

# **SEXUAL PROFILING & BLAQUEER FURTIVITY: Blaqueers on the Run**

T. Anansi Wilson

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## INTRODUCTION

This article focuses on the phenomena of furtive Blackness—the marking on and of the body as a furtive gesture, and the Black strategy of furtively navigating a white supremacist sociolegal world—and strict scrutiny, the precedents on how to investigate, consider and regard Black presence and claims to rights, goods, services, and humanity.<sup>1</sup> Both furtiveness and scrutiny are precedents of law and custom.<sup>2</sup> According to Grahn-Farley and Farley, the law of today—of neosegregation—follows the law of segregation, which is the child of the law of slavery presented as the law of property, granting the power (and legitimacy) to own and duty to submit to ownership.<sup>3</sup> The laws of the United States are both the laws of ownership and the duty to be owned.<sup>4</sup> They exist simultaneously, transcribed as hieroglyphs on the bodies of Black people.<sup>5</sup> They are the laws and precedents of being rendered 3/5 property and 2/5 nominally human.<sup>6</sup>

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1. See T. Anansi Wilson, *Furtive Blackness: On Blackness and Being*, 48 HASTINGS CONST. L. Q. 141, 142 (2020) (examining the relationships between race, gender, sexuality, and law specifically those used as anti-blackness tools).

2. Tabias O. Wilson, *Furtive Blackness: On Being in and Outside of Law* (May 2021) (Ph.D. dissertation, University of Texas at Austin) (on file with the University of Texas, Texas Scholar Works Library system) [hereinafter *Furtive Blackness*].

3. See Anthony Paul Farley, *Perfecting Slavery*, 36 LOY. UNIV. CHI. L.J. 101, 102 (2005) (arguing slavery is still a part of the country because the purpose of slavery is “white-over-Black” which is exactly the purpose of neosegregation).

4. *Furtive Blackness*, *supra* note 2.

5. See Hortense J. Spillers, *Mama’s Baby, Papa’s Maybe: An American Grammar Book*, 17(2) DIACRITICS 65, 67 (1987), <https://www.jstor.org/stable/464747> [<https://perma.cc/8N2E-S7AD>] (indicating hidden branding transfers through generations via the wounds of their ancestors).

6. *Furtive Blackness*, *supra* note 2.

This equation, this “admixture” and alchemy of property and un-property, allows for the sociolegal maneuver to mark one as a “fugitive” from law and perfectly aligns with the underlying legal logic of Black folks being both *in* (property to be disciplined) and *outside* (nominal human/citizen unprotectable) of law.<sup>7</sup> This fugitive is not guilty of kidnapping—because that requires the designation of human—but instead is guilty of theft of self and of property.<sup>8</sup> The fugitive’s crime is stealing and taking a self that is not considered a self; a self that owes a “duty or service for life.”<sup>9</sup> The fugitive is considered and marked to always be in dual flight.<sup>10</sup> The first flight is from the physical power held over them, by the putative master.<sup>11</sup> The second flight which holds still unabated, is the flight from *duty or service as life*.<sup>12</sup> As we read in *Prigg v. Pennsylvania*, the fugitive and the following Fugitive Slave Law are of fungible character, both unspeaking and indifferentiable in the court of law.<sup>13</sup> The fugitive lacks standing, holds the burden of proof of not absconding, while also proving individuality in a legal theater that recognizes legal humanity, a presumption of innocence, and the right to free will.<sup>14</sup> Much like its descendants in *Bakke* and *Rogers*, the burden of proof is insurmountable for the preceding fugitive—or any individual—to produce on their own account because government or master verification of injury is necessary.<sup>15</sup> Yet, as Farley argues, the need for reparation or justice is evidence of the enduring system and logic that engenders the injury in the first place.<sup>16</sup>

The injury, then, is the brand of the master precedent of property re-announcing its presence.<sup>17</sup> The salve—intermediate laws and policies of harm reduction—merely produce temporary relief, and no reprieve, to the ongoing cuts of a system ruled by precedent.<sup>18</sup> Much like the legal regime of the fugitive slave laws and acts, a small measure of temporary freedom exists only when one’s status as a non-fugitive, or non-furtive threat or being can be vouched for by the courts or some other white authority.<sup>19</sup> In summation, the fugitive

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7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. See *Prigg v. Pennsylvania*, 41 U.S. 539, 541 (1842) (“A claim to a fugitive slave is a controversy in a case ‘arising under the constitution of the United States,’ under the express delegation of judicial power given by that instrument.”).

14. *Furtive Blackness*, *supra* note 2.

15. See *University of Cal. v. Bakke*, 438 U.S. 265 (1978) (deciding the legality of affirmative action); *Rogers v. U.S.*, 340 U.S. 367 (1951) (determining the privilege of self-incrimination).

16. Cf. Farley, *supra* note 3, at 103 (indicating the request for equality will always fail because the need for a change in equality itself is enough to always cause the request to fail. The lack of equality comes from a lack of respect that cannot be changed through request alone.)

17. *Furtive Blackness*, *supra* note 2.

