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## Furtive Blackness: On Blackness and Being

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## Furtive Blackness: On Blackness and Being

### Abstract

Furtive Blackness: On Blackness and Being (“Furtive Blackness”) and The Strict Scrutiny of Black and BlaQueer Life (“Strict Scrutiny”) take a fresh approach to both criminal law and constitutional law; particularly as they apply to African descended peoples in the United States. This is an intervention as to the description of the terms of Blackness in light of the social order but, also, an exposure of the failures and gaps of law. This is why the categories as we have them are inefficient to account for Black life. The way legal scholars have encountered and understood the language of law has been wholly insufficient to understand how law encounters human life. These articles are about the hermeneutics of law. While I center case history and Black letter law, I am also arguing explicitly that the law has a dynamic life beyond the courtroom, a life of constructing and dissembling Black life. Together, these essays and exercises in legal philosophy are pointing toward a new method of thinking about law, a method that makes central the material reality of the Black in black letter law.

They examine the semiotic relationships between race, gender, sexuality, and the law. While Furtive Blackness is primarily concerned with regimes of policing—both by badged officers and deputized citizens—Strict Scrutiny examines how the reconstruction amendments have been deployed and redeployed to strictly scrutinize Black presence and appeals to justice and make them unintelligible, irrelevant claims without justiciable and therefore outside of law the concern of law. Strict Scrutiny is a riff on the phrase of judicial review that is primarily concerned with the Court’s inversion of the term to tightly regulate and foreclose Black access to legal redress, as well as the police practice of strictly scrutinizing Black presence and movement in public and private places. In essence, the ascription of furtivity makes way for strict scrutinization; while the Black interior strategy of furtivity and refusal creates a survival praxis that allows for a reprieve in the wake of these indignities.

These articles are an interpretation of the law as a tool of anti-blackness and an exposition of Black thought and deed in response to anti Blackness, both in black letter law and day to day life. Both articles are descriptive, interdisciplinary and rooted in traditional law and accented by Black queer and feminist theory, critical race studies, performance studies and literary analysis.

### Keywords

criminal law, lgbt, lgbtq, civil rights, constitutional law, racial justice, discrimination, anti discrimination, privacy, law, queer theory, black studies, african american, gender, sexuality, class, racism, white supremacy, legal theory, political theory, legal philosophy, critical race theory

### Disciplines

Constitutional Law | Law and Gender | Law and Race | Sexuality and the Law

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# Furtive Blackness: On Blackness and Being

by T. ANANSI WILSON<sup>1</sup>

## Abstract

*Furtive Blackness: On Blackness and Being* (“*Furtive Blackness*”) and *The Strict Scrutiny of Black and BlaQueer Life* (“*Strict Scrutiny*”) take a fresh approach to both criminal law and constitutional law; particularly as they apply to African descended peoples in the United States.

This is an intervention as to the description of the terms of Blackness in light of the social order but, also, an exposure of the failures and gaps of law. This is why the categories as we have them are inefficient to account for Black life. The way legal scholars have encountered and understood the language of law has been wholly insufficient to understand how law encounters human life. These articles are about the hermeneutics of law. While I center case history and Black letter law, I am also arguing explicitly that the law has a dynamic life beyond the courtroom, a life of constructing and dissembling Black life. Together, these essays and exercises in legal philosophy are pointing toward a new method of thinking about law, a method that makes central the material reality of the Black in black letter law.

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1. T. Anansi Wilson is an affiliated scholar and adjunct professor of law at UC Hastings College of the Law. They are also a Ph.D. Candidate in African & African Diaspora Studies at the University of Texas at Austin. These articles originated in material form as draft dissertation chapters, yet their style, concerns and politics originate in the work of earlier Black and BlaQueer scholar-creator activists such as Toni Morrison, Pauli Murray, James Baldwin, Ida B Wells Barnett, Frederick Douglass, WEB Dubois, Audre Lorde, Essex Hemphill and other Ancestors unnamed. A great deal of gratitude is owed to my dissertation Chair Stephen Marshall, as well as advisors and early lookers Imani Perry, Hortense Spillers, Xavier Livermon, Saru Matambanadzo, Michele Alexandre, Christina Sharpe, Anthony Farley, Amber Rose Johnson, La Marr Jurelle Bruce, Saidiya Hartman, Julian Kevon Glover, Eric Johnson, Jossianna Arroyo, Simone Browne, Devon Carbado, Lisa Crooms Robinson, Harold McDougall, Marlon Bailey, Alex Cunningham, Khyree Davis, Alina Ball, Shauna Marshall, Gabriele Lara, Rory Little.

They examine the semiotic relationships between race, gender, sexuality, and the law. While *Furtive Blackness* is primarily concerned with regimes of policing—both by badged officers and deputized citizens—*Strict Scrutiny* examines how the reconstruction amendments have been deployed and redeployed to strictly scrutinize Black presence and appeals to justice and make them unintelligible, irrelevant claims without justiciable and therefore outside of law the concern of law. *Strict Scrutiny* is a riff on the phrase of judicial review that is primarily concerned with the Court's inversion of the term to tightly regulate and foreclose Black access to legal redress, as well as the police practice of strictly scrutinizing Black presence and movement in public and private places. In essence, the ascription of furtivity makes way for strict scrutinization; while the Black interior strategy of furtivity and refusal creates a survival praxis that allows for a reprieve in the wake of these indignities.

These articles are an interpretation of the law as a tool of anti-blackness and an exposition of Black thought and deed in response to anti Blackness, both in black letter law and day to day life. Both articles are descriptive, interdisciplinary and rooted in traditional law and accented by Black queer and feminist theory, critical race studies, performance studies and literary analysis.

Specifically, *Furtive Blackness* engages the Fugitive Slave Law, Black (and Slave) Codes, Fourth and Fourteenth Amendments jurisprudence and current cases of racialized and gendered policing to develop an analytic to Fourth Amendment law, criminal procedure, and policing as practiced by officers of the law and deputized white citizens. This analytic seeks to shed light on how Black and BlaQueer (LGBTQ) people—and bodies—have come to exist both in and outside of law; reachable through its policing arm, yet unreachable by many of its fundamental protections. In other words, this work seeks to articulate a framework that maps how American jurisprudence renders Black and BlaQueer people furtive—what I am titling “Furtive Blackness”—and how this furtivity exists as an afterlife of slavery and operates as a social and legal pretext for police encounters.

*Furtive Blackness* is primarily interested in how Black culture, flesh and movement come to operate—well outside the auspices of the Fourth, Thirteenth and Fourteenth Amendment—as bodies of evidence for probable cause, reasonable suspicion and the logics for the deployment of quotidian searches, excessive force and mass incarceration; *Strict Scrutiny* is primarily concerned with how Black presence appeals to justice are turned aside and viewed skeptically as always, already faulty and often, outside of justiciability. As such, I'm also interested in how this experience with being rendered furtive simultaneously marks Black citizens as outside of the protection of law, yet easily and routinely within its disciplinary reach.

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*If [Blacks] conduct themselves in an orderly way, they will not have to worry about police brutality.*

-Senator Robert Byrd<sup>2</sup>

*Black people will never gain full equality in this country. Even those herculean efforts we hail as successful will produce no more than temporary 'peaks of progress,' short-lived victories that slide into irrelevance as racial patterns adapt in ways that maintain white dominance. This is a hard-to-accept fact that all history verifies. We must acknowledge it and move on. Armed with a perspective on our society that I call: 'Racial Realism,' we can insulate ourselves from despair based on our subordinate status. We will then be free to imagine and implement racial strategies that can bring fulfillment and even triumph.*

-Derrick Bell, *Racism is Here to Stay*<sup>3</sup>

*I've been trying to articulate a method of encountering a past that is not past. A method along the lines of a sitting with, a gathering, and a tracking of phenomena that disproportionately and devastatingly affect Black peoples any and everywhere we are [...] I am interested in plotting, mapping, and collecting the archives of the everyday of Black immanent and imminent death, and in tracking the ways we resist, rupture, and disrupt that immanence and imminence aesthetically and materially.*

-Christina Sharpe, *In the Wake*<sup>4</sup>

*Police: Sixth-leading cause of death for young black men.*

-Research Study from the University of Michigan, Rutgers University and Washington University.<sup>5</sup>

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2. Amy E. Lerman and Vesla M. Weaver, *Protest Is Democracy at Work*, SLATE (Dec. 23, 2014 12:09 PM), <https://slate.com/news-and-politics/2014/12/police-brutality-protesters-history-of-civil-rights-womens-suffrage-child-labor-boston-tea-party.html>.

3. Derrick Bell, *Racism is Here to Stay*, 35 HOW. L.J. 79 (1992).

4. CHRISTINA SHARPE, *IN THE WAKE: ON BLACKNESS & BEING*, 83 (2016).

5. Frank Edwards, Hedwig Lee & Michael Esposito, *Risk of Being Killed by Police Use of Force in the United States by Age, Race-Ethnicity, and Sex*, 116 PROCEEDINGS OF THE NAT'L ACAD. OF SCI. 16793, 16795 (2019).

## Introduction

This paper marks police power as the enforcement branch of United States statecraft and the defining aspect of U.S. racial formation. As such, this essay is an early attempt to take up the relationship between Blackness and policing, and Black thought in relation to policing, as a central logic of the construction of race, the Black imagination, and practice of freedom. This essay will proceed both chronologically as well as conceptually through Black thought and deed in response to the police power, from slavery to the present. It uses the tools of critical race theory; primarily contemporary Black critical theory in the humanities with particular attention to death, furtiveness, and fugitivity. I am concerned with Black thought and existence, but also intramural Black life as framed by this reality. To that end this paper begins to think alongside scholars of fugitivity, criminal and constitutional law, Black Feminist resistances, creatives, and organizers to reframe how we might imagine, encounter and contend with these violences.

In this essay, I am attempting to explore the encounters between and among Black people and case law, statutes and policies, police, and those attempting to act under the cover of law. As an interdisciplinary project, this early draft employs Critical Race, Black Feminist, and Queer Studies methodologies to examine how instances and (extra) legal precedents of anti-Black violence and racial-sexual terror continue to frame and impact notions of Black being. I engage the creative, the legal and the literary to uncover an emerging approach to encountering, understanding and extrapolating anti-Blackness as a legal precedent and a site of Black knowledge production. The past several years have featured scholarly discussion on the fugitive circumstances of Black life and how this fugitivity—the consistency of being in flight of/from state violence—originated in, or near the onset of slavery. The discussion on fugitivity generally focuses on historical and modern instantiations of Black flight and community-making outside of the gaze of subordinating apparatuses or, alternatively, on the nature of the Black (non) being as both fugitive and property; with both analyses centering the plantation the central site of theory. In exploring furtivity, I depart from the debate around fugitivity and articulate the current afterlives of the initial reality of Black fugitivity as a type of always, already illegal and lashable, “Furtive Blackness.” The term furtive is legal parlance for movement that is not only impermissible but illegal, unsanctioned and understood to be the foreshadowing of a coming violence by s/he who moves without leave.

