Terry* stops.[128]

Further, by law, *Terry* stops are reasonable as long as they are supported by reasonable suspicion, which any police officer can claim to have.[129] The argument that this results in the discriminatory application of *Terry* stops, and makes the entire practice "inherently unfair and discriminatory," is not widely accepted and understood by society.[130]

Moreover, the pervasive general belief that systemic racism does not exist may impede any finding of a reasonable expectation of privacy during *Terry* stops. Systemic racism refers to the policies and practices that exist in a society or organization, and that result in "continued unfair advantage to some people and unfair or harmful treatment of others based on race."[131] Although the impact of systemic racism spans generations, more than forty percent of Americans are "unconvinced that systemic racism exists in the U.S."[132] While Black Americans may believe that *Terry* stops are harmful and an invasion of privacy, with more than eighty percent of Black Americans believing systemic racism exists, this does not mean that society acknowledges systemic racism or that *Terry* stops play a role in maintaining racism.[133] This

127. United States v. Jones, 565 U.S. 400, 430 (2012); *id.*

128. *See Reid*, 112 Cal. App. at 290.

129. *See Terry v. Ohio,* 392 U.S. 1, 30 (1968). Police officers can and have lied in order to pursue their suspicions–regardless of whether those suspicions were grounded in anything other than biases. *See* Press Release, U.S. Dept Just., Former Louisville, Kentucky, Police Detective Pleads Guilty to a Federal Crime Related to the Death of Breonna Taylor (Aug. 23, 2022) (discussion of police officers that lied in order to obtain a search warrant).

130. PULLED OVER, *supra* note 69, at 6; s*ee Terry,* 392 U.S. at 31 ("Such a search is a reasonable search under the Fourth Amendment. . .").

131. *Systemic racism*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/systemic-racism (last visited March 1, 2023). The origins of these policies and practices lie in the enslavement of more than twelve million Africans within the United States, and are thus "foundational to and engineered into . . . major institutions and organizations." *See* Justin Worland, *America's Long Overdue Awakening to Systemic Racism*, TIME (June 11, 2020, 6:41 AM), https://time.com/5851855/systemic-racism-america/; RUHA BENJAMIN, RACE AFTER TECHNOLOGY 88 (2019) (citing Joe Feagin & Sean Elias, *Rethinking racial formation theory: a systemic racism critique*, 36 ETHNIC & RACIAL STUD. 931, 936 (2013)). The impact of the insidious establishment of systemic racism in the United States was seen in the use of Black Codes and Jim Crow Laws and is now seen in a lack of equal access to quality health care for Black Americans, Black Americans being more likely to experience difficulty voting, the number of Black deaths at the hands of police officers, and Black children attending under resourced schools at higher rates than other children. *See* Worland, *supra* note 131. The list does not end there. *See id.*

132. Steven Ross Johnson, *U.S. News–Harris Poll Survey: As America Aims for Equity, Many Believe Systemic Racism Doesn't Exist*, U.S. NEWS, (Nov. 16, 2022, 8:00 AM), https://www.usnews.com/news/health-news/articles/2022-11-16/poll-many-americans-dont-believe-systemic-racism-exists.

133. *See id; see also* sources cited *infra* notes 157-161

means that it may be difficult for a court to find that society would accept *Terry* stops as violating a reasonable expectation of privacy. If this is so, the privacy violations that Black Americans experience during *Terry* stops may fail the second part of Justice Harlan's test (although it would depend heavily on the analysis and the judge). Without data on society's understandings of a *Terry* stop, this is all speculation; however, it seems even more likely given that police officers often provide reasons other than race to explain the *Terry* stop and their finding of reasonable suspicion.[134] If police officers are not explicitly racist, and there is a general belief that systemic racism does not exist, it does not easily follow that there should be a reasonable expectation of privacy.

This lack of a legal reasonable expectation of privacy does not, in any way, take away from the idea of the individual right to privacy that should be afforded to Black Americans (and any others, theoretically, on American soil). As of yet, there is no specific test or analysis for this. This means that the idea of a Black American having a reasonable expectation of privacy during police encounters, such as *Terry* stops, may not hold up in court.