18. *Id.*

19. *Id.*

bears the burden of providing individuality, an impossibility once rendered fungible.<sup>20</sup> Durable justice is an impossibility because once one is deemed a fugitive, they are already guilty of the crime; there is no innocence to be proved or provided.<sup>21</sup> Durable justice is an impossibility.<sup>22</sup>

## I. THEORY OF SEXUAL PROFILING

In *Sexploitation: Sexual Profiling and the Illusion of Gender*, Michèle Alexandre provides a prescient framework for understanding how law, society, and culture uphold, promote, and mandate certain gender norms and consequences for trespass in dress or embodiment.<sup>23</sup> Alexandre defines sexploitation as “the legal and social structures that facilitate and, even tacitly, promote gendered norms and ideals via sexual profiling.”<sup>24</sup> Conversely, sexual profiling is defined as “the tool used to institutionalize and systemically perpetuate gender stereotypes.”<sup>25</sup> Alexandre grounds her theory in two historical accounts of women in Haiti, encapsulated in the following quotations:

*They were neither witches nor bewitched until talked about.*  
—Fara Alonso De Salazar (1619)

‘Then the story came back to me as my mother had often told it. On that day so long ago, in the year nineteen hundred and thirty-seven, in the Massacre River, my mother did fly. Weighted down by my body inside hers, she leaped from Dominican soil into the water, and out again on the Haitian side of the river. She glowed red when she came out; blood clinging to her skin, which at the moment looked as though it were in flames.’<sup>26</sup>

As Alexandre later argues, women who refused to conform—what she calls “nonconforming”—to the social, cultural, and legal edicts of their time were “viciously hunted, punished and even killed.”<sup>27</sup> Much like the theaters of slavery, segregation and neosegregation desire to punish those who dared to

20. See Jasmine Wallace, *Fugitive Gestures: The Persistence of Black Meaning and Black Life in an Anti-Black World* (Aug. 2021) (Ph.D. Dissertation, University of Memphis) (on file with Texas Scholar Works Library system) (analyzing the reclamation of humanity and individuality cultivated by enslaved people).

21. *Id.*

22. See *id.* (illustrating a firsthand analysis of injustice: one that depicts the painstaking duality between a regretful existence of facing injustice, or the more futile, yet attractive option—death).

23. See MICHÈLE ALEXANDRE, *SEXPLOITATION: SEXUAL PROFILING AND THE ILLUSION OF GENDER* 50 (Routledge 2014) (taking a cross-sectional approach to the ways in which the law, scholars, and societal expectations examine men, women, and intersex people).

24. See *id.* at ix (defining frequently used terms in the body of work to create a uniform understanding).

25. See *id.*

26. *Id.* at 13.

27. *Id.* (“These two quotes hark back to times and places in history, one to the Spanish Inquisition and the other to mid-twentieth century Hati, where noncon-forming [sic] women were viciously hunted, punished, and even killed.”).

exist outside of their prescribed places and was deep, collective, unifying, and exacting.<sup>28</sup> It remains so.<sup>29</sup> Similarly, the nonconforming woman transmuted from one status to something otherworldly; from woman to witch, from collective property to menacing threat, from fragile and in need of “protection” to overbearing and the logical cause of overwhelming aggression.<sup>30</sup> To be clear, I do not make this argument to draw an equivalency between slavery and patriarchy, but instead to note how the women of Haiti experienced sexual profiling as an afterlife of their ongoing collision.<sup>31</sup>

Similarly, here, the women were once again in flight.<sup>32</sup> They were in flight from a social contract they never consented to; one that defined and constricted their manner of dress, speech, access to the public, and ability to own and inherit property.<sup>33</sup> Sexual profiling—and all gendered regulation, surveillance, and terror—is exacted on and through all bodies, regardless of the sex assigned at birth or gender claimed in life.<sup>34</sup> This article explores how racial-sexual profiling touches BlaQueer people across the United States as a matter of law, order, custom, and sport.<sup>35</sup>

Also present in these quotations is a peek into the power of narratives, description, and other “controlling images” to create a profile that both speaks for and before the person is given a voice.<sup>36</sup> Above, De Salazar reminds us that the Haitian women “were never witches or bewitched until talked about.”<sup>37</sup>

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28. Christer Petley, *Punishments and Privileges: How Plantation Owners in the Caribbean Kept Control over Slaves*, SCROLL IN (Nov. 6, 2018, 9:30 PM), <https://scroll.in/article/900691/punishments-and-privileges-how-plantation-owners-in-caribbean-kept-control-over-slaves>, [<https://perma.cc/8AEL-UMWA>] (describing how slaveholders encouraged complex social hierarchies on plantations that amounted to something like a system of ‘class’).

29. See ALEXANDRE, *supra* note 23, at 13 (reflecting on the dark history of those who were enslaved and lamenting the prevalence of its effects in the modern world).

30. See *id.* at 1 (discussing the deep-seated resentment towards proponents of women’s rights, while exploring the repressive nature of gender categories).

31. See *id.* at 13 (retelling the horrors of Haitian women being hunted, punished, and killed).

32. See *id.* at 151 (showcasing one of the many ways in which women fall victim to sexual profiling and the illusion of gender).