Furtiveness appears most prevalently in criminal law, particularly in the search, seizure and arrest of those deemed suspect, criminal or fugitive; yet also arrives as a type of sly or forbidden expression or movement. Importantly though, the marking of a furtive gesture is often the cause—and justification—for the violation of civil rights that occurs in the modern

capture and death of the accused. This has particular importance for this moment in the era of the Movement for Black Lives. It is the furtive gesture—the move without leave—and the everlasting “fear for their lives” of the police officer—and the white citizen operating under the “cover of law” that allows for, and mandates, the modern stealing and lynching of Black lives. In this exploration, I want to not only think about police interactions with Black people as undoubtedly, inherently deadly reactions to the affront of Black expressive being, but also about Black being and expression of self as undeniably always, already furtive; furtive being a cause for non-Black alarm, for anti-Black reactions and a justification for state and extrajudicial harm and regulation. In this way, my analytic and archive are formed by a constellation of deadly police encounters alongside hair and dress codes; anti-sagging laws passed throughout the South; the perception of Black joy or displeasure as loud and disruptive even when silent; the violent reactions to Black protests and testimonies regarding anti-Black policies or wrongs from emancipation to the present; the instances of scenarios like “BBQ Becky” and other episodes where the performance, assertion or detection of Black being is marked as criminal and social offense. I understand the evolution of this phenomena—this socio-legal mandate—through the memory of scenes of capture across the Atlantic, to the auction block and plantation, to modern instances of search, seizure and arrest and the economic and professional harm of employment expectations—to illustrate how Black presence, expression, refusal and performance remain illegal, impermissible, furtive gestures that mark us as unique targets for legal and extralegal violence. Later, I explore *Thinking Blackly* as a navigational method—“a litany for survival”—that might help us to better explicate and create pathways, practices and politics of freedom.<sup>6</sup>

Anti-Black law and order necessitate a Black understanding that our children are always, already the uninnocent, unchild, unyouth; while adults are always grown but never men or women. It necessitates furtivity as a counterhegemonic practice that is necessary in order for Black people to live. They are always responsible but never dignified with their needs or desires being affirmatively responded to. This is furtive life, to always, already be both/and; that is, whatever the laws call for to justify indignity, violence and capture. I want to posit the unheld, “unbought and unbossed,”<sup>7</sup> Black body, Black being, as one that is always, already suspect and marked as stealthily—furtively—planning, preparing, or engaging in some action that is untoward and sinister. Here, sinister functions as an imaginary

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6. Audre Lorde, *A Litany for Survival*, in *THE COLLECTED POEMS OF AUDRE LORDE* (1978) Tabias Olajuawon, “*Thinking Blackly*”: *State Violence, U.S. Law, and Legal Death Dealing*, *THE BLACK YOUTH PROJECT* (Apr. 12, 2018) <http://blackyouthproject.com/thinking-blacklystate-violence-u-s-law-and-legal-death-dealing/>.

7. SHIRLEY CHISHOLM, *UNBOUGHT AND UNBOSSED* xiv–xvii (2009).

placeholder for all things that are out of the permissible, outside of the movement or performance without explicit leave or order. This sort of furtivity, this Black furtivity, is the daring of Black being; put differently, it is the audacity of the Black person to exist wholly, fully and access human dignity—while assuming rights—within the American polity. Furtive Blackness then, is the articulation of a Black refusal of the terms of the white citizen and an assertion of Black subjectivity under conditions of domination. In other words, it is the Black refusal—through a performance or demand of equitable personhood or due process—of the property status that Cheryl Harris once titled “whiteness as property.”<sup>8</sup>

## II. Defining the Furtive

The term “furtive” is an adjective that derives from the Latin “fur” (thief), and is of the same family as “furtum (theft)” and “furtim (by stealth).”<sup>9</sup> Now, it describes something “done by stealth or with the hope of escaping observation; clandestine, surreptitious, secret, unperceived.”<sup>10</sup> It might also be used to describe someone or something “thievish, pilfering” the character of a “stealthy, sly” person, or the condition of property “obtained by theft, stolen” or “taken by stealth, secretly.”<sup>11</sup>

The phrase is most common in criminal law and criminal procedure. While prevalent in constitutional law, it arises—in modern times—almost exclusively through review of criminal procedure upon appeal; often concerning police contact with civilians, disproportionately Black. The term “furtive” is traceable in case law at least as far back as the early 1800s. However, its appearance at that time is nebulous and more a question of the intent of various parties in civil matters with no bearing upon the formulation I am drawing here. I am drawing upon a body of evidence resulting from the usage of the legal term “furtive” or “furtive gesture” almost explicitly utilized against Black people in the 1990s to the present, from the War on Drugs, to the Movement for Black Lives. This is particularly clear when considering “stop and frisk” and the shootings of myriad Black people, (legally) armed and unarmed. While this is the target time period—due to its mass utilization—the term has ideological and material roots and routes that comingle with the American legal system; particularly, the transmutation of Black people from free person, to captured prisoner, to Black body enslaved, to fugitive property and fraught citizen. Furtiveness is the active refusal of the “Black body” as a unit of Black life and heightens

8. Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1791 (1993).

9. OXFORD ENGLISH DICTIONARY, <https://www-oed-com.ezproxy.lib.utexas.edu/view/Entry/75733?redirectedFrom=furtive&#id3334540>.

10. *Id.*

11. *Id.*

our understanding of interpretive and intellectual skills, even when rendered as nothing but a body without a mind, or wayward thing in need of ongoing physical, psychic, legal, and material disciplining.

The current legal usage of furtive is less concerned with the intent of a subject and more about the legal power of the police. In the past, furtive was merely about the legal arguments and actions of a party to a case; it is now tied directly to movement and danger. More specifically, the “furtive gesture” is understood to be a “movement without leave” from police on the scene. Put differently, a movement is considered furtive when that movement is beyond the scope of what has been permitted—or in reality, desired—by the police officer on the scene. The movement is assumed to be one that will likely put the officer and others in harm. The furtive gesture—and I argue, furtive life and being—becomes the critical juncture where “excessive force” becomes “justifiable” force (including homicide) that triggers the “qualified immunity” defense. When this defense is triggered, the officer is immune from all civil rights charges that the officer did not negligently—knowingly and purposefully—renege on. In other words, Black furtivity or furtive Blackness, argues that the Black body and Black being, operate as a sort of body of evidence for probable cause, reasonable suspicion and excessive force.

### III. Fugitives by Law

*If slavery persists as an issue in the political life of [B]lack America, it is not because of an antiquarian obsession with bygone days or the burden of a too long memory, but because black lives are still imperiled and devalued by a racial calculus and a political arithmetic that were entrenched centuries ago. This is the afterlife of slavery—skewed life chances, limited access to health and education, premature death, incarceration, and impoverishment. I, too, am the afterlife of slavery.<sup>12</sup>*

- Saidiya Hartman, *Lose Your Mother*

This section argues that Black people in America have been rendered, and remain, fugitives by law. Further, that this rendering is an afterlife of slavery and coloniality that offers a promising analytic for understanding the ongoing cases of racialized policing and mass incarceration, as well as imagining new pathways to freedom and justice. As fugitives from justice, we are therefore understood as the legal property, debtor, and irritant of state. What Cheryl Harris calls “whiteness as property”—the phenomenon

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12. Saidiya Hartman, *LOSE YOUR MOTHER: A JOURNEY ALONG THE ATLANTIC SLAVE ROUTE 6* (2007).

whereby the law has consistently legitimized benefits and powers accrued by citizens because they are white and the ongoing price it exacts, and capital and pleasure it extracts, for and from black existence—underscores the importance of understanding and marking the Black person as fugitive and only being, existing outside of law.<sup>13</sup> It is simply the other side of the intellectual coin. Where one is granted irrevocable legal and social citizenship due to their whiteness, the other is marked as fugitive in order to secure, highlight and make material that citizenship. Fugitivity is both a legal designation and an individual as well as collective refusal to bow to legal and social subordination. This requires particular forms of active and passive punishment resulting in shorter, more tortuous lives or, what Hartman has called the “afterlives of slavery.”<sup>14</sup> This is how the fugitive slave—and now the fugitive, furtive Black person—comes to owing service or labor for life.<sup>15</sup> The creditor is no longer an individual—that they too can reap dividends, extract erotic pleasure and engage in racial-sexual terror at will—but the polity as a whole.

A person charged in any State with treason, felony, or other crime who shall flee from justice and be found in another State shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime.

- Article IV, Section II, U.S. Constitution, 1793<sup>16</sup>

No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.

- Article IV, Section II, U.S. Constitution, 1793<sup>17</sup>

While the text of the Constitution fails to mention Black or enslaved people, a cursory reading of history—particularly the federalist papers—makes its subject of governance clear. The Constitution was chiefly a document of political compromise; with Article IV, Section II being the section of most importance to Black people within the United States. It is generally argued that in order to secure the support of the plantation class, the drafters needed to create provisions that protected their property interest

13. See Harris, *supra* note 6.

14. Hartman, *supra* note 10, at 6.

15. See *Dred Scott v. Sandford*, 60 U.S. 393 (1856).

16. U.S. Const. art. IV, § 2.

17. *Id.*

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in chattel slavery. In short, owners of the enslaved wanted an insurance policy for when enslaved peoples escaped; they demanded a way and a right to return them, a promise that foreclosed the possibility of black legal being.

The “any other crime” provision of the first part of the section functions as a catch all, allowing for that crime to be the very crime of escape, flight, or the procurement of tools or instruments that might allow for such an act.<sup>18</sup> Escape or attempting escape were state offenses in many southern locales. The next line attempts to create an extradition requirement on the part of the state where the enslaved person had taken up refuge, in order to facilitate the return of the individual or family to the site of their escape.

Finally, in order to protect slaveholders who were not covered by such expansive state laws, the second portion of the provision deals explicitly with those “held to service or labor” in one state—a slave state—who escape to a free state.<sup>19</sup> The section attempts to end the ability of enslaved people to gain freedom by fleeing to free states, no matter the law of the new local. In order to re-enslave their property, the complaining master was expected to make a claim and be answered. In effect, the second provision was created to mark one as either a fugitive or slave for life, regardless of your physical location. Freedom itself was deemed illegal to the fugitive unless they had been expressly manumitted by their master.

Taken together, we can understand this section of the Constitution as attempting to seal off the political project of freedom from Black life. This occurs while simultaneously branding the Black desire and expression or “language of freedom,” as criminal in manner; or, as we say in law, a fugitive practice. In this way, the specter of Black fugitivity, of Black flight, of Black escape from terror is moved from the local community or municipal arena and transformed into a national, legal problem. One everyone is required to remedy. Thus, the re-capture of the Black body becomes a national practice—despite the chorus of abolitionists—and Black flight, evasion and elusiveness become a requirement of the Black body desiring some type of freedom, some type of life.

Because constitutional provisions often have little power until they are carried out by Acts of Congress, the passing of the Fugitive Slave Law of 1793 was necessary to breathe life into these sections.<sup>20</sup> The law essentially filled in the details as to how a fugitive could be returned and what due process might look like. Because the contents of the law and the constitutional provision are so similar, I have chosen not to reproduce it here but, instead, to simply state their differences. Under the 1793 Act, the master

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18. U.S. Const. art. IV, § 2.

19. *Id.*

20. *Fugitive Slave Law*, LIBRARY OF CONGRESS (Feb. 12, 1973), <https://www.loc.gov/resource/lst.045/?sp=1>.

or agent of the master was required to present their claim to the local magistrate and receive certification or permission from the court before apprehending a fugitive.<sup>21</sup> However, it does not require that magistrates agree to entertain such cases, as this is the purview of state lawmakers.<sup>22</sup> Finally, the act provides a \$500 fine for anyone who interferes with such a duly certified capture.<sup>23</sup> Again, this would be taken up by the local magistrate—if they so choose—because at the time there were only seven federal district judges in the whole of the nation.<sup>24</sup> While Congress had attempted to limit lanes of flight; porous routes for departure—at least slavery—remained, due to the notion of state sovereignty. It is arguable that the 1793 Act breathed an important boost to the construction and maintenance of the Underground Railroad.

