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When Critical Race Theory Enters the Law & Technology Frame

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SPECIAL ISSUE

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When Critical Race Theory Enters the Law & Technology Frame

Jessica M. Eaglin

Michigan Technology Law Review is proud to partner with our peers to publish this essay by Professor Jessica Eaglin on the intertwining social construction of race, law and technology. This piece highlights how the approach to use technology as precise tools for criminal administration or objective solutions to societal issues often fails to consider how laws and technologies are created in our racialized society. If we do not consider how race and technology are co-productive, we will fail to reach substantive justice and instead reinforce existing racial hierarchies legitimated by laws.



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WHEN CRITICAL RACE THEORY ENTERS THE LAW & TECHNOLOGY FRAME

Jessica M. Eaglin*

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INTRODUCTION

On a dreary grey day in winter, an alien enters my office right after I finish teaching my second law course of the day. I assume it is an alien because it is green, translucent, has three eyeballs, and floats in my presence. In my exhaustion I am somehow not that perplexed to see it before me.

“Earthling,” it says, “what do you study in this room filled with books and papers?”

I smile. What academic doesn’t want to discuss their research with a complete stranger? “Well, I’m interested in a number of things, but in this moment I study criminal justice reforms in the era of mass incarceration, with a particular focus on race, law, and sentencing technologies.”

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The alien furrows its single brow. “I have many questions about this, Earthling. We gathered from the heat sensing that this land is filled with human bodies caged in small boxes; these people cannot come and go as they please.”

“Yes, 2.3 million people are, on any given day, behind bars in this country.¹ It’s a terrible reality, but one that many scholars and advocates are committed to addressing. Among other concerns, 60% of the people behind bars are Black and Brown, demonstrating significant racial disparities.² We call this phenomenon mass incarceration.³“

“Black and Brown. What do you mean by this? Is this, as you suggest, race?”

I smack my head. I must be very tired. Of course this alien doesn’t know what race is! It is not of this world.

“Yes, here on this planet, humans ascribe meaning to the different color of an individual’s skin. In the United States, we have a long and problematic history of using law to create differences along these lines in society.⁴ So, for example, my skin is a shade of brown. Based on physical, phenotypical markers, it is clear that I am Black. Someone else whose skin is a different shade of brown may identify as Latinx.⁵ It can be complex. The point is, however, that here, we assume that everyone knows what race is. It is socially determined.”

“Okay. . . and what is this technology of which you speak? Do you study the law of aircrafts that my brethren keep redirecting away from our planet through big vortexes in space?”

1. Wendy Sawyer & Pete Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POL’Y INITIATIVE (Mar. 24, 2020), <https://www.prisonpolicy.org/reports/pie2020.html>. The United States is the largest incarcerator in the world. *Id.* This remains true despite modest reductions in the prison population in recent years. For details on those modest reductions, see E. ANN CARSON, BUREAU OF JUST. STATS., PRISONERS IN 2019 1–2 (2020), <https://www.bjs.gov/content/pub/pdf/p19.pdf> (describing decline in both incarceration rate and the overall prison population since 2009).

2. Wendy Sawyer, *Visualizing Racial Disparities in Mass Incarceration*, PRISON POL’Y INITIATIVE (July 2020), <https://www.prisonpolicy.org/blog/2020/07/27/disparities>.

3. See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

4. See, e.g., IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 9–10 (2006); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1715–24 (1993). For a recent and powerful call to study the erasure of this history in law, see K-Sue Park, *This Land Is Not Our Land*, 87 U. CHI. L. REV. 1777, 2009–2013 (2020).

5. Brown can mean many other ethnicities as well. Moving forward in this essay, I refer primarily to Black people in reference to people whose phenotypical features connote African American. However, race as a social construct captures many different peoples, including white people, within its frame.

“Uh, no. Not at all. I study how the legal practices that produce mass incarceration appear in automating tools designed by humans to shape the decisions of other humans.⁶ Usually, these technologies construct standardized information based on statistical analyses of past human behavior to predict future outcomes.⁷ We humans love to predict the future.⁸ Come to think of it, people have been predicting that aliens would land on this earth forever. One legal scholar even suggested that you would come and offer to take away all the black people in this country in exchange for needed resources if the United States would allow it.⁹ Wait, are you here to take away all the black people?!”

The alien laughs. “No! Of course not. Why would we land on this planet and only take away Black people when we don’t even know what a Black person is? As you say, race is a social construct for which I have no preconceived understanding.¹⁰ So, what do these technologies have to do with race?”

“Right . . . good point.” I shake my head. “Sometimes it is hard to remember that race is a social construct because its social meaning is so powerful that it profoundly shapes U.S. society.¹¹ You see, Black has been constructed as negative, and law produces and reifies that social meaning in many ways.¹² It’s complicated.”

I look through the floating alien (who is transparent, how strange) to see two students milling around outside my office door with their computers open, ready to chat about the midterm exam we discussed in class today. I feel both agitated and relieved. So much to do, so little time. I better get to the point.

6. Cf. Beth Coleman, *Race as Technology*, 70 CAMERA OBSCURA 177, 178 (2009) (framing the study of technology as the study of a human maker creating a reproducible technique).

7. See Jessica M. Eaglin, *Technologically Distorted Conceptions of Punishment*, 97 WASH. U. L. REV. 483, 503–514 (2019) (explaining how predictive algorithms are similar to earlier technologies used at sentencing, like sentencing guidelines).