33. See generally *id.* at xii, 59 (exploring laws relating to property for nonconforming individuals, the widespread method of judging a women’s character based on her manner of dress, and attacks against individuals who rebel against gender roles in their speech).

34. See generally *id.* at 13–14 (surveying ways in which normative views of gender are constructed and perpetuated through media and societal norms).

35. See generally Tabias Olajuawon, *We are Not Yours: I’m Tired of White Women’s Racial-Sexual Terrorism of my BlaQueer Body*, BLACK YOUTH PROJECT (Nov. 9, 2017), <https://blackyouthproject.com/im-tired-of-white-womens-racial-sexual-terrorism-of-my-blaqueer> [<https://perma.cc/8XFG-8HA9>] (scrutinizing the racialized sexual violence and anti-Black fetishism that is rampant in society).

36. See PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT* 7 (Routledge, 2nd ed. 2000) (1990) (portraying controlling images applied to Black women that originated during the slave era, and how they interact with economy, policy, and ideology).

37. ALEXANDRE, *supra* note 23, at 13 (“[T]here were neither witches nor bewitched

The moment of transmutation was not endemic to the body itself; it manifested by the way the body was framed and marked by word—both sociolegally and ocularly—in the narratives that precede one’s presence.<sup>38</sup> Put differently, proximity to a deviant description, regardless of intent or action, is tantamount or equal to, the commission of a crime because once one has been placed into an unyielding yet ever-expanding frame of criminality and net of capturability, their existence, movement, and presence become criminal acts.<sup>39</sup>

What Alexandre marks as “sexual profiling” in Haiti—and I argue, globally, regarding BlaQueer people and other members of the Black Diaspora—is an “afterlife of slavery.”<sup>40</sup> The laws and customs that engage, debase, surveil, mark, disappear, and lynch Black women are identical—in legal and cultural spirit—to the laws of slavery and neo-slavery.<sup>41</sup> In particular, these laws echo and are akin to those of the Antebellum and Reconstruction eras, particularly the Slave Codes and the Black Codes.<sup>42</sup> Broadly, these laws: restricted or forbade movement, presence, self-defense, or political participation; the ability to contract; personhood; citizenship; the ownership of property; the right to marry or bear arms; and the ability to testify against white people.<sup>43</sup>

## II. GOVERNING THE BLAQUEER BODY

*Even before the African slave trade began, Europeans explained the need to control Africans by mythologizing the voracious “sexual appetite” of Blacks.*<sup>44</sup>

—Dorothy Roberts

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until they were written and talked about.”).

38. See generally *id.* at 68 (giving an example of a word that frames and marks a body in a sociologically and ocular way).

39. See generally, Michelle Edelstein, *Structural Racism and Anti-LGBTQ Policies Lead to Worse Health Among Black Sexual Minority Men*, RUTGERS (Apr. 8, 2021), <https://www.rutgers.edu/news/structural-racism-and-anti-lgbtq-policies-lead-worse-health-among-black-sexual-minority-men> [<https://perma.cc/A57M-GNGS>] (purporting that anti-LGBTQ policies make Black sexual minority men feel like burdens in society).

40. See, ALEXANDRE, *supra* note 23, at 10 (defining sexual profiling as a tool commonly used to sexually exploit individuals through the maintenance of longstanding stereotypes and social norms); but see SADIYA HARTMAN, *LOSE YOUR MOTHER: A JOURNEY ALONG THE ATLANTIC SLAVE ROUTE 6* (2007) (discussing how the afterlife of slavery included skewed life chances, limited access to healthcare and education, as well as premature death, incarceration, and impoverishment).

41. See, JOEY L. MOGUL ET AL., *QUEER (IN)JUSTICE: THE CRIMINALIZATION OF LGBT PEOPLE IN THE UNITED STATES* 12 (Michael Bronski ed., 2011) (describing the brutal laws and punishments put in place against women who sought homosexual relationships).

42. See *id.* at 12.

43. See *The Southern “Black Codes” of 1865–66*, CONST. RTS. FOUND., <https://www.crf-usa.org/brown-v-board-50th-anniversary/southern-black-codes.html> [<https://perma.cc/C9S7-9NPT>] (detailing the legal restrictions placed on Black individuals after the Civil War and suggesting that their emancipation was to replicate slavery without legally calling it slavery).