The 1842 Supreme Court Case *Prigg v. Pennsylvania* is a rich site of excavation to illustrate the ways in which Black people across the country began to become imagined and understood as fugitive. Even in states where they were assumed to be both free and citizens under local laws.<sup>25</sup> This case demonstrates the ongoing power and interest of federal law in capturing and subordinating Black people across state boundaries in order to strengthen the tenuous union. It exemplifies how imagining and designating the free Black as both criminal and fugitive became important facets of the American political and legal system. It also begs the question as to how and whether an earlier Black embrace of the criminality—the acceptance that the law always, already brands Black people as criminal and attempts at appearing otherwise are futile—may have bode differently for those who assumed the promise of legal safety could guarantee Black autonomy without flight.

In 1788 and 1826, the Pennsylvania Legislature passed laws essentially making it illegal to remove Black people from the state for the purposes of enslaving them.<sup>26</sup> In 1832, Margaret Morgan, a woman formerly enslaved in Maryland—but granted functional freedom by her master—moved to Pennsylvania.<sup>27</sup> When her owner, John Ashmore, passed away his heirs decided to reclaim her as their own and sent Edward Prigg to return her pursuant to Article IV, Section II of the United States Constitution.<sup>28</sup>

At this point, Ms. Morgan had lived in Pennsylvania for no short period and birthed free children.<sup>29</sup> Mr. Prigg made his claim for her return at the

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21. *Id.*

22. *Id.*

23. *Id.*

24. *An Act to Establish the Judicial Courts of the United States*, <https://www.loc.gov/law/help/statutes-at-large/1st-congress/session-1/c1s1ch20.pdf>.

25. *Prigg v. Pennsylvania*, 41 U.S. 539 (1842).

26. *Prigg*, 41 U.S. at 539–41.

27. *Id.* at 609.

28. *Id.*

29. *Id.*

local courthouse and, after trial, the jury concluded that Ms. Morgan and her children were indeed free pursuant to having lived in the free state for some time and contributing as citizens.<sup>30</sup> Mr. Prigg appealed, arguing against the 1788 and 1826 laws as unconstitutional, and was eventually rebuffed by the Supreme Court of Pennsylvania.<sup>31</sup> Undeterred, Mr. Prigg assaulted and abducted Ms. Morgan and her children and absconded into Maryland.<sup>32</sup> Mr. Prigg stood convicted of both the Pennsylvania statutes and the state of Maryland filed suit on his behalf with the Supreme Court.<sup>33</sup> The reasoning of the Court is the subject of my analysis, but because the decision is so lengthy, I have chosen particularly illuminating passages to deal with:

The right to seize and retake fugitive slaves, and the duty to deliver them up, in whatever State of the Union they may be found is, under the Constitution, recognized as an absolute positive right and duty pervading the whole Union with an equal and supreme force uncontrolled and uncontrollable by state sovereignty or state legislation . . . .<sup>34</sup>

The full recognition of this right and title was indispensable to the security of this species of property in all the slave-holding States, and indeed was so vital to the preservation of their domestic interests and institutions that it cannot be doubted that it constituted a fundamental article without the adoption of which the Union could not have been formed . . . .<sup>35</sup>

The Court entertain no doubt whatsoever that the States, in virtue of their general police power, possess full jurisdiction to arrest and restrain runaway slaves, and to remove them from their borders and otherwise to secure themselves against their depredations and evil example, as they certainly may do in cases of idlers, vagabonds, and paupers . . . .<sup>36</sup>

. . . the owner of a slave is clothed with entire authority, in every State in the Union, to seize and recapture his slave whenever he can do it without any breach of the peace or any illegal violence. In this sense and to this extent, this clause of the Constitution may properly

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30. Margaret Pagan, *The Liberation of Margaret Morgan*, BALT. EVENING SUN (Feb. 21, 1991), <https://www.baltimoresun.com/news/bs-xpm-1991-02-21-1991052216-story.html>.

31. *Id.* at 539–41.

32. *Id.* at 557.

33. *Prigg*, 41 U.S. at 543.

34. *Id.* at 622.

35. *Prigg*, 41 U.S. at 611.

36. *Id.* at 612.

be said to execute itself, and to require no aid from legislation, state or national.<sup>37</sup>

It is striking that the opinion continues to refer to Ms. Morgan as “the slave,” despite this being a specific legal dispute with particular circumstances. This legal breaking and transmutation of Black humanity—much like the liquidation explained in *Black Atlantic*, *Queer Atlantic*—remakes Ms. Morgan as a type of fleshy, living, unruly property with no individual interests, rights or humanity.<sup>38</sup> Understood and transmuted as a species, Ms. Morgan—the slave—has no rights that can be made visible to the court but instead becomes the grounds in which the power of the Court can be explained, understood and made visible. The Court marks itself as not only the protector of whiteness as property but also, the properties of whiteness. In so doing it empowers itself and its agents in political and legal terms. By marking the power to “seize and retake” slaves as an absolute, positive right that is uncontrollable by sovereign states the Court both narrows the avenues of Black flight and makes its practice ever-more necessary. Further it creates an individual right, one only accessible to white slave-holding men that eclipses the power of the state. Even before it has chosen to apply the Bill of Rights to the states.

The recapture of Ms. Morgan then—the necessary collapse of her fugitive dream—can be read as the expansion of the anti-fugitive, yet fugitive-dependent, jurisprudence and polity. Further, this legal and grammatical breaking of Black as fugitive allows Ms. Morgan and others to be written out of the constitution and other laws governing humans and citizens. Ms. Morgan’s silent erasure provides a stunning contrast to how the Court loudly proclaims the necessity of her capture to creation and endurance of the Union. Without ever saying her name or expressing her existence—a grammar of unbeing and ungendering—as having the importance to create and unmake laws; the Court makes it clear that there is no law, no union without the individual right and federal power to (re)take the fugitive slave and the cessation of Black flight.<sup>39</sup>

While the Court states that Article IV, Section II is self-executing and requires no further legislation to come into force, it later admits that the states cannot be compelled to enforce the Constitution, or at least this particular section.<sup>40</sup> While this seems like a win of sorts for abolitionist states and the North it actually functions as a Trojan horse for the entrenchment of anti-

37. *Prigg*, 41 U.S. at 612.

38. Omise’eke Natasha Tinsley, *Black Atlantic, Queer Atlantic: Queer Imaginings of the Middle Passage*, 14 GLQ 191, 200 (2008).

39. Hortense J. Spillers, *Mama’s Baby, Papa’s Maybe: An American Grammar Book*, 17 DIACRITICS 17, 65, 67 (1987).

40. *Prigg*, 41 U.S. at 541.

fugitive jurisprudence. The South and Congress interpret this as a clear need for greater federal involvement and pass the much stricter Fugitive Slave Act of 1850.

The Fugitive Slave Act of 1850 is broadly, and improperly, understood as the birthplace of the legal concept of the fugitive Black. As mentioned before, this conception occurred long before this or any American legislation, on the other side of the Atlantic. The Act of 1850 did, however, bring the concept of the Black fugitive into plain view. Pursuant to the legislation, enslaved people could no longer testify on their own behalf, nor were they permitted a jury trial to determine whether they were being lawful detained.<sup>41</sup> The law also setup myriad independent commissions, to work concurrently with U.S. courts, to clear the dockets for hearings.<sup>42</sup> Federal marshals were fined large amounts for refusing to detain fugitives and any escape that happened during their employ.<sup>43</sup> This created a secondary penal code—as well economic sanctions—for Black flight and the whites who might have otherwise been inclined to assist them, or at least resist detaining them. Black flight had become a community cost and criminal offense for all white citizens. White citizens now had another imputed interest in Black non-freedom: job security and economic stability. In order to maintain their lifestyles, white citizens—many had assisted in escape already faced fines and prosecution—had to end, circumvent or temper Black flight. Here, we witness the expansion of the surveillance state. From the plantation, to the courthouse, to the corner store and to encompass every other instance of public Black being. This surveillance is the result and practice of deputized and democratized whiteness. Whereby the law operates as a collective mandate to hold Black people captive and enslavement and subordination become requirements of stable American citizenship.

#### IV. From Fugitive to Furtive

While the notion of “furtive” as a legal description is coterminous with American jurisprudence, its usage as a matter of criminal law and constitutional (civil rights) law is more related to legal and critical discussions of fugitives and fugitivity, along with vagrancy, loitering, and waywardness. The Fugitive Slave Law (and Act) allowed for the rendering of all Black people as suspected runaways (fugitives) and therefore, created a legal process of (mass) Black arrestability, without due process; or how vagrancy and loitering laws allowed for the arrest and surveillance of Black people for “moving aimlessly” or remaining still “without clear purpose.”

41. *Fugitive Slave Law*, LIBRARY OF CONGRESS (Sept. 18, 1850), <https://www.loc.gov/resource/lst.045/?sp=2>.

42. *Id.*

43. *Id.*

Similarly, the “furtive gesture” triggers a policing power that allows for Black arrest, surveillance and terror for activities that purportedly apply to all people within the U.S. but maps specifically onto Black flesh as always, already present. In this way, the “furtive gesture” is the afterlife of slavery and the modern manifestation—if not a potpourri—of previous policing powers activated by markings of the Black person as fugitive, vagrant and loiterer. In other words, these phrases continue to echo and articulate the position of the Black body and being, already in and outside of law(s). The Black body is always within law’s reach of regulation, discipline and propertying. However, it is outside of law’s conception of the human, citizen and rights bearer. Yet, often, it is through the Black inside of law (disciplining)—and the practice of the outside (violation or disregard of Black “rights”/personhood)—that various civil rights are created, tested and proven.

Crossing the savanna, one came face-to-face with the violence of the slave trade. The vast stretches of empty space and the far-flung settlements testified to the long history of war and raiding. The desolate landscape and the great plain of uninhabited territory told the story of rout and pillage, and also the story of people running for safety. The deserted villages and ghostly towns were the traces of people in flight. And Gwolu was one of the places to which they fled, hoping to be safe.<sup>44</sup>

When I invoke the fugitive here, I am not speaking from voice alone. My understanding of the term is multifaceted, and I pull from myriad interlocutors and bodies of knowing. In part, I draw from criminal and constitutional law, cultural studies, critical race studies, LGBTQ studies, and personal narrative. I come from a long line of fugitives. Those who are consistently evading law enforcement, and those who escaped slavery and lived among—and later married—Indigenous Peoples for a time. In addition, I draw from recent scholarship in fugitive studies. My chief interlocutor for thinking through a fugitive politic—a fugitive dream—is Saidiya Hartman. In *Lose Your Mother*, Hartman marks the life of the fugitive as one of Ancestral heritage, as well as future destination:

The fugitive’s dream exceeded the borders of the continent; it was a dream of the world house. If I learned anything in Gwolu, it was that old identities had to be jettisoned in order to invent new ones. Your life just might depend on this capacity for self-fashioning. Naming oneself anew was sometimes the price for freedom.<sup>45</sup>

The bridge between the people of Gwolu and me wasn’t what we had suffered or what we had endured but the aspirations that fueled flight and the yearning for freedom. It was these shared dreams that might open a common

44. Hartman, *supra* note 9, at 219.

45. Hartman, *supra* note 9, at 233.

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road to a future in which the longings and disappointed hopes of captives, slaves and fugitives might be realized . . . If after a year I could still call myself an African American, it was because my Africa had its source in the commons created by fugitives and rebels, in the courage of suicidal girls aboard slave ships, and in the efforts, thwarted and realized, of revolutionaries intent upon stopping the clock, instituting a new order, even if it costs them their lives . . . The legacy that I chose to claim was articulated in the ongoing struggle to escape, stand down and defeat slavery in all its myriad forms. It was the fugitive's legacy. It didn't require me to wait on bended knee for a great emancipator. It wasn't a dream of a White House, even if it was in Harlem, but of a free territory. It was a dream of autonomy rather than nationhood. It was the dream of an elsewhere, with all its promises and dangers, where the stateless might, at last thrive.<sup>46</sup>

In this travel-memoir and polemic, Hartman fleshes out her idea of the fugitive's dream. The dream of those who escaped or were stolen during the beginning of the slave trade as the practices of evasion, survival and flight that allows for momentary grasps and gasps of freedom and fleeting non-capture on the shores of the Ghanaian town of Gwolu. She marks the fugitive's dream as a politic that mandates no rulers or peasants, no borders or nations, but instead, like the people of Gwolu, a politic of becoming one, anew together.