8. See generally IAN HACKING, *THE TAMING OF CHANCE* 4–5 (1990) (noting the embrace of statistics in the West based on deeply social bases).

9. DERRICK BELL, *The Space Traders*, in *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* 158–94 (1992).

10. HANEY LÓPEZ, *supra* note 4, at 8 (critiquing Derrick Bell’s *Space Trader Chronicle* on this basis).

11. See, e.g., DOUGLAS S. MASSEY, *CATEGORICALLY UNEQUAL: THE AMERICAN STRATIFICATION SYSTEM* 51–112 (2008) (describing the depth and persistence of racial inequality in the United States).

12. See, e.g., Devon Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 978 (2002) (explaining how legal discourse treats race as something real and not real, and in turn reifies it).

“Alien—can I call you that?—you raise an interesting question. What do these technologies have to do with race? Well, developers of the technologies and law and policymakers often refer to these tools as a means to improve efficiency and perhaps effectiveness in decision making while also reducing the threat of racial bias by individual decision makers. The idea is that, by deciding hard questions at a distance, often without the explicit consideration of race, the social significance of race will disappear.”

“And does it? Can technology make it disappear? Also, you can call me AJ.”

“Okay, AJ. To your question—no, not really. See, race is a social construct, and technologies are social artifacts. These technologies only make sense in a social context shaped by race. So, more often than not, a technology illuminates the social significance of race in race-neutral terms. That is what interests me. I think about whether and how technologies replicate race, and what it means for law if technologies are the way that people want to address mass incarceration in the United States.”

“Earthling, I have many more questions. But I sense that you want me to leave. Perhaps you wish to speak with the humans behind me. Let us continue this conversation later.”

With that, AJ disappears. I sigh. What a strange conversation. I gesture my students into my office. We have a brief, but pleasant conversation about the practice exam. Oddly, neither student comments on AJ’s presence. After they leave my office, I recognize why seeing my students allowed me a momentary sense of relief. At least in that conversation I could assume that my student knew what I meant more often than with AJ. In turn, that thought prompts me to jot down a few notes to myself. On second thought, I turn on my computer. . . .

In this essay, I suggest that law and technology scholarship tends to focus on fixing technologies without critically analyzing the role of law in creating the social context in which the technologies are adopted. I demonstrate how legal scholars incorporate a critical race lens to expand the discourse on law and technology as an antidote to this tendency. Further, I call for more in-depth exploration of the intersection between race, technology and the law in legal scholarship going forward. Part I describes the “techno-correctionist” tendency in law and technology scholarship. Part II introduces critical race theory into the frame. First, I explain how understanding race as a social construct produced through

law provides guidance on how to critique law and technology in society. Second, I assert that understanding how race shapes our perception of social realities provides guidance on how to expand critiques of law through examination of technologies in society as well. Part III considers the significance of framing such critiques as the intersection of critical race theory (CRT) and law and technology.

I. THE “TECHNO-CORRECTIONIST” TENDENCY IN LAW & TECHNOLOGY

Technologies are inherently social artifacts. That is, the technical is always inherently social.¹³ Technical artifacts do not occur outside of social context, and so we must study the social forces that produce technologies as much as we study the technologies and how they may shape the social world.¹⁴

Outside the field of law, many humanities-oriented scholars are rising to this task. For example, in fields such as history,¹⁵ media studies,¹⁶ and political science,¹⁷ scholars are producing critical texts that help us understand the expansion of specific technologies and their resonance in social and political contexts. Within and outside those literatures, scholars are applying critical race perspectives to the question of technology’s role in society.¹⁸ These works, in turn, influence legal scholarship.

Yet, as a field of study, law and technology exhibits a tendency to focus on the thing at issue—the technology—in ways that can overlook or take for granted the role of law in creating and disrupting the social forces that shape and give meaning to technology in sociohistorical context. As a field, legal scholarship often orients around two issues—the design of a technology and its implementation to achieve a particular

13. Coleman, *supra* note 6, at 177 (“technology is often defined as an intrinsically human extension of the self”).

14. See, e.g., HACKING, *supra* note 8, at 4–5 (exploring the rise of probabilities in social context); LANGDON WINNER, *THE WHALE AND THE REACTOR* 19–22 (2d ed. 2020). (urging an exploration of the tools and social forces).

15. See, e.g., ELIZABETH HINTON, *FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN THE UNITED STATES* (2017); HUNTER HEYCK, *THE AGE OF SYSTEM: UNDERSTANDING THE DEVELOPMENT OF MODERN SOCIAL SCIENCE* (2018).

16. See, e.g., CHARLTON D. MCILWAIN, *BLACK SOFTWARE: THE INTERNET AND RACIAL JUSTICE FROM THE AFRONET TO BLACK LIVES MATTER* (2020).

17. See, e.g., VIRGINIA EUBANKS, *AUTOMATING INEQUALITY: HOW HIGH TECH TOOLS PROFILE, POLICE, AND PUNISH THE POOR* (2018); NAOMI MURAKAWA, *HOW LIBERALS BUILT THE PRISON STATE* (2014).

18. For an introductory overview of “race critical code studies,” see RUHA BENJAMIN, *RACE AFTER TECHNOLOGY: ABOLITIONIST TOOLS FOR THE NEW JIM CODE* 40–46 (2020).

end, usually efficiency, within the bounds of law.¹⁹ A step beyond that, but still within the same frame, there is a great deal of scholarship that considers whether law can properly regulate the infusion of technology into specific contexts as well.