44. Dorothy E. Roberts, *Rape, Violence, and Women’s Autonomy*, 69 CHI.-KENT. L. REV. 359, 365 (1993).

The laws during and following slavery centered around incisive regulation of the Black body and Black life.<sup>45</sup> It, however, bears repeating that the laws of slavery and neo-slavery impact every sector of Black life including, but not limited to, incessant regulation of the Black body, its movements, and non-movements.<sup>46</sup> That is the focus here, particularly emphasizing legal and extralegal action that contort and confine BlaQueer life.<sup>47</sup> While “[d]eviant sexualities were similarly ascribed to Africans as a necessary tool of the colonization of Africa, the transatlantic slave trade, and chattel slavery,” it has been particularly difficult to find evidence of BlaQueer life during or around slavery, and even more difficult to find laws, customs, or practices that specifically target BlaQueer people.<sup>48</sup> This is the violence of the archive—and an ongoing terror on BlaQueer life—they are erased, even when attempting to live out loud.<sup>49</sup> In some ways, being BlaQueer sits in tension with, and affirms, the notion of Black fungibility.<sup>50</sup> BlaQueer folk are fungible as Black people, insofar as the practice of anti-Black violence is concerned.<sup>51</sup> However, they are also visibly distinct from Black people—which is noticed by Black people as evidenced by intramural Black, anti-BlaQueer violence, surveillance, and terror.<sup>52</sup> Because there are very few records, I have only found one instance of BlaQueer people in the archive (and not just those accused of having anal intercourse). Therefore, this section is less specific and grounded in text than others.<sup>53</sup> The lack of records makes this work difficult but necessary as a political project, a practice of witnessing, and ancestral veneration.

That being said, it is important to engage in a brief historical review and note that “homosexual and non-procreative sexual acts have been punishable by death since at least the time of the early Israelites, 400 BCE.”<sup>54</sup> In 1348,

45. See *id.* at 365 (discussing the racialized sexual mythology that arises from slavery and how it is related to the regulation of Black bodies).

46. See *id.*

47. See *id.* (accentuating how Black individuals and their bodies were both over-criminalized and underserved by the law); see also Edelman, *supra* note 39 (underlining that to this day oppressive anti-LGBTQ policies disproportionately impact the freedoms of Black individuals to almost the same extent as slavery did).

48. See MOGUL ET AL., *supra* note 41, at 6 (stressing that hypersexuality and oversexualization were attributes assigned to Africans during colonization and that because of this hyper and over sexualization that there should be evidence of BlaQueers during slavery).

49. See Olajuwon, *supra* note 35 (contextualizing how BlaQueer persons must be aware of their surroundings based on the historical sexual violence they have faced).

50. See Shannon Winnubust, *The Many Lives of Fungibility: Anti-Blackness in Neoliberal Times*, 29 J. OF GENDER STUD. 102, 105–6 (2020) (defining fungibility as a social theory that continues to serve as a mechanism for maintaining anti-blackness).

51. See *id.* at 105–6.

52. See Wilson, *supra* note 1, at 170 (describing the furtive nature in which Black Queer individuals must live in to preserve their own safety and wellbeing in a socially oppressive environment).

53. Furtive Blackness, *supra* note 2.

54. See MOGUL ET AL., *supra* note 41, at 11 (acknowledging that sodomy laws and homosexuality were not new social inventions made in America but were present throughout

Spanish law condemned those who voluntarily engaged in sodomy, which led to castration, followed by stoning.<sup>55</sup> The Portuguese, in 1446, issued an edict condemning “sodomites” to death by fire, similar to that prescribed in the misreading of the Story of Sodom and Gomorrah.<sup>56</sup> According to Ritchie, Whitlock, and Mogul, in *Queer (In)justice: The Criminalization of LGBT People in the United States*, “the first English civil law concerning sodomy was enacted in 1533 and prohibited ‘the detestable, abominable Vice of Buggery committed with mankind or beast,’ and resulted in a sentence of death and ‘forfeiture of all property belonging to the executed person.’”<sup>57</sup> While the crimes of buggery and sodomy were often used interchangeably throughout the seventeenth and eighteenth centuries, bestiality was commonly prosecuted as buggery, while “carnal copulation” between men was prosecuted as sodomy.<sup>58</sup> While each colony had its own criminal codes and processes, the aforementioned crimes were capital offenses, similar to treason and murder.<sup>59</sup> It is important to note, that while the punishments were stiff, the prosecution was rare and highly selective, often resting on class and racial status.<sup>60</sup> According to Mogul, Ritchie, and Whitlock, there were “fewer than ten executions” for sodomy, buggery, and bestiality in the seventeenth century and even less in the eighteenth century.<sup>61</sup> Of course, these cases overrepresented Black people.<sup>62</sup>

In 1646, Jan Creoli, whom was listed as a “Negro,” was “choked to death and then burnt to ashes” for the sodomizing—not the rape or molestation—of the ten-year-old Black child, Manuel Congo.<sup>63</sup> White men were rarely prosecuted for sodomy throughout the colonies unless it was forceful against another

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global history).

55. *See id.* at 12 (pinpointing an example of legal and physical violence against homosexual individuals in global history).

56. *See id.* (exemplifying how religion was used throughout history to criminalize and support violence against homosexual individuals).

57. *Id.* (providing another historical example of how homosexuality was criminalized and resulted in the execution of the same population).

58. *See id.* at 13 (highlighting the impreciseness of how legal constructions were used interchangeably, and how the crimes specified were actually labeled and prosecuted differently).

59. *See id.* (summarizing the history of how nonprocreative sex acts were criminalized to the same degree as other crimes against persons and the colony).

60. *See id.* at 13–14 (“[T]hose targeted for prosecution appear to have engaged in behavior that upset ‘orderly hierarchies of race, age, and status among men.’ While both Black and white men accused of sodomy faced possible execution, swift imposition of a death sentence appears to have been more likely for Black men.”).