She pines for a type of freedom that is not based in rhetoric's of security or control, but instead rooted in the uncertainty of statelessness. Beyond this, it is unclear where the politics begin and end. It is not fleshed out as a constitution or constellation of rule(s) or customs but simply the ability to be, and live or die, as you are. The problems with this are clear; namely that the functional bit is damning. What does this require? The historical example of Gwolu notes a concerted effort to organize oneself against mastery; an effort that failed to protect many. Can the fugitive ever move from being "a captive on reprieve since at any moment he or she could end up in the slaver's net?"<sup>47</sup>

Others attempt to answer this question in ways big and small. For example, in *Spill*, Alexis Pauline Gumbs' aptly titled tribute to Hortense Spillers, fugitivity is not marked as a dream but a constellation of survival strategies inextricable from the lives of Black people (Black women in this piece).<sup>48</sup> When thinking about fugitivity, Gumbs is not concerned with movement of the body alone, but instead about thoughts, actions and feelings

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46. Hartman, *supra* note 9, at 234.

47. Hartman, *supra* note 9, at 222.

48. See Alexis Pauline Gumbs, *SPILL: SCENES OF BLACK FEMINIST FUGITIVITY* (2008). In this collection Gumbs focuses exclusively on the lives and practices of Black women, as a Black Feminist praxis, yet here, I am expounding upon that to encapsulate the entire Black experience.

that themselves must be tucked away for survival. Her exploration of fugitivity is exclusively presented as an individual practice, yet one that is collectively known and mastered by Black women. Through Gumbs, we can map the spiritual and emotional component of fugitivity. How do we think of the fugitive that remains? Gumbs pushes us to move beyond the body as the central place of our analysis.

Yet it is the body that must be controlled, contorted or hidden in order to mask the thoughts that too might be marked as criminal and attempted to be held hostage. In *The Fugitive's Properties*, Stephen Best reminds us that fugitivity and law have always been chiefly concerned with flesh, blood, and, more specifically, labor.<sup>49</sup> Instead of marking the birthplace of the Black fugitive on the shores of Africa—like Hartman and I—Best locates the fugitive in the black letters of modern American and colonial law. Yet each of us understands fugitivity as an ascribed status. Best marks the slave as having two bodies, much like the colonial kings.<sup>50</sup> The slave as the human and the slave as property; the king as flesh and blood, and the king as office. Best conceives a complicated argument that essentially states that law is concerned with the slave as property, a social and legal designation, that is owned in perpetuity by the state, via slaveholders.<sup>51</sup> The slave as human is ostensibly free, yet he owes his other body—his property form—as labor and service, forever. The human slave is essentially estranged from himself—a concept not far removed from Du Bois' earlier articulation—and when he refuses to give up his propertied self (labor and service) he lives as a fugitive.<sup>52</sup> For Best, fugitivity is not physical flight per se, but instead a type of refusal to perform labor and service.<sup>53</sup> I find Best's formulation convincing if incomplete. I agree with him on the function and history of law in fugitivity. I argue though, that the three-fifths standard—where we are marked as three-fifths human—belies a type of rhetoric that marks us as two-fifths national property. It is this two-fifths that is mandated to obey (or be put down) in confrontations with police, white citizens and non-Black others in all encounters; this is what I mark as the furtive. Yet, though the three-fifths standard was instituted as a rhetorical, political compromise—one whose logics continue to affect the political system today—it also true that Black people are not and have never been divisible. Rather property interest in Black people amplified the citizenship of the slaveholder above

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49. See Stephen Best, *THE FUGITIVES PROPERTIES: LAW & THE POETICS OF POSSESSION* (2004).

50. STEPHEN M. BEST, *THE FUGITIVE'S PROPERTIES: LAW AND THE POETICS OF POSSESSION* (2004).

51. *Id.*

52. W. E. B. DU BOIS, *THE SOULS OF BLACK FOLK* (David. W. Blight and Robert Gooding-Williams 1997).

53. BEST, *supra* note 50.

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everyone else, including other white men. Later, I engage with Spillers to think of furtivity as a sort of afterlife of this marking as self-absconded property.

Furtivity, like fugitivity, is not only a matter of law, it is in our blood and baked into the conception of Blackness. However, as the legal *de jure* language has moved from escaped slaves to threatening others, it is important that we begin to reconcile with this evolving, yet remaining, logics, rhetoric, and appeals to fear and suspicion that emanate from a different socio-jurisprudential moment. The slave patrol is gone. In its wake are police, neighborhood watches, surveilling neighbors, and white people performing a racial anxiety and hunger for the power to subordinate and affirm their citizenship. Taking Hartman, Best, and Gumbs together, I can and do mark fugitivity as an assortment of politics, performances, and movements that grasp for freedom and attempts to evade domination, capture, search, or seizure. However, I mark furtivity as both ascribed status and strategic refusal of state violence and subordination. Furtivity is the modern instantiation of race-making and sociolegal logics that call for and require the disciplining of the Black body through public, violent lessons of comportment, either through agents of the state or its culturally deputized white citizenry. I use the work of fugitive theorists to anchor the history of how and when Black people have been rendered both in and outside of law, particularly in the post-civil rights era. While she doesn't mark her work as a fugitive theory, I also look to Simone Browne's articulation of "racializing surveillance" and "dark sousveillance" in *Dark Matter* as a particularly powerful, modern example of the ways that Black people contend with, resist and evade state violence that is carried out by deputized white citizens.<sup>54</sup> Brown defines racializing surveillance as:

. . . a technology of social control where surveillance practices, policies, and performances concern the production of norms pertaining to race and exercise a "power to define what is in or out of place" that "signals those moments when enactments of surveillance reify boundaries, borders, and bodies along racial lines," and where the outcome is often discriminatory treatment of those who are negatively racialized by such surveillance.<sup>55</sup>

Further, she marks dark sousveillance as "a site of critique, as it speaks to black epistemologies of contending with antiblack surveillance, where the tools of social control . . . were appropriated, co-opted, repurposed, and

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54. SIMONE BROWNE, *DARK MATTERS: ON THE SURVEILLANCE OF BLACKNESS*, Duke University Press (2015).

55. *Id.* at 16.

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challenged in order to facilitate survival and escape”<sup>56</sup> In this offering, Browne reminds and instructs us that the ongoing problems of racial profiling, policing, state and private violence, incarceration and Black responses to them—and their legitimacy—are outgrowth and afterlife of the regime of slavery.

The daily politics—if not poetics—of fugitivity are most closely associated with the work of Fred Moten. His book *The Fugitive Undercommons*, with Stefano Harney, is a masterful work.<sup>57</sup> Written by a Black scholar of poetics and literature, as well as a white, clinical professor of architecture and design, it reads as a manual for fugitive living:

Our task is the self-defense of the surround in the face of repeated, targeted dispossessions through the settler’s armed incursion. And while acquisitive violence occasions this self-defense, it is recourse to self-possession in the face of dispossession (recourse, in other words, to politics) that represents the real danger.<sup>58</sup>

What is most striking about this text is its rejection of the oppressor-oppressed narrative as well as the notion of equalizing and rights alike. Moten and Harney instead push forward two important methods for those in the undercommons—the raced, the queer, the othered etc.—that are based in practical ways to plan one’s life. The first is Black study—not academic study—but thought and analysis garnered from talking to those in your community. Black study is: “[W]hat you do with other people. It’s talking and walking around with other people, working, dancing, suffering, some irreducible convergence of all three . . . .”<sup>59</sup> The second is planning for the whole, from the dispossessed self. It asks, how does one move through the world and thereby model and create the world with the values we all want? In moving toward furtivity, I think alongside Harney and Moten in noting furtivity or furtive blackness as not only something that is predetermined but also an interiority and studied radical practice. Additionally, I reject the equality centric goal that other scholars are invested in, noting that the Black body is always in and outside of law, and that equality requires a different legal and social text that cannot be conjured from reform. Indeed, Black furtivity—and the conditions that require Moten’s fugitive planning—are necessitated by the current legal regime. In terms of the law, Black fugitivity and furtivity flow from the same precedence of Blackness as unlawfulness.

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56. SIMONE BROWNE, *supra* note 54, at 21.

57. See STEFANO HARNEY AND FRANK MOTEN, *THE UNDERCOMMONS: FUGITIVE PLANNING AND BLACK STUDY* (2013).

58. *Id.* at 17.

59. *Id.* at 110.

Yet, the former is concerned particularly with emancipation from labor subordination and propertying, while the latter is the frame through which state and private actors legitimize their access to and disciplining of the Black body and its duality as reachable by law for discipline and unreachable—or without standing—for protection. This explication is not meant to be an exploration of all conceptions of fugitivity, but rather how fugitivity leads us to the moment of furtivity and the intellectual and political genealogy of this framework.

When discussing the “black letter law” notions of the fugitive as a precursor—and key ingredient—to furtivity or furtive blackness, I am also invoking the different but complementary critical conceptions of “fugitivity” by Stephen Best, Sadiyah Hartman, and Fred Moten. I take seriously and employ Best’s configuration of fugitivity as the predicament of the Black body as being of mixed character. That is to say, it is still considered property and human, and its conception—performance and expression—as human is read as a particular violation of basic contract law. Put differently, the Black body is rendered fugitive because it is no longer performing the duty and labor of property. It is violating the culture and jurisprudence that marks it as always, already “owing service and labor for life,” as expressed in *Dred Scott*.<sup>60</sup> With Best, fugitivity is not about a physical flight or movement, but rather a violation of (social) contractual duty that continues to map itself on the Black body even in the wake of slavery. Best’s concern with the state, or perhaps communal, interest in Black people as property allows us to make sense of the ways that Black expressions of citizenship, selfhood, and access to public goods, rights and services are understood to be simultaneously legally suspicious and outside of law. These assertions are “suspicious” and render the Black body furtive because they are read as threats to both contract law and the social order. The Black body in flight of propertied subordination is furtive because it is considered an attack on whiteness and its inherent power to subordinate the white interest in citizenship. In short, Bests’ configuration of the fugitive being in flight of property or labor duties is a precursor of sorts. It is a precursor to the legal rhetoric for furtiveness as well as legal suspicion and probable cause to contact, search, seize or arrest. This allows for a particular yet quotidian disciplining of the Black body as inside of the constitutional standards and watch of law while also understanding the affirmative rights that safeguard against such violence as outside of law.