Consider as example the notable debates about actuarial risk assessments in criminal administration. These tools rely upon an algorithm to classify persons based on their predicted likelihood of engaging in criminal behavior in the future.²⁰ The algorithm reflects normative judgments translated onto statistical analyses of observations in large datasets designed by data analysts to make these predictions.²¹ The tools are often offered as a means to increase efficiency, effectiveness, and reduce the threat of biases, including racial biases, in the decision-making of individual criminal administrators.²² For example, these tools are proliferating at sentencing to inform judicial decision-making. In theory, by considering the tools' results (for example, its characterization of a defendant as low, medium, or high risk of recidivism), a judge will come to the objectively "correct" decision at sentencing more frequently.²³ Further, these "correct" sentences may in the long run reduce reliance on incarceration because the tools will identify which persons require more carceral supervision (through incarceration or otherwise) and which ones do not.²⁴

The expansion of these tools in criminal administration is deeply controversial for a variety of reasons, which legal scholars explore at length. There are many strands to the literature, but two prominent discourses stand out in this moment. One considers the design of the tools. Within that umbrella, much scholarship considers how to ensure transparency and accountability in tool design.²⁵ Just as much, if not more, scholarship considers whether the tools' design adheres to notions of

19. See, e.g., Ifeoma Ajunwa, *The Paradox of Automation as an Anti-Bias Intervention*, 41 CARDOZO L. REV. 1671, 1677, 1677 n.22 (2020) (observing that "one faction of law and technology legal scholars has become preoccupied with determining the legal guidelines to ensure fair automated decision-making").

20. ANGÈLE CHRISTIN, ALEX ROSENBLAT & DANAH BOYD, COURTS AND PREDICTIVE ALGORITHMS 1 (2015), https://datasociety.net/wp-content/uploads/2015/10/Courts_and_Predictive_Algorithms.pdf [<https://perma.cc/79FA-9HAW>].

21. *Id.* at 4.

22. *Id.* at 1–2.

23. See, e.g., Brian Green, *The False Promise of Actuarial Risk Assessments: Epistemic Reform and the Limits of Fairness*, FAT at 1 (2020) (noting that a central assumption of actuarial risk assessments in sentencing is that they mitigate judicial bias).

24. See *id.* at 2 (noting that a central assumption of actuarial risk assessments in sentencing is that they will promote criminal justice reform).

25. See, e.g., Joshua A. Kroll et al., *Accountable Algorithms*, 165 U. PA. L. REV. 633 (2017) (arguing that transparency alone will not maintain algorithms' fairness and introducing new technology to improve accountability).

equality under the law, particularly around race and gender.²⁶ A complementary body of legal scholarship considers how to implement the tools for use in criminal administration. For example, recent scholarship questions how best to convey risk information so that judges will adhere to these population-based representations more consistently.²⁷ In the policing context, scholarship considers how advancing technologies affect the law of policing, particularly constitutional law.²⁸

These legal discourses often adopt a technical perspective to the expansion of the tools in criminal administration. That is, it accepts as a given that the problems presented in criminal administration lend themselves to technical, numbers-driven solutions.²⁹ This orientation has at least two significant effects. First, it leads to the emphasis of particular kinds of knowledge in the study of the tools' expansion. For example, scholars tend to draw on various methodologies to explore the tools, often converging on empiricism and its intersection with law.³⁰ Methodologies and kinds of knowledge that do not easily mesh with that intersection are easily jettisoned or subordinated in that discourse. Second, this framing suggests a particular vision of law. The role of law, it appears, is to mediate technologies in society, and the role of the legal scholar is to figure out how.

Such scholarship, while important, is constrained by its “techno-correctionist” orientation.³¹ It situates law as deeply passive to the dilemmas that technologies are often offered to resolve, particularly the threat of racial and economic biases by individual actors. It imagines technologies as simply achieving the aims they are stated to do, and the role of law as furthering or hindering those aims on the basis of pre-

26. Deborah Hellman, *Measuring Algorithmic Fairness*, 106 VA. L. REV. 811, 814 (2020) (exploring how we should assess whether an actuarial risk assessment is fair); Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803, 806 (2014) (arguing that relying on actuarial risk assessments at sentencing “amounts to overt discrimination” and violates the Equal Protection Clause).

27. Brandon L. Garrett & John Monahan, *Judging Risk*, 108 CALIF. L. REV. 439, 441–47 (2020) (encouraging expansion of Risk Assessment Instruments (RAIs) and the creation of regulation frameworks to monitor and regulate the use of RAIs in the pretrial and postconviction sentencing context).

28. See, e.g., Andrew Guthrie Ferguson, *Big Data and Predictive Reasonable Suspicion*, 163 U. PA. L. REV. 327, 330 (2015) (exploring whether police stops can be predicated on algorithm-derived suspicion).

29. For a more detailed explanation of the implications of this framing as a response to mass incarceration, see Eaglin, *supra* note 7, at 483 (2019). Cf. Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259, 268–71 (2018) (distinguishing between “over” and “mass” criminal justice reforms).

30. For an overview of fairness and equality debate, see Sandra G. Mayson, *Bias In, Bias Out*, 128 YALE L.J. 2218 (2019).