61. *See id.* at 13 (noting that while there is a documented history of people having sexual relations with animals and those of the same sex, the crimes were not equally punishable in terms of one another).

62. *See id.* (providing several examples of how despite the small number of cases and convictions under sodomy and buggery laws, those sentenced were predominately Black individuals).

63. *See id.* at 14 (detailing the gruesome deaths experienced by Black individuals who were punished under colonial sodomy laws).



white man.<sup>64</sup> Although “humanitarian reform” movements began to replace the death penalty for anal intercourse and bestiality with life imprisonment, such reform only applied to white men as separate laws were passed to ensure Black people convicted of any sexual crime against a white woman could still be put to death.<sup>65</sup> While it is important to note how these laws emerge, and how their ideological underpinnings continue to circulate, it is also important to note that sexual acts during this time period did not necessarily come to define one’s identity; it is not until the nineteenth century that “sexual acts desires become constitutive of identity.”<sup>66</sup> Citing Foucault, “the sodomite was an aberration[;] the homosexual was now a species.”<sup>67</sup> This transformation from aberration to essence is notable not only due to its political implications, but also due to the additional layer of scrutiny and insurmountable indignity it places on BlaQueer people.<sup>68</sup>

To that end, I begin by recounting the story of William Dorsey Swann and then engage in a close reading of his experience.<sup>69</sup> Swann’s story—much like any BlaQueer person born into slavery—is not widely reported but came into view due to the violence of the law.<sup>70</sup> Swann’s story is now a public-facing work due to the work of another BlaQueer writer and scholar, Channing Joseph.<sup>71</sup> Joseph has published one article on Swann.<sup>72</sup> The book, “House of Swann: Where Slaves Become Queens,” is a rich starting place.<sup>73</sup>

64. *See id.* (recognizing that there was preferential treatment of white individuals and an implied acceptance of homosexuality so long as the individual was white and non-confrontational).

65. *See id.* (commenting on how reform association with sodomy laws did not apply to Black individuals. Separate laws were often created to ensure that Black people were convicted of sexually related crimes).

66. *See id.* at 19 (briefing the position of historian Michael Foucault in understanding the development of human sexuality and identity).

67. *See id.* (characterizing the shift in the Western classification of sexuality as definitive and constitutive).

68. *See generally id.* (stressing how the process of criminalization coupled with the perpetuation of archetype narratives created the levels of scrutiny and indignity that placed additional burden on what is now the Black queer community).

69. *See generally*, Channing Gerard Joseph, *The First Drag Queen was a Former Slave*, NATION (Jan. 31, 2020), <https://www.thenation.com/article/society/drag-queen-slave-ball/> [<https://perma.cc/VV6P-HGC9>] (recounting the history and experience of a formerly enslaved person who was a pillar in the establishment of queer freedom before more modern efforts towards queer liberation).

70. *See generally id.* (recounting how the story of William Dorsey Swann was discovered by the author during the course of their research. Due to the criminalization and negative stigmas associated with nonconformity, along with standard views of sexual orientation, many of these stories would not be documented in history.).

71. *See* CHANNING JOSEPH, <http://channingjoseph.com/elements/bio.html> [<https://perma.cc/2YPF-4QWK>] (“Prof. Joseph is a 2020 winner . . . for his forthcoming biography, *House of Swann: Where Slaves Became Queens*. The book is the untold story of William Dorsey Swann—a former slave who became the world’s first self-described ‘drag queen’ and a progenitor of ballroom culture.”).

72. *See generally id.* (indicating that he has only published one article on Swann).

73. *Cf.* Marjorie Morgan, *From Slavery to Vogueing: The House of Swann*, NAT’L

According to Joseph, Swann was born enslaved in Maryland around 1858.<sup>74</sup> While his legal name was William Dorsey Swann, his friends knew him as “The Queen.”<sup>75</sup> Swann survived slavery, the Civil War, police surveillance, torture behind bars, and of course, the twin terrors of racism and homophobia that likely operated as precedent to transphobia and gender policing.<sup>76</sup> Swann was formerly owned by a white woman named Anne Murray—in Hitchcock County, Maryland.<sup>77</sup> I want to pause here for a moment to underscore exactly what it is we are witnessing. Too often we think about emancipation and the partial end of slavery as solely racial liberation, but ignore or overlook the existence of BlaQueer and trans people as another form of slavery.<sup>78</sup> Yet here we are, in the archive, at the end of slavery, where a BlaQueer child is not only getting his first taste of legal freedom—on the basis of race—but he is on the verge of asserting a type of racial-sexual, BlaQueer freedom too.<sup>79</sup> Years later, in DC, at the age of 24, Swann would have his first documented brush-up with the law.<sup>80</sup> This brush-up is an introduction to BlaQueer resistance, but more importantly, furtiveness as a BlaQueer ancestral praxis.<sup>81</sup> Swann stole books from the Washington Library Company in addition to some unknown items from the home of his employers, Henry and Sara Spencer (heads of the Spencerian Business College), and was arrested for petty larceny.<sup>82</sup> He received a sentence of six months in jail—despite the fact that others accused of the same crime, arising from the same incident, had already been released on bail.<sup>83</sup> Despite his treatment Swann’s character and BlaQueer Magic was

MUSEUMS LIVERPOOL, <https://www.liverpoolmuseums.org.uk/stories/slavery-voguing-house-of-swann> [<https://perma.cc/TV7H-L4MS>] (detailing the significance of Joseph’s work in terms of the intersection of the LGBTQ community and the Black community).