Much like Hartman and Moten with “fugitivity”—and now Lamar Bruce<sup>61</sup> with “loitering as (black and queer) practice”—I position “furtive

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60. *Dred Scott v. Sandford*, 60 U.S. 393 (1856).

61. La Marr Jurelle Bruce, *Shore, Unsure: Loitering as a Way of Life*, 25 GLQ 352 (2019).

Blackness” as a social, cultural and legal predicament, an afterlife of slavery and a quotidian practice and radical politics of Black life, that comes into clear focus when examining BlaQueer life.<sup>62</sup> In other words, furtive blackness describes both how Black people are rendered furtive by law, legal/policing practice and those utilizing the language and power of lawfulness as well as how black people—particularly BlaQueer people—engage in furtive thinking, moving, being, staying, remaining, dressing, speaking as a means to survive, live and thrive.<sup>63</sup> I pull from and echo each of the scholars above to create an interdisciplinary potlicker. On their own, each of their theories offer a different conception of Black life; yet, on our own, we only have an incomplete conception of Black life. Furtivity, or furtive blackness then, is the potlicker for the moment, until better spices are found.<sup>64</sup>

### V. Spillers and Branding Furtive Bodies

Through its description of “furtive” as both adverb and noun, the Oxford Dictionary maps the way furtivity refers to wholly contradictory, oppositional practices.<sup>65</sup> The furtive here is both of character and action. This slippage between nature and performance is not dissimilar from other legal terms of art, particularly those that are affixed primarily to the bodies of Black people. The notion of furtivity being of both character and action—and not least of all condition of property—allows for a legal catch all. While the concern with property harkens back to the position of the Black body as one mixed character, of flesh and property. The slippery construction of furtivity allows it to catch and map onto myriad Black bodies. This allows for things like gender, gender performance, class, sexuality and ethnicity to merely color *how* the Black body is marked as furtive. In some ways, furtivity marks the Black body as fungible and indecipherable, because no matter who or how one is, the branding has already occurred. However,

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62. See La Marr Jurelle Bruce, *Shore, Unsure: Loitering as a Way of Life*, 25 GLQ 352–54 (2019).

63. The term BlaQueer is one I have popularized—nothing is new under the sun—to incapsulate and make clear the material, spiritual and political simultaneity of being Black and Queer at once. Put differently, one is not merely Black and LGBTQ, but always, already both and subject to the consequences and knowings that this experience and marking allow. It is to exist outside of sexual, racial and gender normativity. See TABIAS WILSON, *GODLESS CIRCUMCISIONS: A RE-COLLECTING & RE-MEMBERING OF BLACKNESS, QUEERNESS & FLOWS OF SURVIVANCE* (2016).

64. Derrick Bell’s concept of interest convergences exists as an intellectual ancestor to the notion of being “in/outside of law” in my formation, but the language, the specific phrase itself is borrowed again from La Marr Jurelle Bruce’s work in *Shore, Unsure*.

65. OXFORD ENGLISH DICTIONARY, <https://www-oed-com.ezproxy.lib.utexas.edu/view/Entry/75733?redirectedFrom=furtive&#eid3334540>.

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while the branding cannot be evaded, its appearance and luminosity will be tempered or heightened by the intersectional identities of the individual in question.

While furtivity maps differently within Blackness, it maps onto all Black bodies none-the-less. It does so regardless of an individual's action or intent. One may not have been acting furtively or have made a furtive gesture—a “movement without leave” —but if one is marked as naturally furtive, it might then “reasonably” be assumed that some furtive movement, thought or scheme is afoot. The call to reason is important to mark because the legal triggers of reasonable suspicion and probable cause provide pre and post encounter with police or white citizens logics to justify myriad contacts with the Black body existing inside of law. In other words, furtivity functions on multiple registers. Furtivity marks an appeal to logic/reason, to lawfulness and social order, to the fears and hopes of the individual and collective and to the Black body as captive/property run free, and that freedom run amuck. I make no claim as to which of these registers began to operate first but instead argue that they collude and collide to create a world where the Black body exists—in many ways, not as body but flesh—not in an undetermined liminal space between lawfulness and lawlessness but instead as both in and outside of laws. That is to say, as Spillers has argued, that the Black flesh itself is marked by a “kind of hieroglyphics”:

These undecipherable markings on the captive body render a kind of hieroglyphics of the flesh whose severe disjuncture comes to be hidden to the cultural seeing by skin color. We might well ask if this phenomenon of marking and branding actually “transfers” from one generation to another, finding its various symbolic substitutions in an efficacy of meanings that repeat the initiating moments? As Elaine Scarry describes the mechanisms of torture . . . these lacerations, woundings, fissures, tears, scars, openings, ruptures, lesions, rendings, punctures of the flesh create the distance between what I would designate a cultural vestibularity and the culture, whose state apparatus, including judges, attorneys, “owners,” “soul drivers,” “overseers,” and “men of God,” apparently colludes with a protocol of “search and destroy.” This body whose flesh carries the female and the male to the frontiers of survival bears in person the marks of a cultural text whose inside has been turned outside.<sup>66</sup>

While Spillers argues that “severe disjunctures” appearing as both the fleshy, material scars and their communicated meanings and political and

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66. Spillers, *supra* note 35, at 65–7.

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cultural manifestations and afterlives—are undecipherable, their meanings become clear, even if inarticulable, to anyone who dares to take a closer look. As Spillers suggests, the markings operate similar to a brand.

Consider that few understand the Nike symbol derives from the Greek goddess of victory, Nike, and that the “swoosh” sign and sound affiliated with the brand are representing her wings and the sound they make when accelerating.<sup>67</sup> Despite the understanding of the specific Greek mythology and history, it is clear that Nike represents athleticism, sports and the “just do it” attitude. At some point in time, the references to the goddess disappeared and what remained was an embedded instruction on how to engage with the product, what to associate with the brand. The story that remained was and is a story of instruction of how to render the product and its placement in the collective psyche. I am using the word “brand” here as a double entendre, that operates both as a tool of corporate accumulation and as a scar making property. The brand marks not only ownership but positionality and status. Yet when the brand is applied to human flesh, it sears hot as an ever-present scar.

This is similar to how the specific physical ruptures and whippings of the Black flesh have disappeared from the collective memory and seeped into the Black body as a remnant reminder of how to consider, treat, and encounter it/us. The physical scars are no longer present and the flesh no longer drips blood but the body stands in to receive the treatment prescribed by these memories of what Thomas Jefferson has called “manners”<sup>68</sup>; the traditional practice of how to dis/regard Black and white bodies.<sup>69</sup> The Black collective body, the Black community and individual person, are understood in law and practice to be collectively owned—and collectively subordinate—resulting in an unfreedom that is a central freedom to American jurisprudence, policing, politics and daily life. Emancipation has yet to be acquired, and the chase an ever treacherous, even fatal journey for those who dare step out of lawfulness.

This is how and why the Black body is considered furtive. As the whip and chain disappeared, as did the explicit language of the Black flesh as property and fugitive, this was followed by the creation and disappearing of the languages marking the Black body as loitering and/or vagrant, in the era of the Black Codes, in the wake of the end of Reconstruction, and then, with the advent of the Warren Court’s “right to privacy” the furtive gesture and legal categories of reasonable suspicion and probable cause began to take the

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67. Philip Levinson, *How Nike Almost Ended Up with a Very Different Name*, BUSINESS INSIDER (Jan. 19, 2019 2:35 PM), <https://www.businessinsider.com/how-nike-got-its-name-2016-1>.

68. Thomas Jefferson, *Notes on the State of Virginia* (1832), <https://www.loc.gov/item/03004902/>.

place of these earlier social scripts; all to the same end, rendering the Black body as always, already in/outside of law and creating a public logic and mechanism that allows for anti-Black violence by state actor and private accomplice.

## VI. BBQ Becky: Blackness as In and Outside of Law

“BBQ Becky” is perhaps the most popular, modern scene of “furtive Blackness,” whereby the Black body—and being—itself functions as logic and “probable cause” for the administration of search, seizure, or terror. I want to use BBQ Becky to display how furtive Blackness, or furtivity, allows us to reach the gaps in discourse between public and private policing. Too often, the discussion begins and ends with the ways in which law and law enforcement render the Black body particularly vulnerable to police “overreach.”<sup>70</sup> However, less discussed is how law itself functions as the public logic of power, and how this logic is performed, communicated and weaponized by private actors, against Black bodies. BBQ Becky demonstrates how white citizens routinely perform the policing powers of the state, either through appeals to formal authorities or the attempted utilization of social or physical force.

In April of 2018, Jennifer Schulte, Ph.D., was caught on video calling the police on a Black family in Oakland, California. The family was barbecuing at a public lake when Dr. Schulte—or BBQ Becky—called 911 to demand that the family be “dealt with immediately” so that “coals don’t burn more children and we don’t have to pay more taxes.”<sup>71</sup> Hours later, when no police respond, Dr. Schulte calls again and speaks to a different dispatcher. This time she is heard yelling and asks, “I was wondering when the police are going to come and help me!” Later stating that “I’m really scared! You gotta come quick!”<sup>72</sup>

The “BBQ Becky” incident is not entirely different from the historical recounting of lynching. In fact, minus the angry mob—whose afterlife is embodied in Schulte herself—the scene is remarkably similar to that of a staged lynching. A Black family is in public enjoying themselves and by accessing public lands, asserting a valiance of citizenship and humanity. A white woman passes them and is disturbed by their presence, joy, and access to public lands and privileges. The white woman then assumes the power of the state—attempting to act “under the color of law”—to regulate, police and

70. Here though, I would argue that all nonconsensual police contact is overreach.

71. Christina Zhao, ‘BBQ Becky,’ *White Women Who Called Cops on Black BBQ, 911 Audio Released: “I’m Really Scared! Come Quick!”*, NEWSWEEK (Sept. 4, 2018 5:42 AM), <https://www.newsweek.com/bbq-becky-white-woman-who-called-cops-black-bbq-911-audio-released-im-real-ly-1103057>.

72. *Id.*

evict this Black family.<sup>73</sup> This assumption of power functions as a racial dog whistle, disavowing this Black family of access to a public space, while also elevating her own personal desires.

In light of the family's disregard for her demands to relocate, BBQ Becky appeals to the policing power of the state to enforce her will. While the police do not arrest any of the parties to the barbecue, Becky's dramatic attempt to access and wield policing power as if it were her own, evidences the ways in which Black bodies are socially marked as furtive and with the hieroglyphics of both probable cause and reasonable. By waiting for hours to witness an arrest, Becky shows her desire and entitlement for a type of racial-sexual terror or trauma porn that is reminiscent of the lynch mob. There, thousands of people would often gather for photos with the mutilated body and take pieces of Black flesh with them as souvenirs.<sup>74</sup> The desire to see Black bodies disciplined is a feature of furtivity that appears to be standard, as white people call and wait for the police to arrive, while also consuming myriad videos of Black people being brutalized by police.<sup>75</sup>

Yet, Becky's desire is not all that is evident here. The renaming of Dr. Schulte "Becky" and BBQ Becky, is a humorous example of Black refusal of the conditions of Blackness, deputized white supremacy and the racial-sexual power structure Schulte attempted to reign down on this family. The spectacle of the white damsel in distress, at risk of violent (and almost always sexual) contact from Black men is not novel. In fact, it is at least as old as American chattel slavery and a primary (false) reason for the record lynching's of Black men during Reconstruction.<sup>76</sup>

## VII. The Fourth Amendment and Furtivity

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

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73. The notion of "under the cover of law" means that someone is acting under the seeming banner of state sanctioned policing.