31. Ajunwa, *supra* note 19, at 1677.

existing, transcendental values. Yet law for its part creates those social forces and conditions just as much as it regulates the technologies created to address them. Technologies enter a world shaped by law just as much as they shape that world. As such, a broader orientation in legal scholarship is necessary to begin to fully grapple with the issues that technology raises in society in this historical moment. That is, law needs to get in tune with the politics of technology.

II. INFUSING THE CRITICAL RACE LENS INTO THE LEGAL DISCOURSE

Critical race theory emerged as one strand of a larger surge in critical thought that reached law in the 1970s and 80s.³² Minority legal scholars questioned the adequacy of conventional race-remedies law to achieve its self-professed aims.³³ These scholars challenged the objectivity and neutrality of laws that legitimated and entrenched racial inequities.³⁴ They adopted novel methodologies to confront the “historical centrality and complicity of law in upholding white supremacy (and concomitant hierarchies of gender, class, and sexual orientation).”³⁵ Critical race theory has expanded in recent years such that there are many subfields under its umbrella both in law and outside it, but it remains a vibrant field of study whose main thrust remains the study of race, racism and power in society.³⁶

The central claim of this Part is simple: critical race theory already plays an important role in the expanding literature on law and technology. It is an antidote to the techno-correctionist tendency in law and technology discourse. In what follows, I explain why critical race theory is synergist in this context and how it prompts different questions for legal inquiry. I draw primarily on the role a single strand of critical race

32. RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 4–5 (2018). For a detailed history of critical race theory’s origin in law, see Kimberlé Crenshaw, *Twenty Years of Critical Race Theory: Looking Back to Move Forward*, 43 *CONN. L. REV.* 1253, 1266–1300 (2011).

33. Crenshaw, *supra* note 32, at 1305–10.

34. *Id.*

35. I. Bennett Capers, *Afrofuturism, Critical Race Theory, and Policing in 2044*, 94 *N.Y.U. L. REV.* 1, 23, 27 (2019) (emphasizing the role of storytelling in critical race scholarship) (internal quotation omitted).

36. DELGADO & STEFANCIC, *supra* note 32, at 3–4 (noting the expansion of critical race theory within and outside the law). Note that in this short essay, I focus on critical race theory rather than the broader scope of critical theory within which critical race theory emerges. This includes feminist theory, critical legal studies on the one hand, and LatCrit, QueerCrit, DisCrit, and eCrit on the other. For a recent summary of critical race theory’s origin and its many intellectual offshoots, see Capers, *supra* note 35, at 22–24.

theory—the “social construction” thesis³⁷—offers to the study of law and technology. In subpart A, I introduce the social construction thesis and demonstrate how legal scholars implicitly use that frame to expand the discourse on law and the design of technologies. Subpart B demonstrates how this thesis similarly expands the discourse on the role of technology in shaping how law reproduces race in society.

A. Socially Constructed Technologies

Race is a social construct.³⁸ The physical features we ascribe to different groups of people, particularly with regards to skin color, have meaning because we continue to ascribe social meaning to it. Yet, that social meaning has real consequences for lived experiences. As such, race is a social construct with real social functions that produce and reproduce both race as a social construct and the fluid social meanings we ascribe to race.³⁹

The social meanings ascribed to race do not just “occur” in society; rather, they are produced. As critical race scholar Ian Haney López explains, “to say race is socially constructed is to conclude that race is at least partially legally produced.”⁴⁰ That is, law, among many other institutions and forces, constructs race. The question for critical race scholars is not whether race is real, but how it is produced and through what avenues meanings are ascribed to it and reinforced. The challenge for critical race legal scholars is to unmask how race is constructed through law.⁴¹ Law, in this context is broadly construed. It means more than just “law on the books;” rather it refers to the whole panoply of practices and actors who use law to produce social meaning, both consciously and unconsciously.⁴² Taken a step further, these scholars identify the interaction of laws that prescribe meaning to race, the actors that uphold these meanings, and the practices that are manifested from these interactions in order

37. DELGADO & STEFANCIC, *supra* note 32, at 9.

38. This means that “the notions of racial difference are human creations rather than eternal, essential categories.” EDUARDO BONILLA-SILVA, *RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN AMERICA* 8 (2018) (nothing that social scientists generally accept this idea, but that is about where agreement on the matter of race ends).

39. See, e.g., Crenshaw, *supra* note 32, at 1349 (“Race is not natural, yet race is embedded in social relations, many of which are naturalized by the knowledge-making disciplines that we have inherited and participate in reproducing.”).

40. HANEY LÓPEZ, *supra* note 4, at 7.

41. *Id.* at 8.

42. *Id.* at 85–87.

to challenge the discourses that produce and reify race as a real thing already “out there” in the world.⁴³

As technology is a social artifact, it stands to reason that it too is socially constructed.⁴⁴ That is, technologies have politics that in turn reproduce the social meaning of race or challenge it.⁴⁵ Understanding race and technology as both inherently social phenomena encourages a more critical eye that denounces the assumed objectivity of a tool. Rather, it demands employing methodologies that have exposed the very constructedness of race as a means to also expose the constructedness of technology.⁴⁶ The challenge for law scholars is to take this a step further, by seeing how law, as a set of social practices and legal actors, participate in the social construction of race which is reflected, reinforced, and produced in the technologies expanding to shape our lives. The challenge, then, is not simply to regulate the tools through law, but to see how law creates the dilemmas that the tools present. Law constructs the shape of technology. Race constructs the shape of technology. Critical race theory invites legal scholars to use law to deconstruct the social construction of race produced and illuminated through the tools.