74. *See generally* Joseph, *supra* note 69 (providing a brief summary of Swann’s background and life events).

75. *See generally id.* (defining the term “queen” as a title “reserved for someone in a position of honor and leadership in the community”).

76. *See id.* (describing the injustices experienced by Swann as being an openly queer and Black individual during colonial times).

77. *See id.* (summarizing Swann’s life as an enslaved person).

78. Furtive Blackness, *supra* note 2.

79. *See* Joseph, *supra* note 69 (intimating that while Swann experienced freedom from slavery, his attitudes and behavior advanced sexual freedoms not recognized at the time).

80. *See* Netisha Currie, *William Dorsey Swann: The Queen of Drag*, NAT’L ARCHIVES (June 29, 2020), <https://rediscovering-black-history.blogs.archives.gov/2020/06/29/william-dorsey-swann-the-queen-of-drag/> [<https://perma.cc/BRG9-8SQ2>] (noting two case files related to Swann; one for petty larceny and one for running a “disorderly house,” impliedly meaning a brothel).

81. *See id.* (detailing instances where William Dorsey Swann defended his rights against an abuse of law enforcement power); *see also* Joseph, *supra* note 69 (identifying Swann as the first activist leading queer resistance).

82. *See id.* (“In 1882, Swann pled guilty and was sentenced in September to six months in jail for stealing books from the Washington Library Company, and one month for theft of objects from the home of Henry and Sara Spencer, heads of the Spencerian Business College where Swann was employed.”).

83. *See id.* (noticing others involved in the theft were released on bail while Swann

so powerful, so potent, and puissant that the employers from whom he stole filed a presidential pardon on his behalf stating “[Swann] was free from vice, industrious, refined in his habits and associations, gentle in disposition, and courteous in his bearing.”<sup>84</sup> The Spencers also noted that, “he was trying to improve his education and provide for his family, and that the Spencers would happily offer [Swann] lifetime employment as the college janitor.”<sup>85</sup> Swann’s willful theft of the books—and decision to plead guilty—is notable for a few reasons.<sup>86</sup> First, in stealing the books from his employer, he stepped out of the subject position of “owing service or labor” for life and instead used his employer’s property to educate himself thereby investing in himself as his own person.<sup>87</sup> Second, in admitting guilt, he embraced criminality itself as a condition of life and engaged in furtiveness as a praxis for navigating an anti-Black world.<sup>88</sup> Finally, Swann did not merely steal for himself to navigate to freedom, but stole to create more financial stability for himself and his younger brother.<sup>89</sup> Through his ability to rally white people to his side, we see the furtiveness and cunning often necessary to survive while BlaQueer.<sup>90</sup>

However, this is not how Swann became known as our first drag queen or the “queen of drag.”<sup>91</sup> On January 14, 1887, Swann hosted what appears to be one of many balls.<sup>92</sup> These are not wholly dissimilar from the balls thrust into popular culture by brilliant shows like *Pose*, but where *Pose* centered on creating community through individual houses and community competition, Swann’s gatherings operated as a sanctuary for the Black, Queer, and formerly enslaved.<sup>93</sup> We must think of his home—and the balls he hosted—as a type of

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remained incarcerated. The Assistant U.S. District Attorney recommended a pardon for Swann, however no record reveals if the pardon was ever granted.).

84. *Id.* (identifying Swann’s sentencing judge and an Assistant U.S. District Attorney both recommending the pardon).

85. *Id.* (affirming others valued Swann as a person, even after his alleged illegal conduct).

86. *See id.* (occurring in 1882).

87. Fugitive Slave Act, 31st Cong. Sess. I ch. 60, at 463 (1850) (alluding to the Act’s choice to use language describing slaves as “persons owing service or labor”).

88. Furtive Blackness, *supra* note 2.

89. *See* Currie, *supra* note 80 (concluding from the pardon request, Swann was attempting to provide for his family); *see also* Joseph, *supra* note 69 (recognizing Swann’s younger brothers also attended his drag balls).

90. *See generally id.* (highlighting that thirty of Swann’s friends and allies, including his employers, the Spencers, signed a petition of pardon pleading he was a respectable and industrious).

91. *See* Joseph, *supra* note 69 (contending that beginning in the 1800’s, Swann was the first American activist to lead a queer resistance group and became the first known person with the title “the queen of drag”).

92. *See id.* (emphasizing this particular ball was raided by the police).