74. Harvey Young, *The Black Body as Souvenir in American Lynching*, 57 THEATER J. 639, 639–57 (2005).

75. Here I want to also think about how White bodies begin to stand in for Black bodies in judicial jurisprudence. I want to think about *Kisela v. Hughes* and the ways this white woman's body was seized and attacked in order to maintain the power to wield particular violences against the Black body as inside the bounds of law. We can also talk about *Lawrence v. Texas*, 539 U.S. 558 (2003) in this section.

76. Ida B. Wells-Barnett, THE RED RECORD, TABULATED STATISTICS AND ALLEGED CAUSES OF LYNCHING IN THE UNITED STATES (1895).

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- Fourth Amendment, U.S. Constitution<sup>77</sup>

The Fourth Amendment of the U.S. Constitution guards what is commonly understood to be the “right to privacy.” This right serves as a constitutional bulwark against the government’s power to arbitrarily “search” or “seize” the person or property of anyone located in the United States. While this right was originally created to prevent the type of “general writs”—timeless documents that allowed the messengers or agents of the king to search and seize people, property and homes—issued during colonial times, it has become one of the most dynamic legal theaters for race-making and social in/justice. The Fourth Amendment, like all of the Bill of Rights, initially only took hold in federal courts and did not apply to the states until the Supreme Court’s doctrine of incorporation came into play. In *Wolf v. Colorado* in 1949, the Court ruled that the Fourth Amendment did indeed apply to the states.<sup>78</sup>

The right to privacy does not easily map onto the Black body. To the contrary, it seems to be untraceable, and furtivity—a suspicious character or nature—readily takes its place. While the letter of the law purports to be colorblind and makes no mention of race or Blackness the specter of Blackness and the precedent of white supremacy are its ideological underpinnings. This performance of colorblindness therefore allows the Court to remain blind to the very racial differentials in treatment that such indifference allows. In the exploration below, Critical Race and Black Queer Theorist Devan Carbado shows how race and gender trouble and complicate the meaning of privacy.<sup>79</sup> This also helps us understand how racism and gender prejudices collude to produce the presence of furtivity that demands a level of surveillance, tracking and what I would call “moving seizures”<sup>80</sup>:

Assume that Tanya, an African-American woman, is walking home from work at nine in the evening. Two officers observe her. They have no reason to believe that Tanya has done anything wrong. Nonetheless, they decide to follow her. Indeed, they follow her all the way home. They do so to ensure that Tanya does not commit a crime (a sex crime, let’s say), and to arrest her if she does. Remember, the officers have no objective reason to

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77. U.S. Con. amend. IV.

78. *Wolf v. Colorado*, 338 U.S. 25 (1949); The Court did not apply the “exclusionary rule” to the states until 1961 in *Mapp v. Ohio*, 367 U.S. 643 (1961).

79. Devon W. Carbado, *Race, Pedestrian Checks and The Fourth Amendment in THE CAMBRIDGE HANDBOOK OF POLICING IN THE UNITED STATES* 309–330 (Tamara Rice Lave & Eric J. Miller 2020)).

80. I want think “moving seizures” as a facet of furtivity; a marking of the way that even when physically able to move, one is still, always, already under the ocular hold of the state, its agents and co-conspirators REDUNDANT. In this way, gaze itself a material seizure and it functions as a violent lesson of comportment, a foreshadowing of possible terror to come and a reminder of one’s place as in and outside of law.

believe that Tanya has done—or will do—anything wrong. There is no objective evidence, in other words, that Tanya has ever engaged in prostitution. Nevertheless, they follow her based solely on their gendered racial suspicion of black women as sex workers. The foregoing conduct would not trigger the Fourth Amendment.<sup>81</sup> The Supreme Court would conclude that Tanya has not been seized. Indeed, the officers haven't even approached her. That the officers' decision to follow Tanya was racially motivated along the gendered lines I have suggested does not matter. The Fourth Amendment is not a bar to this form of racialized surveillance.

Stipulate now that the police officers decide to approach Tanya. That alone would not trigger Fourth Amendment protections. In this context as well, the Court would conclude that Tanya has not been seized.<sup>82</sup> Because following and approaching Tanya is not conduct that implicates the Fourth Amendment, the officer does not need a prior justification to do so. As with the previous example, the outcome of this hypothetical remains the same if race influenced the officers' decision to approach Tanya.... But what if in the context of approaching Tanya, the officers decide to question her? Assume, more specifically, that they ask Tanya the following questions: "Do you live around here?" "What's your name?" "Where are you going?" "Where are you coming from?" "May I see your identification?" The officers' engagement with Tanya along the preceding lines still would not constitute a seizure.<sup>83</sup>

Through Carbado's exploration we are given the opportunity to think about the way the Fourth Amendment does and does not map onto the Black body—in this case a Black woman's body—in the material world. While the amendment promises a general "right to privacy" and specifically "[t]he right of the *people* to be *secure* in their *persons*, houses, papers, and effects, against unreasonable *searches* and *seizures* (emphasis added)" it is clear that these rights have not attached to Tanya. Taken at first glance; there is nothing particularly peculiar about a woman walking in the evening. Women walk, often in the evening. The ability to move freely, at any time of day, in any public—or self-owned—place, is not only a quotidian exercise for American citizens but it also a foundational right that predates the constitution. The right to move freely is a natural right that is so integral—that it is mentioned in the Articles of Confederation to ensure that states

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81. See *Florida v. Royer*, 460 U.S. 491, 498 (1983) (suggesting that while police officers may approach an individual without reasonable suspicion or probable cause based on the notion that the individual is free to ignore the police). The Court has also addressed whether police following people in public places constitutes a search and answered that question in the negative. See, e.g., *United States v. Knotts*, 460 U.S. 276, 285 (1983).

82. *Florida v. Bostick*, 501 U.S. 429, 434 (1990) (declaring that "a seizure does not occur simply because a police officer approaches an individual").

83. *Id.*

extend it to interstate travel and commerce.<sup>84</sup> The ability to travel freely is mentioned most prominently in the Declaration of Independence, which is, perhaps, the basis for American lawmaking. “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”<sup>85</sup> Perhaps, it is most telling then that this second line of the Declaration would be often repeated argument in the abolitionist movement and one often castigated by those who supported slavery. That the argument existed at all is evidence enough that the vaunted natural right has long had trouble becoming affixed to the Black body. Another instance of furtive Blackness—the movement, non-movement, expression and assertion of rights by Black people—as in and outside of law.

Reading the case study of the fictitious Tanya allows us to think of furtivity as a framework for how white people—and the state—frame and understand the Black body. Furtivity captures and includes the legal logics for contact. Namely that there is “reasonable suspicion” and “probable cause” to believe that criminal activity afoot; Blackness afoot. Though the Court requires that reasonable suspicion be particularized and the officer able to articulate “to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience” this protection exists only in criminal procedure.<sup>86</sup> In other words, after one has been stopped, searched, seized or arrested. The only remedy is to exclude evidence of wrongdoing. However, if there is no evidence, or no wrongdoing, there is no remedy. Black people who are not guilty of committing a formal, articulated crime have no remedy against police contact under the Fourth Amendment unless and until they can prove that the officer clearly intended to deny a previously articulated constitutional right. There is no right to be Black and present, as the law does not occasion race-specific protections. Therefore, allowing race specific invasions of privacy.

For the police, Tanya is suspicious and reasonably so, while her “racialexualgender” gives “probable cause” for a sustained encounter.<sup>87</sup> Though she is merely attempting to walk home after an evening shift at work, she is carrying more than her body. She is carrying her flesh and with it, a hieroglyphic, branding or collective of social texts that communicates the past that is not past; the legacy of her as always, already in and outside of law. Her flesh is branded with the statutes and cultural offenses of laws since formally forgotten. She is seen yet without *standing*; standing being the legal ability to file suit or register harm on one’s own behalf in the court of law.

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84. ARTICLES OF CONFEDERATION of 1952, art. I, § 8.

85. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

86. Terry v. Ohio, 392 U.S. 1 (1968).

87. Christina Sharpe, IN THE WAKE: ON BLACKNESS & BEING, 83 (2016).

She is visible and re-marked as out of place and in transgression of the laws seared onto her flesh. By being present and in motion she is in direct violation of the 1702, 1730, 1737 and Slave Laws that deem Black public presence after dark and Black travel without permission as illegal and cause for seizure.<sup>88</sup> Her “free” movement also defies and offends the legacy and letter of vagrancy laws like the Virginia Vagrancy Act of 1866; which allowed for the capture, imprisonment and forced employment for “anyone” who appeared to be without work or home.<sup>89</sup> The call of the vagrancy law—that the Black body is required to be employed for the production of capital—further Best’s formulation of fugitivity being an issue of flight from labor or the designation of self as property. However, the addition of the purposely vague loitering laws that criminalized (Black) standing or movement without discernable, lawful intent moved beyond the question of whether Black people were absconding from duty or nature and instead marked them as furtive in nature and practice. That is to say, their nature as property and human made them always, already guilty and their intended actions—through loitering laws—began to be framed and understood to have no discernable, lawful intent. The burden of non-culpability becomes placed on the Black body, yet it is impossible to reach due to the branding of the Black flesh. The framework of furtivity attempts to connect how both the nature/character and intent/actions of Black people are framed through the gaze of de jure law and its formal and social enforcement.

### VIII. On Qualified Immunity

Qualified immunity is a legal doctrine that marks the deadly seizure of Black people, by police, always, already legally permissible.<sup>90</sup> Put simply, it qualifies certain police involved homicides as qualifying for immunity from prosecution. Under this doctrine, the police are able to exercise deadly

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88. ACTS OF ASSEMBLY, PASSED IN THE PROVINCE OF NEW YORK, FROM 1691 TO 1718 58–9 (printed by John Baskett 1719), <https://babel.hathitrust.org/cgi/pt?id=mdp.35112103374528&view=1up&seq=5>.

89. Virginia Vagrancy Law at 1–2, *Chapter 28. An Act Providing for the Punishment of Vagrants* (1866), [http://www.virginiamemory.com/docs/vagrancyact\\_tran.pdf](http://www.virginiamemory.com/docs/vagrancyact_tran.pdf).

I italicize anyone here to note that while the law itself is colorblind, it was clearly intended to mark and seize Black people. This becomes particularly when we note that the penalties for vagrancy were often—if not always—waived for white people who claimed to be impoverished; while Black people were almost always leased off for labor, by the sheriff. This shows that the issue at hand was not poverty—both non-land-owning whites and formerly enslaved Black were poor—but Blackness, as a form of (in Best’s formulation) fugitive property.