My own work on the institutionalization of actuarial risk assessments at sentencing strives toward this end. In *Constructing Recidivism Risk*, I analyze how actuarial risk assessments are designed, and the ways that it intersects with significant questions of law and policy pertinent to sentencing.⁴⁷ The piece grapples with what recidivism risk means, why the tools are designed as they are, and who makes decisions about the numerous subjective judgments that produce the tools for use at sentencing.⁴⁸ Perhaps a more critical race aspect of that article questions why most actuarial risk assessment tools rely on criminal records, particularly

43.

44. Much of the Science and Technology Studies (STS) literature explains the significance of this assertion. For a concise entry point to this literature, see Sheila Jasanoff, *Ordering Knowledge, Ordering Society*, in *STATES OF KNOWLEDGE: THE CO-PRODUCTION OF SCIENCE AND THE SOCIAL ORDER* (2004).

45. Simone Brown suggests that “racializing surveillance is a technology of social control where surveillance practices, polices, and performances concern the production of norms pertaining to race and exercise a power to define what is in or out of place.” SIMONE BROWN, *DARK MATTERS: ON THE SURVEILLANCE OF BLACKNESS* 16 (2015). Her book renders visible “the many ways that race continues to structure surveillance practices” by exploring material objects like ship plans, runaway notices, and lantern laws as precursors to the technologies being explored today. *See id.* at 11.

46. *See, e.g.*, BENJAMIN, *supra* note 18, at 11 (urging that we “pull[] back the curtain” on purportedly neutral technologies to “draw attention to forms of coded inequity” in the tools and in society).

47. Jessica M. Eaglin, *Constructing Recidivism Risk*, 67 *EMORY L.J.* 59, 63–64 (2017).

48. *Id.* at 64–65.

arrest data, as the source of its definitional question (what is recidivism) and the basis of predictions of recidivism risk (the predictive factors in the tool).⁴⁹ As I point out, criminal records are cheap and easy to access, yet have significant racial implications.⁵⁰ I argue that, as a matter of sentencing law, their use may be nothing more than a product of material interests shaping social reality.⁵¹ Recognizing that tool construction is the production of social meaning, I argue that the demos should decide important questions of tool design, including whether to use arrest data at sentencing, and the law should facilitate such engagement.⁵² It calls for law to mediate the creation of social meaning, with a particular eye toward incorporating marginalized populations into that process.

In a very different context, Professor Ifeoma Ajunwa's recent intervention on automated decision-making technologies used in the employment law context strives toward a similar end. In *The Paradox of Automation as an Anti-Bias Intervention*,⁵³ Professor Ajunwa echoes the concerns raised by other scholars regarding how automated decision-making can reinforce and entrench racial and economic biases in the purportedly neutral tools.⁵⁴ She critiques law and technology scholarship for its narrow framing of algorithmic bias as "a solely technical problem" when it is actually a matter of inadequate employment law.⁵⁵ She points out that the design of employment law itself is inadequate; excessive deference to employers in discrimination claims and the preservation of the "cultural fit" criterion in law facilitate racial (and other) biases in employment practices.⁵⁶ These legal deficiencies contribute to and are exacerbated by biases identified in automated decision-making technologies.⁵⁷ Thus, in addition to suggesting that the existing legal frameworks to regulate automated decision-making in the employer context should change, she argues that we must see the problem of racial bias in a tool as a problem of law in society. The "solution" is not just a technical fix to the design of the automated system; rather, it must be a change in exist-

49. For a summary of the significance of these questions, see *id.* at 86–87.

50. *Id.* at 95–96 (significance of arrests); 101–04 (fiscal incentives shape design of tool).

51. *Id.*

52. *Id.* at 113–20 (proposing expanded accountability measures through law).

53. Ajunwa, *supra* note 19.

54. Indeed, a seminal work on biases and algorithms generates from the employment context. Solon Barocas & Andrew Selbst, *Big Data's Disparate Impact*, 104 CALIF. L. REV. 671 (2016). Yet, as Professor Ajunwa notes, there is a relative dearth of discussion about automation and employment discrimination in legal scholarship. Ajunwa, *supra* note 19, at 1675. For another notable exception to that assertion, see Pauline T. Kim, *Data-Driven Discrimination at Work*, 58 WM. & MARY L. REV. 857 (2017).

55. Ajunwa, *supra* note 19, at 1679.

56. *Id.* at 1711–16.

57. *See id.*

ing employment law which permits race and economic status to influence employment practices.

These articles adopt disparate approaches to disparate questions of law and technology. What binds them together is the inherently “crit” framing that the pieces adopt. Both articles question why algorithms work as they do, with an eye toward racial and economic justice. Both illuminate the role of law in the construction of technology. Most importantly, both consider the dilemma of racial and economic justice as socially constructed through law, and illuminate how law can entrench or interrupt the social significance of race in data driven technologies.

B. *Technologies Constructing Social Reality*

Race, whether intentionally or not, shapes our understanding of the social world.⁵⁸ Even in this recent era of “colorblind ideology,” the socio-historical significance of race persists.⁵⁹ Race is, following Michael Omi and Howard Winant, “both a social/historical structure and a set of accumulated signifiers that suffuse individual and collective identities, inform social practices, shape institutions and communities, demarcate social boundaries, and organize the distribution of resources.”⁶⁰ Quite simply, race constructs our social world. Law actively facilitates this in intentional and unintentional ways.