93. *See id.* (highlighting that today, more than a century after William Swann’s last known ball, the houses of the contemporary ballroom scene maintain the same basic format as the House of Swann’s. Balls feature competitive walking dances and gestures and are organized around family-like groups led by “mothers.” All are common themes, are part of mainstream popular culture, and are regularly heard on FX’s *Pose* and VH1’s *RuPaul’s Drag*

underground railroad specifically for BlaQueer folks who had nowhere else to go, whose very presence was deemed criminal by a myriad laws and immoral by the whims of private citizens—both Black and white—and newspapers trading in scandal and public scorn.<sup>94</sup> There was magic operating in plain sight and worldmaking of Swann and his companions.<sup>95</sup> Swann was not merely hosting social gatherings, but was creating a type of fugitive under-commons where BlaQueer people could be something akin to free, for a few hours a night.<sup>96</sup> Much like activist Micky B who came nearly a century and a half later, Swann evidenced the dignity, wisdom, and cunning inherent to BlaQueer furtiveness.<sup>97</sup> Swann’s home was raided the night of this particular ball; it wouldn’t be the last time.<sup>98</sup> *The Washington Critic* reported:

“Six colored men, dressed in elegant female attire, were arraigned in the dock at the Police Court this morning on a charge of being suspicious persons . . . . They nearly all had on low neck and short sleeve silk dresses, several of them with trains,” as well as “corsets, bustles, long hose and slippers, and everything that goes to make a female’s dress complete.” Drag balls had been going on in secret for years. Invitations to the dances, for instance, were often whispered to young men at the YMCA, and newspapers described the arrests of several black men wearing “bewitching” fascinators, silk sacques, or cashmere dresses while en route to balls. In 1882, Swann served a jail term for stealing plates, silverware, and other party supplies. But the 1887 raid was the first time the wider world learned of him and the motley group of messengers, butlers, coachmen, and cooks.<sup>99</sup>

In the wake of slavery and the era of lynching, in the midst of widespread government and social control of Black bodies and sexuality, Swann often earnestly invested in an early notion of both fugitive and furtive practices.<sup>100</sup> Swann’s

*Race*).

94. *See id.* (publishing the names of Swann’s guests arrested by police in newspapers created substantial risk for those choosing to join the balls).

95. Furtive Blackness, *supra* note 2.

96. *See* Joseph, *supra* note 69 (accepting that Swann’s balls were a semi-safe secret environment providing individuals with the freedom of self-determination).

97. *See* Isabelle Lichtenstein, *Micky B*, GOMAG (July 2, 2020), <http://gomag.com/article/136510-2/> [<https://perma.cc/6PN4-K9GD>] (“National Organizer for the Transgender Law Center.”); *see also* Cameron Hill, *Portraits of PRIDE: 6 LGBTQ Game Changers You Should Know*, RAYNBOW AFFAIR MAG. (Sept. 22, 2019), <https://www.rainbowaffair.com/portraits-of-pride-6-lgbtq-game-changers-you-should-know/> [<https://perma.cc/6645-229C>] (“[B]uilding Transgender movement across the south from rural towns to big cities, through potlucks and legal clinics, from deep isolation to collective liberation.”); *see generally* Joseph, *supra* note 69 (asserting that Swann was, at his core, an activist, using both legal and political steps to advance queer rights).

98. *See* Joseph, *supra* note 69 (documenting another raid occurred on the night of January 14, 1887, and again on April 13, 1888).

99. *Id.*

100. *See id.* (“Swann endured slavery, the Civil War, racism, police surveillance, torture behind bars, and many other injustices. But beginning in the 1880s, he . . . became

embrace of criminality allowed him to create a space for BlaQueer living in the midst of legalized terror.<sup>101</sup> It is important to note Swann was not in flight from, nor hiding, his identity as a BlaQueer person; he embraced it.<sup>102</sup> Swann consistently dressed elegantly, with “everything that goes to make a female’s dress complete.”<sup>103</sup> If anything, Swann openly defied orders to conform to his racial/sexual/gender ascription.<sup>104</sup> Demonstrating notions of “suspect classes,” it is important to note that Swann and his companions were charged as “suspicious persons.”<sup>105</sup> This language hints at their position as uniquely furtive, not simply due to their race but also due to their defiance of gender norms and queer embodiments.<sup>106</sup> Much like furtiveness, this position as suspect is not merely about what they were doing; it is about who they are perceived to be.<sup>107</sup> Whether one is a suspicious person depends simultaneously on nature and performance, and Swann’s nature and performance were criminal acts rendering him available for legal prosecution and public debasement via media accounts.<sup>108</sup>

Again, citing Joseph:

Swann’s drag balls came with grave risks to his guests’ reputations and livelihoods. A large but undetermined number managed to flee during the police raids, but the names of those arrested and jailed were printed in the papers, where the men became targets of public scorn. With the news coverage, the world took an interest—everyone from neighbors and police to local officials and even psychiatrists. Now that the group was publicly known, it would prove to be a fascinating new subject for researchers trying to grapple with the complexities of human sexuality and psychology. Lacking any of the terms we use today, like “cross-dresser,” “transgender,” and “gender-nonconforming,” Dr. Charles Hamilton Hughes described Swann’s group in an 1893 medical journal as an “organization of colored erotopaths” and a “lecherous gang of sexual perverts.” Another

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the first American activist to lead a queer resistance group.”).