90. See *Kisela v. Hughes*, 138 S. Ct. 1148 (2018) (per curiam); *White v. Pauly*, 137 S. Ct. 548 (2017) (per curiam); *Mullenix v. Luna*, 136 S. Ct. 325 (2015); *City and County of San Francisco v. Sheehan*, 135 S. Ct. 1765 (2015); *Plumhoff v. Rickard*, 572 U.S. 765 (2014); *Brosseau v. Haugen*, 543 U.S. 194 (2014) (per curiam).

force when they believe they—or their partners—are in imminent danger of serious physical injury. Importantly, the issue of whether the successful use of excessive or deadly force is qualified for immunity is placed under the reasonable person standard. Essentially, the law asks, “would a reasonable person under the circumstances act the same way?” This question portends to take in the totality of the circumstances and think from the officer’s point of view. Ironically, this standard is also the same standard to use to mark whether Tanya felt “free to leave” in any of her police encounters. However, while the standard does not take racial experience into account—thereby erasing and making invalid the material reality of anti-Blackness in law, lawmaking and policing—it takes into account the inherent fears, pressures concerns and proclivities of an officer. Again, here, we are able to see how the Black person is rendered both in and outside of law. The officer need only say “I feared for my life” and the immunity is triggered, while the nature of their job—and perhaps their encounters with furtive black folks—and fear buttresses the reasonableness of the use of force. However, Tanya is able to be searched, seized and killed; and her experiences as a Black woman are inadmissible in court and cannot be used to contextualize whether her actions or fears were reasonable.

### **IX. BlaQueer Furtivity: Intramural Policing and Thinking Blackly as Embodied Framework**

While Furtive Blackness, or Black Furtivity, surely can be understood as an interracial phenomenon—beyond the Black-White binary—racial formation and domination are not its only places of residence, despite being the most popular domicile. The policing power, central to U.S. statecraft, that animates and powers racial formation and dislocation in the United States is a legal power that is also extralegal, sociocultural and intramural. In speaking of the intramural, I am referencing the work of Hortense Spillers, where she argues that mechanisms of anti-Black violence and performances come to manifest themselves in the intramural activities and relationships between and among Black people.<sup>91</sup> This is particularly clear when we employ what Black feminist scholar Patricia Hill Collins has called “the pivoting center.”<sup>92</sup> The pivoting center is a theoretical intervention stemming from the scholar’s articulation of “standpoint theory”; arguing that the center, or lens, of our analysis must pivot to account various vantages of systems of power and matrix of domination. Put differently, any theory of power analysis must consider the material experience of various oppressed

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91. Spillers, *supra* note 30, at 65–81.

92. PATRICIA HILL COLLINS, BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT 221–238 (1990).

communities. I argue, as Hill-Collins did, that those who share structural and societal positions—particularly around race and gender (here I add sexuality)—share a “unique angle of vision” with regard to knowledge production and analysis of the dominant, as well as shared, society.<sup>93</sup>

To be simultaneously Black and Queer—BlaQueer—and alive, is to be necessarily furtive. It is to move, indeed, to live, without leave. Without permission. It is to be seen and (mis)understood as being in flight from one’s duty to perform the labors and languages of compulsory heterosexuality—in Black—or what Christina Sharpe calls “racialsexualgender.”<sup>94</sup> In other words, we evade the compulsory performances of normative racialsexualgender in ways that are marked as both fugitive and furtive. We flee the things that are not true of our desires, that do not emanate from our own pleasures, erotics and predilections; and we evade the gaze that might uncover these resistances and respond with its terror, because we know that to assert our desires is to be marked as furtive, as *justifiably* disappeared, lashed or otherwise violated. To be BlaQueer then, is to be furtive in plain sight. Furtivity is a BlaQueer theory—a BlaQueer gaze, analytic and embodied politic—that provides an important intervention to, and a connective tissue among, the fields of law, Black Studies, Black Queer Theory and Black Feminist Theory. It is particularly engaged with sub-branches of critical race studies, fugitivity studies, criminal law, BlaQueer critique, law and literature and performances studies. Indeed, its ancestry is messy and fraught and not immediately traceable as pure or linear; it took a village.

Furtivity is a mechanism of what I’ve titled “Thinking Blackly.” The three components of which are witnessing (the archival), testifying (the articulation) and refusal (the praxis).<sup>95</sup> Each of these moments are positioned from the standpoint of the individual Black person and the collective Black polity. Thinking Blackly does not presuppose an inherent or common Black thought. Instead, it proffers an analytical framework and a methodology for engaging the conditions of Black life and the possibilities for Black futures. Thinking Blackly is particularly important when considering criminal and constitutional law because it provides an analytical framework that juxtaposes the reality of Black material and experiential life; with the aspirations and holdings of law and jurisprudence. For example, the right against unreasonable search and seizure withers in the reality of furtive blackness, as demonstrated through legacies of racial-sexual terror, excessive force, stop and frisk and racial profiling. Thinking Blackly is grounded in the irreducible particularity of Black existence. Therefore, it engages with and

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93. Patricia Hill Collins, *Defining Black Feminist Thought in RACE CRITICAL THEORIES 35* (Philomena Essed and David Theo Goldberg eds. 2002).

94. Sharpe, *supra* note 4, at 83.

95. Olajuawon, *supra* note 6.

responds to the intraracial power dynamics and experiential differences between and among Black people. For that reason, we engage what the “pivoting center,”<sup>96</sup> and what Patricia Hill Collins has articulated as a Black Feminist “standpoint theory.”<sup>97</sup> In these two formulations, we can understand the practice and tradition of Thinking Blackly—and its three central tenants—as being particular to the experiences of the individual Black person when engaged in witnessing, testifying and refusing; or, to some extent, from the sub-community one seeks to do these with or on behalf of. For example, if we are Thinking Blackly about the constitution’s consideration of a right to dignity—and the person doing this of BlaQueer experience—the witnessing, testimony and refusal will be informed by that particular collection of experiences and ways of knowing and being.

While there are critical analytical differences between witnessing, testifying and refusal; yet there are not always clean breaks between these practices. We can think about these components as scaffolded; by which I mean that build upon and constitute each other as interrelated and sometimes overlap. Witnessing functions as the archival; it is here that we collect knowledge about the conditions of Black life, with concern to an issue. It is from this collection, this archival of quotidian Black experiences, that we are able to then gather the words and create the narrative of a testimony. The act of testimony is broad and vital. One can testify to their own community—where power and identity markers are similar, if not the same—as a sort of affirmation of a collective experience or, as affirmation of the experiences, troubles or situation of another, as well as on their behalf to a different community. Testimony is the presentation of data, of narratives, of particular experiences or issues that have been noted through witnessing (either through one’s own experience or seeing that of another). From this formulation, it is clear that good, credible testimony requires witnessing. We can imagine bad testimony, or mere opinion, as being unverified by the archival; consider for example, Trump’s consistent warnings of Mexicans as rapists, drug dealers and the like. Anyone can speak, not everyone can testify. Testimony requires credibility and credibility is founded on the experience of witnessing. Refusal is a refutation or denial—a dislodging—of a particular ontology or practice of anti-Blackness, whether this be a maligning narrative or controlling image or protest or contestation of treatment. It might be understood as a less diplomatic, or more combative form of testimony, or combination of testimony and witness as praxis. Refusal can take many forms, but it necessarily includes witnessing—as one must know what, how and why they

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96. Patricia Collins, *Gender, Black Feminism, and Black Political Economy*, 568 THE ANNALS OF THE AM. ACAD. OF POL. AND SOC. SCIENCE, 41–53 (2000).

97. *Id.*

are refusing—and may also include a testimony within it. This essay is an attempt at witnessing, testimony and refusal. Black, and especially BlaQueer, living requires a studied expertise in “thinking blackly.” It is this mastery of thought—and the anticipation and detection of violence—that allows BlaQueer people to foresee, foretell and interpret coming and presently inarticulate threats to the Black polity. In other words, the BlaQueer functions as the canary in the coal mine for the rest of the Black polity; being most closely exposed to the pollutants of racial-sexual terror, from the margins of the community. Our proximity to quotidian threats engenders a finely tuned system of threat detection and evasion similar to what Simone Browne has titled “dark sousveillance.”<sup>98</sup> Meanwhile, our natal connection to non-Queer Black people renders us particularly vulnerable to intramural violence, necessarily attuned to its comings and somehow always, already concerned for the livelihoods of those equally likely to love and lash us.

### **X. Scenes of Furtivity: BlaQueers (Intramural) Policing and Bodies of Evidence**

*So I go there [West Hollywood Sheriff's Station] and I basically let them know I'm coming from an older friend's house—at the time I didn't want to speak his name. But I did initially say that I feel like I was drugged. And because I was talking rapidly and constantly looking around tryin' to watch my back to see if someone was approaching me the only thing they would say is, "You're tweaking. You're under the influence and if you don't get away from here I'm going to take you to jail for being under the influence." They didn't care to ask who it was or where did it happen, and I said, "Well just let me write a statement down; you guys can give me a number for that I can use if I need to come back it'd be available." He said, "OK." He gave me a paper. I wrote it down. Sat there for about 10 minutes and because I was still rambling about the situation they did not want me standing in the front lobby of the department; they told me to leave.<sup>99</sup>*

-Damar Love, speaking on his experience with Ed Buck, a multimillionaire sexual predator, in whose house Gemmel Moore's body was found<sup>100</sup>

98. See Browne, *supra* note 50.

99. Michael Harriot, *The Curious Case of the Black Male Prostitute Found Dead* (Nov. 13, 2017), THE ROOT, <https://www.theroot.com/the-curious-case-of-the-black-male-prostitute-found-dead-1820247720>.

100. Gemmel Moore was a BlaQueer teen who stated he was forcibly injected with Crystal Meth by Ed Buck multiple times, until he became addicted. Gemmel's body was the

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In the exchange above Damar Love appears in a police station. I imagine him shaken—physically and emotionally—disheveled and unkempt, attempting to summon the will to testify on his own behalf. His eyes are likely red and dilated from the effects of crystal meth, or “Tina,” while his hair and clothes may belie the fact that he had a long night of sexual labor. He speaks quickly, looking around him to see if he is being approached, in danger of being accosted. The police mark and dismiss him as evidently “tweaking.” The word not only indicates that he is under the influence of drugs, but the tone and delivery of the word implies that he did so willingly, has a problem and *is* a drug addict. In this scene we witness Damar Love being transmuted from victim-witness, attempting to testify to the violation that occurred on his body, to suspect flesh. He is attempting to bear witness to his own harm, that he had been drugged, that he had been sexually exploited. He is attempting to use his body to testify to coming dangers that others might face but the misreading of his flesh renders his body not as a liberatory space of evidentiary proof—space to be read to back up, supplement and make sense of his actions—but instead as a prosecutorial indictment that marks his actions as always, already furtive; criminal, sly and in need of discipline. Similar to ways that fugitive slave is rendered part man and part commodity—the commodity “owing service and labor for”—the furtive BlaQueer is rendered furtive by systems of law and custom, while performing furtivity through the body to evade, perceive and elide these very customs that seek to discipline the flesh. While Damar is attempting to warn and spread word about a racial-sexual predator on the loose, he is reprimanded for being present, for presenting himself in the wake of such illegible violence. His presence as victim, as citizen worthy of protection and audience is agrammatical and is marked being under the valence of furtive intentions—stealth—his flesh becomes a conduit, a marker, a proof of reasonable suspicion. In dismissing him, the police simultaneously dismiss the knowledge that is produce in sites of violence only familiar to those existing in nucleus of compounded oppressions as gibberish as best; but they are also dismissing the safety of an entire community as outside what is marked as the “public.” His assailant, Ed Buck, would later go on to drug, rape and kill other BlaQueer and trans people in the West Hollywood era; facing no charges.<sup>101</sup>

Michael Johnson was a college wrestler who was charged with two counts of HIV transmission and four counts of exposure. Michael was then

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first among many found dead or near dead in Buck’s house—all the victims were BlaQueer men—despite various calls by Moore’s family, the BlaQueer community and sex workers who have survived Ed Buck.