An Afrofuturistic perspective, on the other hand, focuses on a different expectation of privacy. While existing law focuses on reasonability and what constitutes a reasonable expectation of privacy, an Afrofuturist perspective posits an analysis of what reasonability even means to a Black American. A perspective that centers Black voices and power, while also stretching conceptions of space and freedom in ways not yet known to Black Americans, forces the question: how can current conceptions of reasonability meld into an Afrofuturistic conception of reasonability that uplifts Black Americans? Further, because Afrofuturism seeks to disrupt hierarchies, there may even be questions of whether the concept of reasonability is one that can only exist within our current racial and social hierarchies. Reasonability is not universal,[135] as in it does not always represent Black Americans or the Black experience. An Afrofuturist perspective requires a more rigorous and specific inquiry.

At present, this concept of "reasonable" does not extend to the Black American experience in all contexts.[136] What is reasonable to one person may not be reasonable to a Black American, and vice versa.[137] The measurement of this reasonability could

134. *See infra* note 155.

135. "The cultural superstructure upon which the necessary illusion of reasonableness and the reasonable person rest is being divested of the "universal" and "objective" (selective) scaffolding supporting a supposedly objective interpretation of reasonableness." Scott Astrada & Marvin Astrada, *The Enduring Problem of the Race-Blind Reasonable Person*, AMERICAN CONSTITUTION SOCIETY (May 11, 2020), https://www.acslaw.org/expertforum/the-enduring-problem-of-the-race-blind-reasonable-person/.

136. *See id.* ("Examples of identity and experience that muddy notions of reasonableness include: the relationship between police and certain racial groups . . . .").

137. See Aliza Hochman Bloom, *Objective Enough: Race is Relevant to the Reasonable Person in Criminal Procedure*, 19 STAN. J. C.R. & C. L. LIB 1, 6-7, 11 (2023) (describing the reasonable person standard in the criminal context. The article's overall argument that "excluding an individual's race . . . contributes to a reasonableness standard which is increasingly unmoored from reality and subjectively marginalizes groups, particularly Black men.") "Race is a factor that clearly influences a 'reasonable person's judgment of whether they are free to end a police encounter and walk away, or whether they are in custody, or whether their consent to a search is voluntarily given.". *Id.*

differ from a subjective standpoint (as in, there are different understandings of what would be reasonable for each group of people), or from a societal standpoint where the "white box" is imposed (and reasonability is only found within that box).[138] Many individuals, such as the participants in the 2019 study discussed above, may decide to alter their behavior in a way that is reasonable to them, yet that same behavior could be considered unreasonable to someone who lives comfortably in the "white box."[139] Thus, an Afrofuturistic reasonable expectation of privacy would center Black voices and the Black experience, and it would find that *Terry* stops violate this privacy.

III. THE DISCONTINUATION OF *TERRY* STOPS

In the 1983 case *Kolender v. Lawson,* the Supreme Court held that the California vagrancy statute at issue was unconstitutionally vague;[140] this decision struck down vagrancy laws across the country.[141] This Part first discusses *Kolender* before moving into a legal analysis of *Terry* stops in light of *Kolender's* holding and in light of Afrofuturism. The Note further argues that Afrofuturism as a paradigm should guide the assessment of *Terry* stops, and that such a paradigm necessitates a finding that the stops should be discontinued.

A. Extending the holding of Kolender

The law examined in *Kolender v. Lawson*, California Penal Code § 647(e), required individuals to identify themselves to police officers.[142] California courts had interpreted the law to require individuals to provide "credible and reliable" identification "detailed enough" for an officer to check the authenticity during a stop.[143]

The case concerned Edward Lawson, a Black man who was frequently subjected to police harassment in California.[144] When walking in predominantly white neighborhoods, he was detained or arrested about fifteen times within eighteen months.[145] He was prosecuted twice and convicted once because the second charge was dismissed.[146] Before his repeated arrests due to this identification law, he had no previous criminal record.[147] His only crime was his pension for walking, but unfortunately, his race did not allow his behavior to fall within the lines of the "white box."

---

138. *See, e.g., id.* at 6.

139. *See Examining Trauma, supra* note 89, at 161-63.

140. *See* Kolender v. Lawson, 461 U.S. 352 (1983).

141. This decision reaffirmed the 1972 Supreme Court case *Papachristou v. Jacksonville* which held that a Jacksonville vagrancy ordinance was unconstitutionally vague—this case did not strike down vagrancy laws altogether. *See* Papachristou v. Jacksonville, 405 U.S. 156 (1972).

142. *See* Cal. Penal Code § 647 (1872), *invalidated by Kolender,* 461 U.S. 352.