Technologies also shape our social world in sometimes subtle and sometimes obvious ways. For example, Science & Technology Studies scholars have long emphasized the intersection of science and technology with politics and culture.⁶¹ The two are co-productive.⁶² As technologies expand in society, law becomes a space to mediate both the social construction of the world and the pursuit of “serviceable truths” produced through technologies.⁶³ To interrogate technology, then, is to ask deeper questions about society. The same is true of race. That is, the

58. MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES 106 (2013) (“[I]n the United States, *race is a master category*—a fundamental concept that has profoundly shaped, and continues to shape, the history, polity, economic structure, and culture of the United States.”).

59. See Devon Carbado & Cheryl I. Harris, *The New Racial Preferences*, 96 CALIF. L. REV. 1139, 1142 (2008).

60. OMI & WINANT, *supra* note 58, at 125.

61. Jasanoff, *supra* note 44, at 13, 17.

62. *Id.*

63. JULIE E. COHEN, BETWEEN TRUTH AND POWER: THE LEGAL CONSTRUCTIONS OF INFORMATIONAL CAPITALISM 5 (2019) (“Through their capacities to authorize, channel, and modulate information flow and behavior patterns, code and law *mediate* between truth and power.”); see also Sheila Jasanoff, *Serviceable Truths: Science for Action in Law and Policy*, 93 TEX. L. REV. 1723 (2015).

study of race is the exploration of the ways in which it is both there and not there in society. What are the functions of race and technology on one another, and what is their respective effect on society? The inquiry demands understanding the work that both do, not on a surface level, but in a sociohistorical context. In turn, both require exploring the way race on the one hand, and technology on the other, interact with and shape law.

To begin with my own work, in *Technologically Distorted Conceptions of Punishment*,⁶⁴ I grapple with how the historically situated introduction of sentencing technologies shapes legal and policy debates around the institutionalization of actuarial risk assessments now. I argue that we cannot understand why legal scholars and policymakers embrace statistically robust actuarial risk assessments at sentencing now without an understanding of how the expansion of sentencing technologies mutated the social meaning of key concepts that shape our understanding of the legal practices that sustain mass incarceration.⁶⁵ For example, I assert that we have come to see racial justice as a matter of technical precision in sentencing, rather than the pursuit of substantive justice through it.⁶⁶ In turn, we have come to see the notion of recidivism risk as objective, rather than socially constructed through law.⁶⁷ Similarly, I argue that the idea of rehabilitation altered as scholars and policymakers made risk technologies more central to its agenda.⁶⁸ Though not nefarious in itself, its effect contributes to the notion that the way to solve the problem of mass incarceration is within the carceral state rather than outside it.⁶⁹ In short, these social transformations change our perception of legitimate sentencing reforms, orienting us toward more technical interventions and creating the foundation for the interpretation of statistically robust actuarial risk assessments as apolitical. Yet, in this Article and others, I suggest this is simply a narrative—the expansion of sentencing technologies are deeply political, and cultural, too.⁷⁰ In short, *Technologically Distorted* offers a counter-narrative that illuminates how technology shapes social realities and legitimates the role of law in sustaining the status quo.⁷¹

64. Eaglin, *supra* note 7.

65. *Id.* at 502.

66. *Id.* at 526.

67. *Id.* at 528; 533.

68. *Id.* at 521.

69. *Id.* at 521–23.

70. *Id.* at 534–35; see also Jessica M. Eaglin, *Population-Based Sentencing*, 106 CORNELL L. REV. (forthcoming 2021) (connecting the expansion of guidelines and RAIs under the umbrella of the culture of control).

71. Eaglin, *supra* note 7, at 535.

In a very different context, Monica Bell's recent article on race and policing illuminates how technology shapes social reality. In *Anti-Segregation Policing*, Bell argues that patterns of racial segregation shape policing, and policing also shapes patterns of racial segregation.⁷² The two are co-productive of one another, and as such the law of policing can intervene to disrupt residential segregation.⁷³ Among other aspects of policing that contribute to residential segregation, Bell points to the shape and location of police jurisdictions. Urban police organizations actively construct physical space by segmenting departments into districts, precincts, and service areas.⁷⁴ The creation of these imagined spaces have significant impact at the intersection of race and policing; it can “construct how police officers conduct daily work” through race and class.⁷⁵ As she points out, police districting is actually created based on predictive algorithms—the same predictive technologies that I have studied in the sentencing context.⁷⁶ She urges policing scholars, particularly those located at the intersection of policing and democratization, to at least question the seemingly natural, physical spatialization of police as a measure to redress residential racial segregation often considered beyond redress through civil rights law and the like.⁷⁷ Significantly, she suggests that the solution does not lie in the technical design of the algorithm, but instead in the normative values orienting decisions about the allocation of resources. Creating police districts to reduce residential segregation may require shifting from the “operations-first perspective” embedded in predictive technologies to an “anti-segregation approach,” which “could fuse with broader concerns about urban governance, community power, and democracy.”⁷⁸

What binds these works together is a critical perspective, an implicit thesis, asserting that technology shapes society and ideas of race construct social discourse, and the two converge through law. That is, racial meaning and technology are co-productive of one another in ways that seem invisible but have been legitimated by law. This thesis expands the

72. Monica C. Bell, *Anti-Segregation Policing*, 95 N.Y.U. L. REV. 650, 705–09 (2020).

73. *Id.* at 729 (setting forth “normative legal frameworks that advocates and police leaders can use to interrupt the role of policing in perpetuating residential segregation”).