101. Harriot, *supra* note 97.

convicted of one count of transmission and four counts of exposure and sentenced to 30 years and six months in prison for consensual sex with white male peers.<sup>102</sup> His conviction was later overturned in appellate court—after prosecutors failed to share exculpatory evidence, his penis was shown to potential jurors and racist, homophobic arguments were made and unanswered in court—and his case resulted in a ten year plea agreement; where six years have been served, and the remainder will be served on parole beginning in October in 2019.

I recount these details to underscore how the law engages in gratuitous violence, in the name of justice, when dealing with Black people, but particularly those that are poor and BlaQueer. In the court transcripts and public commentary—much like during slavery—Michael’s body only shows up in the record as testimony and proof to his deviance, dangerous nature and need for discipline. Michael’s body, his genitalia, is made available, seized as a speaking, prosecutorial witness—a body of evidence—without his consent, but is disallowed to testify in his defense. This is not dissimilar from the position of Ms. Morgan in *Prigg*, where the Black body itself becomes transmuted to evidence of misconduct but is disallowed standing to refute the presumption of deviance. Michael was not tested to see whether HIV markers were identical to the boys who accused him of willful transmission; this is tantamount to not bothering to check the fingerprints on a gun because the flesh before you is clearly guilty, stealthy, furtive. This had the effect of eliminating the argument, the affirmative defense, that they could have received the virus elsewhere. The mere presence of his HIV positive body becomes the logical reason for the seroconversion of the other boys; he was the clear contagion. His body is read as hypersexual, powerful and predatory—Tiger and *Mandingo*-like—and the white boys as his prey; he is a furtive, racial-sexual predator, who knew or should have known to perform his sexual labor in a way that protected his prey against the danger of his flesh, all the while attending to their desire for his consumption. This is despite their pleas for raw sex, despite their never having been tested for HIV before. His flesh operates as body of evidence that cannot testify in its own defense.

Criminal procedure renders BlaQueer people especially furtive—particularly when sex is concerned—however, categories of sexuality are often destabilized in the context of racial conflict, except where whiteness intervenes. In the case of El Amin we can mark how his sexuality become secondary to his race—a type of godless circumcisions<sup>103</sup>—and the readings

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102. Dominique Jackson, *Michael Johnson, Who Faced 30 Years Behind Bars for Transmitting HIV, Has Just Been Granted Parole* (Apr. 12, 2018), <https://blavity.com/michael-johnson-who-faced-30-years-behind-bars-for-transmitting-hiv-has-just-been-granted-parole?category1=news&category2=politics>.

103. The term “godless circumcision” refers to a phrase used in my book “Godless Circumcisions: A Recollecting & Re-membling of Blackness, Queerness and Flows of

of the hieroglyphics on his flesh depend not on his being but instead, on the motive of the policing agent of the state, or those working on its behalf; which turn on the protection of whiteness as property and then gradients of white patriarchal supremacy. Consider this exchange:

“They walked up to me, pulled out a weapon and struck me,” [El Amin] said, referring to the purse a drunken Jonathan Snipes used to slap him after he thought he heard a gay slur .” This incident was started by . . . two drunk, white men that felt they were entitled to come and swing at me for no reason.”

“I know you want to cast this as an issue about race, I just do not see that there is any evidence of that,” [Manhattan Supreme Court Justice Arlen Goldberg] said. “When you picked up the chair, that was a criminal act, that cannot be excused.”<sup>104</sup>

El-Amin a BlaQueer man, was hysterically painted in the media as being a hulking homophobe—with leading gay rights organizations calling for him to be charged under hate crime statutes—was later convicted of two accounts of first degree attempted assault and two counts of second degree assault and sentenced to nine years in prison and three years on parole.<sup>105</sup> A video displays much, but not all of the incident.<sup>106</sup> However, it is undisputed that the couple drunkenly approached El-Amin at the bar, cussed at him, and struck him across the face with a large purse. Due to his musculature and size he was immediately portrayed as another fungible homophobic Black man, despite being a visible LGBT activist for 20 years. Here, his size and race operated as evidence of his guilt but was unable to remark—and quickly dismissed as irrelevant—as to the violence of the strike, the racial slur hurled his way, fear of being attacked by two men or an ability to stand his ground or self-defend against two drunken assailants. The concern of the judge and the court here is not about whether self-defense is itself an affirmative

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Survivance.” It operates as a shorthand for the ways in which Black--and especially BlaQueer--folks are expected to cleave away parts of their person, truths and ways of being in order to participate in the white supremacist and cisheterosexist society we live in; from our families to our workplaces.

104. Rebecca Rosenberg, *Black Gay Man Gets 9 Years for Bar Fight with White Gay Couple*, N.Y. POST (Sept. 16, 2016), <https://nypost.com/2016/09/16/gay-man-gets-9-years-in-prison-for-beating-gay-couple-with-chair/>.

105. Trudy Ring, *Nine-Year Sentence for Man Convicted in Chair Attack at NYC Restaurant*, THE ADVOCATE (Sept. 15, 2015), <https://www.advocate.com/crime/2016/9/15/nine-year-sentence-man-convicted-chair-attack-nyc-restaurant>.

106. *Man attacked with chair at BBQs in Chelsea*, YOUTUBE (May 6, 2015), [https://www.youtube.com/watch?v=GyuzV2D7U98&feature=youtu.be&ab\\_channel=Isaam\\_Sharef](https://www.youtube.com/watch?v=GyuzV2D7U98&feature=youtu.be&ab_channel=Isaam_Sharef).

defense; but instead whether El Amin possessed the proper intent when defending himself. His intentions—even in the face of two attackers—are illegible and suspect. He is seen as hiding something, as being intentional stealth and concealing the true horror that he always, already intended to cause. By being cast as inherently furtive, his body is moved from Black and queer and activist being—to a dangerous mass of predatory flesh that must be controlled, put down and surveilled at all cost.

### **Conclusion: The BlaQueer Body Performing Furtivity and Refusal**



(Photo of Mickey Bee, Photo credit: Ryan Lavalley PhD, OTR/L)

*It's important to see a black trans woman be unafraid of police  
I was tired. The most I could do was dance away my  
anger, frustration, and sadness," Bradford said in a telephone  
interview Friday. It's important to see a black trans woman be  
unafraid of police and policing.*

-Bradford said of her dance.<sup>107</sup>

Here, we see Micky singing with her body as a BlaQueer canary in the mine of state machinery to arouse a chorus of refusal, mutual witnessing, and testimony. This not only announces her presence, but it also demonstrates the resolve to remain furtive. Micky stealthily moves beyond and through

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107. Jorge Rivas, *A Beautiful Act of Resistance in the Face of a Terrible Law in North*

legal and extralegal violences attempting fleshly control. Micky remains fierce, fab, and irreverent in the face of gender race and racial-sexual terror; all while using her body to perform a method of evasion and knowledge production. Disallowed from entering the governor's mansion to gain an audience and officially register her protest Micky begins voguing. This not only has the effect of expressing her dissent, but it is an assertion of her unmovability and her resolve to be seen and heard; even when silenced and unseen. Voguing through and among the police officers, Micky displays the importance of another audience—one that is also part of her performance—her fellow protesters and peers in the struggle for life and dignity. These shared gestures, the physical and verbal calls and responses are displays of solidarities inherent to furtivity. Micky and her friends are companions, a chorus and a troupe articulating a politics through voguing, an artistic rendition as a commonplace of the intramural *modus operandi*. Micky does not yell. She does not sing. She dances. She manipulates the weight of her flesh—the weightfulness thrust upon it—and maneuvers across the concrete showing how her body remains her own. She elongates her arms and dips to ground, taking clear pleasure in the look and feel of her body as she quickly returns in display of her regal silhouette.

By voguing, Micky brings to bear decades of BlaQueer and Trans histories of remaining and refashioning. In her, we see the embodiment of the Jamaican Gully Queens—and numerous youth around the United States—that, cast out of their homes, come together anew, in public as an unshakeable community.<sup>108</sup> The public becomes their home and the fallacies of law—a system that continues to render them furtive with the promise of justifiable violence—becomes their primary way of sustenance. In many ways, Micky reminds us that those who are deemed furtive are oftentimes both cat and mouse in the process and politics of citizenship and criminalization. Micky and *Southerners On New Ground* (SONG) allow us to gaze upon the tension between being deemed furtive and participating in a furtive politics. Furtivity is ascribed, to varying degrees, on all Black people within the United States. However, BlaQueer furtivity is particularly pronounced, because BlaQueer people are nowhere safe; not amongst their racial collective, nor the broader white or non-Black LGBTQ community. Furtivity is ascribed, much in the same way that Spillers describes the racial hieroglyphics. Yet here, while also being ascribed, furtivity is being both

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108. The “Gully Queens” are BlaQueer and trans people who live in the gullies—the gutters and waterways—of Jamaica. The Gully Queens form complex community structures that enable them to survive the anti-BlaQueer state, as well as its deputized citizenry; which often launches attacks on these communities, resulting in the murder and dismemberment of the Queens. To be clear, the Gully Queens are primarily low-income people, who were thrown out of their homes and communities under the suspicion or actuality of being non-cisheterosexual.

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embraced and used as a strategy of existence. Here, it is in the face of the state's marking of this Black Trans woman as furtive—as illegal, threatening and outside of the protection of law—that Micky and her peers embrace a furtive politic, performance and solidarity that seeks to refuse the power and/or legitimacy of the state's ability to control, mark or subordinate them.

This double reading of the dynamic relationship between the state and the refusal of the state is not merely rhetorical but an essential strategy of interpretation given how Blackness registers and exists in this world. We must be clear on what the state purports to be doing and say—while also attending to its actual functions—and how, why and what Black and BlaQueer people are responding to or refusing. It is not enough to read the given facts of a case—as these are always, already controlled and contorted by the state—but we must instead lean into the context, silences, groans and his/herstories of the truths rarely allowed to be evidence.

By embracing the furtive—a BlaQueer racial-realist approach to laws and their social manifestations—Micky allows herself to see past rhetoric of both justice and normativity and is able to mark them as manifestations and mechanisms of power accumulation. This sightedness allows her and other BlaQueer people the space and imperative to create a constellation of new politics, understandings and practices that attend to the needs of their erotic—in the parlance of Audre Lorde—while also attending to the ways their bodies are read, understood, desired and encountered. This navigational method is the product of thinking blackly. Its centering in BlaQueer furtivity allows for an analytic that rests in the fulcrum of the pivoting center and allows for an accounting of myriad Black experiences by looking back at systems of being, of law and of violence from the space of those who must contend with violence from within Black community and white America. BlaQueer furtivity and thinking blackly allow us to unmask the conditions, that might prepare us to answer the query of Audre Lorde when she wonders: “which me will survive all these liberations?”

In conclusion, Micky Bee's protest and refusal mark how BlaQueer performance and the embrace of the furtive allows for an alternative method of encountering the state, its policing power and intramural violence. Micky's refusal may be imagined as a public method of testimony and refusal of the insidious, formal and extralegal violence against the BlaQueer and Trans body and flesh. Although Micky is moving against a law—and narrative—that marks and lashes BlaQueer people, she is also demonstrating the power of living otherwise. Micky is showing what it might mean to live beyond—and not merely in reaction to—the violent conditions of the spaces, states and worlds we encounter. In embracing herself as furtive, Micky becomes a demonstration of a different type of freedom and an example of how Black and BlaQueer people understand and encounter law and law

enforcement practices that render them both in and outside of law and  
lawfulness.

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