143. Linda Greenhouse, *Justices overturn vagrancy law requiring identification for police*, N.Y. TIMES (May 3, 1983), https://www.nytimes.com/1983/05/03/us/justices-overturn-vagrancy-law-requiring-identification-for-police.html.

144. *See Kolender*, 461 U.S. at 354.

145. *Id.*

146. *Id.*

147. *Id.*

Ultimately, the Court ruled in favor of Lawson.[148] The Court concluded that the statute was unconstitutionally vague within the meaning of the Due Process Clause of the Fourteenth Amendment.[149] The statute's requirements of "credible and reliable" identification were never clarified.[150] Without a standard that determined what someone must do to satisfy the "credible and reliable" identification requirement, police officers were granted full discretion to decide whether a suspect violated the statute. People who walked the street and were suspected of violating the statute were only allowed to continue on their way "at the whim of any police officer."[151]

Although the concept of privacy was not explicitly mentioned in the overturning of vagrancy laws in *Kolender*, the concept was present all the same. The statute at issue in that case allowed police officers to invade the privacy of anyone deemed suspicious and required them to identify themselves.[152] Instead of Mr. Lawson being able to privately enjoy his walks, he was excessively stopped about fifteen times and overwhelmed by a barrage of questions regarding his identity.[153] In its analysis, the Court focused on the ambiguity of the identification requirement in the statute, but a primary concern for the majority was that people be allowed to walk public streets without being subject to the "whim of any police officer" who may have vague suspicions of criminal activity.[154] Ultimately, Mr. Lawson's privacy should not have been at the whim of the police officers who continuously stopped him.

Terry stops also subject people to the whims of police officers. Police officers have complete discretion to conduct stops once they have determined, or have the belief, that criminal activity is afoot.[155] Individual state laws that pertained to *Terry* stop-like police conduct, such as the California statute where police officers essentially conducted *Terry* stops for vagrants in *Kolender*, have been struck down due to vagueness or discrimination.[156] However, the entire practice must be discontinued because it is both vague and discriminatory.

148. *Id.* at 361.
149. *Id.* at 350, 361.
150. *Id.* at 358.
151. *Id.* at 358 (citing Shuttlesworth v. City of Birmingham, 382 U.S. 87, 90 (1965)).
152. *Id.* at 358-59.
153. *Id.* at 354.
154. 461 U.S. at 358 (citing *Shuttlesworth,* 382 U.S. at 90).
155. Police officers must assess the situation and determine what he believes to be true about that situation before performing a *Terry* stop. The majority in *Terry* addresses the situation involving Terry and focuses on what the officer *believes* to be suspicious, which may leave room for discretion in that beliefs, in and of themselves, are not concrete: "When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is, in fact, carrying a weapon and to neutralize the threat of physical harm." *See* 392 U.S. 1, 24 (1968) (emphasis added). It is worth noting, that police officers must point to "facts" and "rational inferences from those facts," but as discussed, racial profiling and biases may warp these facts and rational inferences. *Id.* at 21; *see* sources cited *supra* notes 82-85, and accompanying text. Given the fact that *Terry* stops largely do not result in arrest, the officers' beliefs that criminal activity was afoot do not always mean that there was criminal activity. *See* sources cited *supra* notes 73-76 and accompanying text.
156. In a recent case, *Floyd v. City of New York*, the court held the New York stop-and-frisk policy violated the Fourth Amendment because it rendered stop and frisks more frequent for blacks and Hispanics. 813 F. Supp.2d 417, 436, 446 (2011).

Studies have shown that police discretion is influenced by factors such as race or ethnicity.[157] They have also shown that *Terry* stops in particular are largely ineffective and discriminatory.[158] For example, a 2012 study found that only six percent of *Terry* stops resulted in an arrest. [159] In 2021, another study found that sixty-one percent of those who were stopped were found to be innocent, and sixty percent of those who were stopped were Black.[160] Absent specific criteria defining exactly how a police officer should establish reasonable suspicion, it remains permissible for police officers to rely on discriminatory factors, such as race, in making their determinations.[161] Thus, police officers may violate individual privacy based on the color of someone's skin, or anything else outside of the "white box." There is no way to truly govern whether police officers are relying on their training and experience, their own biases, or both.