74. *Id.* at 705–06.

75. *Id.* at 706–08 (drawing on the work of Daanika Gordon to demonstrate how “layering police districts atop segregation merely reinforces troubling policing strategies that seem inevitable in the context of segregation); see generally Daanika Gordon, *The Police as Place-Consolidators: The Organizational Amplification of Urban Inequality*, 45 LAW & SOC. INQUIRY 1 (2019).

76. Bell, *supra* note 72, at 708 (“Usually, police redistricting is conceptualized as a merely technical matter of operations, facilitated through proprietary algorithms.”).

77. *Id.* at 743.

78. *Id.* at 744.

discourse on law and technology beyond the confines of the thing, encouraging engagement through the thing to critique the social world. Bell's work, like my own, questions how technology shapes social reality. The question is not whether this meaning is intended or not, but rather what the social significance of that action is and how law can intervene in its social production.

III. TOWARD NEW QUESTIONS AT THE INTERSECTION

These are but a few examples of legal scholarship that adopts a critical race lens when critiquing the proliferation of technologies in society; there are many more.⁷⁹ By illuminating the enduring role of the social construction thesis, this Essay emphasizes that the techno-correctionist tendency in law and technology is not a demand of the literature, but a choice. In this Part, I argue that surmounting the techno-correctionist tendency through critical race theory can deepen both law and technology scholarship and critical race legal scholarship to create the foundation for *praxis*, so necessary to creating a more just world demanded in this historical moment.

First, exploring this intersection can deepen law and technology debates. For example, there is a robust debate in law and technology scholarship about the race, equal protection doctrine, and the design of actuarial risk assessments used in criminal administration.⁸⁰ The question pertains to whether actuarial risk assessments perpetuate racial bias.⁸¹ This dilemma is often framed as a technical problem—because there are differential rates of offending observed in the world, risk assessments produce differential predictions of recidivism based on race.⁸² Having “discovered” this technical dilemma, legal scholars are conflicted in what to do about it. The question turns on whether and how to design an actuarial risk assessment. Recognizing this dilemma as the problem of prediction in a racially unequal world, Sandra Mayson encourages the adoption of the most accurate tools possible, but urges criminal justice actors to re-

79. For example, in the pretrial bail context see Ngozi Okidegbe, *Democratizing Potential of Algorithms?*, 53 CONN. L. REV. (forthcoming 2021) (manuscript at 29–31) (on file with author). In the corrections context, see Chaz Arnett, *From Decarceration to Encarceration*, 41 CARDOZO L. REV. 641, 711–12 (2019) (critiquing the “better than jail” dichotomy in relation to electronic monitoring as an alternative form of punishment).

80. See, e.g., Hellman, *supra* note 26, at 817 (summarizing the measurement challenge from the computer science literature).

81. Mayson, *supra* note 30, at 2231–33 (2019) (unpacking the different meanings of “bias” with regards to actuarial risk assessments in criminal administration).

82. See, e.g., Green, *supra* note 23, at 7 (summarizing the technical challenge of creating fair predictions).

spond to risk with supportive concern rather than coercive measures.⁸³ Aziz Huq recognizes a similar problem;⁸⁴ he suggests the creation of racially disparate actuarial risk assessments to account for enduring racial stratification in society.⁸⁵

Adding a critical race lens deepens these findings, and perhaps can lead to alternative questions. What this literature identifies—and what their exploration of race and predictive algorithms in criminal administration shows—is the enduring significance of race as a social construct that shapes U.S. society. Largely missing from this literature is a careful exploration of the intersection between actuarial risk assessments and the social production of racial meaning through law. Such an analysis would consider not just the tool’s design, but whether and how the legal discourses that surround it construct racial difference. More importantly, the critical race lens would encourage legal scholars to identify and critique the laws and practices that produce not just the socially constructed inequalities in the tool, but the social constructs that in turn produce the shape of demand for these tools in society.⁸⁶

Second, exploring this intersection can deepen critical race legal discourse in this unique historical moment. Critical race scholarship is alive and well in the legal academy.⁸⁷ However, to the extent that CRT has been marginalized along with critical legal theory more broadly, legal researcher Corinna Blalock has persuasively argued that such marginalization occurred as a result of the inability for legal theory writ large to confront the hegemony of neoliberal logic in society.⁸⁸ Neoliberalism, as a series of policies and political projects, stands for the shift in orientation of government function toward market logics.⁸⁹ A growing contingent of

83. Mayson, *supra* note 30, at 2286–87, 2294–95.

84. Aziz Z. Huq, *Racial Equity in Algorithmic Criminal Justice*, 68 DUKE L.J. 1043 (2019).

85. *Id.* at 1056–57, 1101–02 (critiquing the limits of equal protection doctrine in ensuring “racially just” algorithms in criminal administration).

86. *See, e.g.*, Green, *supra* note 23, at 7 (calling for a shift away from generating fairer and more accurate risk assessments and toward diminishing carceral logics and practices).

87. Along with the continued production of important scholarship by leading names in the field, young scholars are continuing to advance the critical race theory agenda in different directions. *See, e.g.*, Priscilla Ocen, *Integrating Critical Race Theory and the “Social Psychology of Criminal Procedure,”* in *THE NEW CRIMINAL JUSTICE THINKING* (2017); Jasmine B. Gonzalez Rose, *Toward a Critical Race Theory of Evidence*, 101 MINN. L. REV. 2243 (2017).

88. Corinne Blalock, *Neoliberalism and the Crisis of Legal Theory*, 77 LAW & CONTEMP. PROBS. 71, 90 (2014).

89. *Id.*

legal scholars engage with law and the political economy.⁹⁰ To the extent that these scholars think about law and technology, it tends to pop up within isolated paradigms (e.g., work, bail reform).⁹¹ But technology, and the narratives that surround it, is a central means by which neoliberal logic has expanded, and continues to expand.⁹² Contending with the hegemony of neoliberalism requires contending with the hegemony of technology as the means to address pressing social problems made visible in this unique historical moment. Critical race legal scholars can contend with that hegemony by using law to create the space to politicize the racialized status quo through critiques of technology. Moreover, exploring this intersection can enrich our understanding of the ways that race continues to function, and is reproduced, in society. Adopting some of the nontraditional tactics employed by CRT scholars, like storytelling, can allow us to engage with those questions more directly in this space.

This intersection creates the foundation for transformation in society, not through technology but through critique. That is, at the intersection of critical race theory, technology, and law lies a foundation for praxis. Applying CRT to law and technology creates the possibility for legal scholars to analyze and critique society and begin to imagine transformative interventions through law. That is, by thinking about technology as a social artifact that allows us to critique the current social order, legal scholars can explore new (and old) avenues for change through law rather than reinforcing existing logics and entrenching existing practices.⁹³ At the intersection, law and technology scholarship can, as critical race scholars across disciplines have suggested, become the transformative literature it often portends to be.⁹⁴ Doing this requires asking different

90. See, e.g., *Yearly Roundup: What the LPE Blog Published in 2020*, L. & POL. ECON. PROJECT (Dec. 29, 2020), <https://lpeproject.org/blog/yearly-roundup-what-the-lpe-blog-published-in-2020> (discussions of technology situated in context of bail and work).

91. See *id.*

92. Eaglin, *supra* note 7, at 541; Corinne Blalock, *Mutant Neoliberalism and the Politics of Culture*, L. & POL. ECON. PROJECT (Apr. 28, 2020), <https://lpeproject.org/blog/mutant-neoliberalism-and-the-politics-of-culture> (warning that “neoliberalism’s obsession with efficiency and technocracy” is reflective of the deeper ideology of the market framed as “common sense” and “connected to issues of dignity, self-rule, and pessimism about the ability of a distant government to understand individual struggles.”).

93. Jessica M. Eaglin, *The Perils of Old and New in Sentencing Reform*, 76 ANN. SURV. AM. L. (forthcoming 2021) (critiquing the urgency in legal scholarship to attend to the new of technology rather than the old of social justice).

94. Here is where Professor Bennett Capers’s work resides. See, e.g., Capers, *supra* note 35; I. Bennett Capers, *Race, Policing, and Technology*, 95 N.C. L. REV. 1241, 1244 (2017) [hereinafter Capers, *Policing*]. His unique perspective at the intersection of race and technology converges on the possibilities of technology, with a particular look toward the future. See, e.g., Capers, *supra* note 35, at 30; Capers, *Policing*, *supra* note 94, at 1247. By contrast, my own work seeks to illuminate how technologies shape our understanding of

questions about law and society—questions we are all trained not to see. How has law socially constructed the discourse around technology? How does law facilitate the material conditions that produce the demand for certain technologies? How do technologies reproduce or alter our understanding of race in society, and what is the role of law in perpetuating that meaning? If race functions like a technology, then how, where and when should it be employed to challenge the assumptions that shape the status quo? Whatever the answer to these questions may be, critical race theory offers a means—though not the only means—to raise such questions. It reminds us that we built this world through legal constructions around social ideas of race; we must find novel ways to confront the social production of race through law if we are to change it.

CONCLUSION

When I look away from my computer screen, I see that the sun has set. Have I been writing all this time? What happened to that afternoon exhaustion? I really must get home. Yet, as I pack up my things and head toward the door, I feel a sense of excitement. Part of the difficulty of discussing race with AJ stemmed from the socially constructed assumption that we think we know what race is. Part of the challenge in studying technology is that we think we know what it is and what it does, too. When we scratch the surface of both, it becomes clear that in society, both race and technology are constantly changing, and at the center we will always find law. I smack my head for the second time today. To ask what technology has to do with race is to forget how race operates in society. Race functions like technology! I forgot to tell AJ that. AJ was right—there are many questions to consider at the intersection of race, technology, and the law. When AJ returns, I must be ready. With that, I pick up my phone to call a few friends

the social world and in turn, constrain it to the confines of the status quo, including in the context of race. To my mind, we do not disagree on matters of racial justice as much as we may disagree on whether technology will (rather than can) be the thing to get us to that place. For a much earlier but insightful reflection on the potential and pitfalls of technology for the larger project of “outsider” law reform, see Richard Delgado & Jean Stefancic, *Outsider Jurisprudence and the Electronic Revolution: Will Technology Help or Hinder the Cause of Law Reform?*, 52 OHIO ST. L.J. 847 (1991).