B. The Role of Afrofuturism

Ultimately, if *Terry* stops were the product of *Terry* laws, not a court response to police practice, a case could be made that they are unconstitutional pursuant to the void-for-vagueness doctrine. Unfortunately, we do not currently have a doctrine that pertains to police practices and whether those practices, as a whole, are vague, discriminatory, or both. Still, this is where Afrofuturism comes in. The Supreme Court could, in viewing the issue Afrofuturistically, overturn *Terry v. Ohio,* which cemented the practice and provided it constitutional protection. If *Terry* stops were viewed in an Afrofuturistic light, they would be discontinued as a practice both due to vagueness and the damaging implications that they have for Black Americans' lives.

Both the void-for-vagueness doctrine and general ideas regarding vagueness, in this context, are particularly Afrofuturistic in that they aim to eliminate any laws that perpetuate the social and racial hierarchies allowing for the privacy violations Black Americans experience during *Terry* stops. In an Afrofuture, the rules that guide society are not steeped in racial biases and ambiguity that make it easy for police officers to find Black lives suspicious and that diminish Black experiences. An Afrofuturist perspective seeks to highlight the inequities, traumatic experiences, and privacy violations characterized by Black existence, and aims to eliminate all vague laws which

157. Benjamin Brown, *Police discretion*, OXFORD BIBLIOGRAPHIES (July 26, 2022), https://www.oxfordbibliographies.com/display/document/obo-9780195396607/obo-9780195396607-0325.xml.

158. *See* sources cited, *infra* notes 159-160.

159. *See* JEFFREY FAGAN, SUPPLEMENTAL REPORT, DAVID FLOYD V. CITY OF NEW YORK 34, available at https://ccrjustice.org/files/FaganSecondSupplementalReport.pdf. (Of the almost two million stops utilized in a study in New York from 2010-2012, only around 6% resulted in an arrest. This trend of unproductive investigatory stops has not declined. In fact, in 2021, 61% percent of those who were stopped were found to be innocent.).

160. *Stop-and-Frisk Data,* NYCLU, https://www.nyclu.org/en/stop-and-frisk-data (last visited Mar. 6, 2023) [hereinafter *NYPD Data*]. "At the height of the practice in 2011, they found that approximately nine out of 10 frisked individuals were innocent – in that year, the majority of those frisked (53%) were Black." *Inside the NYPD's Surveillance Machine,* Amnesty Int'l, https://banthescan.amnesty.org/decode/ (citing *NYPD Data.*). In 2021, sixty percent of those stopped were Black. *NYPD Data.*

161. Ric Simmons, *Race and Reasonable Suspicion*, 73 FLA. L. REV. 413, 422 (2021).

maintain them. Thus, the Supreme Court could find *Terry* stops unconstitutionally vague, and overturn *Terry v. Ohio*, resting in the Afrofuturistic understanding that *Terry* stops are vague because there is no clear definition of what classifies a person as reasonably suspicious.

The Court in *Kolender* held that the void-for-vagueness doctrine requires statutes to define the criminal conduct with "sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."[162] This is to avoid due process concerns: in this context, due process requires that a person "of ordinary intelligence" have a "reasonable opportunity to know what is prohibited, so that he may act accordingly."[163]

While Black Americans may choose to act a certain way in front of police officers, spurred by fears of invasive privacy violations, there is no way to definitively know how one should act in order to avoid a *Terry* stop.[164] Besides operating outside of the "white box" and looking suspicious enough to a police officer, there is no specific conduct that is prohibited.[165] Further, there is no measurement or equation for reasonable suspicion,[166] and no true way to avoid being at the whim of a police officer.

Truly, no one's privacy should be at the whim of a police officer. *Terry* stops allow this to happen by giving police officers the power to use reasonable suspicion as a shield to violate someone's privacy. Not only can police officers lie about what spurred their reasonable suspicion, there is nothing that stops police officers from relying on little to no evidence before conducting a *Terry* stop.[167] Technically, as long as it is justifiable by the officer and believed by his superior, observing any "unusual behavior"[168] outside of the "white box" is enough for a finding of reasonable suspicion. This broad discretion, as evidenced by statistics,[169] has been abused and

162. *Kolender*, 461 U.S. at 357.

163. Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

164. *See, e.g. Examining Trauma, supra* note 89.

165. *See e.g.* Floyd v. City of New York, 959 F. Supp. 2d 540, 558-59 (S.D.N.Y. 2013) (citing a finding that "8% of all stops [conducted by NYPD between January 2004 and June 2012] "8% of all stops led to a search into the stopped person's clothing, ostensibly based on the officer feeling an object during the frisk that he suspected to be a weapon, or immediately perceived to be contraband other than a weapon. In 9% of these searches, the felt object was in fact a weapon. 91% of the time, it was not" and that "[b]etween 2004 and 2009, the percentage of stops where the officer failed to state a specific suspected crime rose from 1% to 36%.")

166. *See Terry v. Ohio*, 392 U.S. 1, 21 (1968).

167. The standard is simply "unusual conduct," but there is no clear definition regarding what a police officer can deem "unusual." *See Terry*, 392 U.S. at 30 ("We merely hold today that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.").

168. *See id.*

169. "The NYPD has conducted millions of stop-and-frisks in New York City over the last two decades. The majority of those stopped are people of color, and a vastly disproportionate number are Black. . . . [W]e

results in the violations of many who simply want to enjoy their privacy to be let alone. Thus, the practice of *Terry* stops should be discontinued.

The discontinuation of *Terry* stops would give those on American soil freedom from police scrutiny and invasive violations of their privacy. It would free police officers from the burden of analyzing everyone they come in contact with, and from the fear of potentially encountering a dangerous situation. However, this inevitably raises a large question regarding crime. Without *Terry* stops, who will stop the bad guy?

Afrofuturism envisions a world where the "bad guy," inevitably someone outside of the "white box," is no longer given that label. An Afrofuture is one where there are no police practices steeped in historical precedent with constitutional protections to shield racist behavior. An Afrofuturistic paradigm forces a shift from the "white box" towards laws and practices that do not inherently enforce the "white box."[170] Vagrancy laws and police practices such as *Terry* stops do not fit into this Afrofuture.

Every single human being has a paradigm that guides their way of life. No matter the profession, every individual has biases and frameworks that they use to make decisions. Judges, policymakers, legislators, and police officers are no exception to this rule. This Note suggests that *Terry* stops in particular should be viewed within an Afrofuturistic paradigm. Based on the Afrofuturistic understanding of space and privacy–embodied in the right to be let alone that all Black Americans should have–*Terry* stops should be considered a practice that harms, instead of uplifts, Black Americans and should therefore be discontinued.

CONCLUSION

Afrofuturism, as a paradigm, guides speculation about the future. In the context of this Note, what would the law look like if the privacy invasions of Black Americans were not so normalized? This is only one specific example of how an investigation of the past forms realizations about the present to help navigate toward a changed future. Afrofuturistic imaginings can begin with the genesis of the United States–if Killmonger's idea of freedom were realized, what would be of the Black American? Perhaps then they would have had the right to be let alone, although only in the sense that, as Killmonger proposed, they drowned at sea.

Afrofuturistic conceptions can also begin in the present, with, as this Note suggests, the idea of the "white box" that permeates the structures, culture, and norms of the United States. The "white box" affords white Americans an invisibility cloak unless they are obviously committing a crime. Unambiguous Black Americans are automatically seen as outside of the "white box," making them more visible to police

do know that many of these stops have been unlawful and that some have led to violent police misconduct." *See NYPD Data, supra* note 160.

170. In dissent, Justice Sotomayor urged a shift away from the white box and laws that enforce the white box to protect the "canaries in the coal mine" and recognize unlawful police stops so that there is the pursuit of justice: "We must not pretend that the countless people who are routinely targeted by police are "isolated." They are the canaries in the coal mine whose deaths, civil and literal, warn us that no one can breathe in this atmosphere. . .They are the ones who recognize that unlawful police stops corrode all our civil liberties and threaten all our lives. Until their voices matter too, our justice system will continue to be anything but." Utah v. Strieff, 579 U.S. 232, 254 (2016) (Sotomayor, J., dissenting) (internal citations omitted).

officers and more likely to be labeled criminals. This labeling subjects Black Americans to privacy violations that white Americans are not privy to. Black Code-era vagrancy laws were the explicitly racist way to perpetuate the "white box." Now *Terry* stops allow police officers to use the "white box" as a way to label all others reasonably suspicious. Just as vagrancy laws were deemed so vague that they allowed police officers to violate privacy virtually whenever they pleased, *Terry* stops should be discontinued due to the same vagueness.

The past is not just the past. Afrofuturistic analyses of the past shine a light on the hierarchies that laws were written to perpetuate. In a perfect world, these analyses can guide the application of an Afrofuturistic paradigm to future legislation and policies.