101. *See id.* (accepting that his chosen lifestyle would inevitably lead to multiple stints in jail and public scrutiny, yet still choosing activism).

102. *See id.* (alluding to a physical altercation Swann had with police, trying to prevent officers from raiding a dance party).

103. *Id.*

104. *See generally id.* (accepting the risk of continuing to live the chosen lifestyle, even though it was disfavored by the populace, and doing so might lead to incarceration).

105. *Id.* (charging Swann, after the raid of January 14, 1887, of being a *suspicious person*); *see* Legal Information Institute, *Suspect Classification*, CORNELL L. SCH., [https://www.law.cornell.edu/wex/suspect\\_classification](https://www.law.cornell.edu/wex/suspect_classification) [<https://perma.cc/B8FZ-P2N8>] (defining the suspect classification as a class of individuals that have been historically subject to discrimination).

106. *See id.* (realizing contemporary undertones of Swann’s time wholly favored men with *manly qualities*, but recognizing the rhetoric advancing these characteristics came from both white and Black authors).

107. Furtive Blackness, *supra* note 2.

108. *See* Joseph, *supra* note 69 (singling out those unique characteristics of Swann and his cadre which invited the unwanted attention of police, psychiatrists, media, neighbors and local officials).

psychiatrist, Dr. Irving C. Rosse, described them as “a band of negro men with . . . androgynous characteristics.”

On the one hand, the publicity made it more difficult for Swann and his friends to stay hidden from those who sought to do them harm. On the other, now that their existence was widely known, more people might have been interested in joining his secretive all-male family.<sup>109</sup>

Put differently, Swann’s newfound hypervisibility both endangered his life and marked him as a beacon of safety, protection, love, and dignity for those living in the shadows of Black life and anti-Black homophobic terror.<sup>110</sup> It is fair to assume that Swann had to be hypervigilant about the safety of himself, as well as those he sought to create community with and for.<sup>111</sup> At any moment, he could be handed over to authorities for the crime of being a “suspicious person” or merely being.<sup>112</sup> Beyond the police, Swann and his companions also had to concern themselves with violence and the scorn of private citizens—both Black and white—who undoubtedly frowned about their open and flamboyant BlaQueer gender embodiment.<sup>113</sup> In this way, Swann was in constant flight from danger from all sides while also engaging in a furtive praxis that allowed him to create, conjure, and maintain a sense of dignity for himself and space of protection for his chosen family.<sup>114</sup> However, Swann’s most consequential mark on history occurred at another raid reported on April 13, 1888.<sup>115</sup> *The Washington Post* headline read: “Negro Dive Raided. Thirteen Black Men Dressed as Women Surprised at Supper and Arrested.”<sup>116</sup> According to Joseph’s research:

[M]ore than a dozen escaped as the officers barged in and Swann tried to stop them, boldly telling the police lieutenant in charge, “You is no gentleman.” In the ensuing brawl, the Queen’s “gorgeous dress of cream-colored satin” was torn to shreds. [T]he fight was also one of the first known instances of violent resistance in the name of LGBTQ rights.[<sup>117</sup>

109. *Id.*

110. *See id.* (“In post-Civil War America there was little patience for men who subverted gender norms.”).

111. *See id.* (asserting that Swann’s balls came with grave risks to the guest’s reputations and livelihoods. Physical harm was one detriment, and most individuals swept up in raids frequently had their names published in newspapers and were publicly ridiculed.).

112. *See id.* (illustrating that while Swann was charged with being a “suspicious person,” he also spent ten months in jail for running a brothel, when in actuality he was only hosting a drag ball).

113. *See id.* (receiving and accepting scrutiny from not only the police, but also from the public at large for their failure to follow preconceived gender norms).

114. *See id.* (discussing how Swann’s drag balls made him the target of police raids, criminal charges, and public scorn. However, the publicity made it easier to find those interested in joining his family, thus expanding their community, and eventually becoming a family legacy.).

115. *Cf. id.* (emphasizing one of Swann’s drag balls raids because it is recognized as one of the first occurrences of “violent resistances” for LGBTQ rights).

116. *Id.* (quoting *Negro Dive Raided. Thirteen Black Men Dressed as Women Surprised at Supper and Arrested*, WASH. POST, Apr. 13, 1888).

117. *Id.*

**KEPT A "HELL OF INIQUITY."**

**Judge Kimball Sends Dorsey Swan  
Down for Ten Months.**

William Dorsey Swan, the colored man at whose house, No. 1504 L street northwest, a "drag" was raided about two weeks ago, and who was convicted in the Police Court last week of a charge of keeping a disorderly house, was sentenced to ten months in jail by Judge Miller today. This is the case in which a number of men, white and colored, were found in this place, which Judge Miller characterized as a "hell of iniquity." There were several colored men and one white man reported to be of the character of Swan, and during the trial of the case in court there appeared young men of respectable parentage who told of how they had visited this place, danced and indulged in strong drink of all kinds, from beer to champagne.

A large stock of liquors found on the premises was in court as evidence, but Dorsey said that he didn't have to buy the liquor.

In disposing of the case Judge Miller told of the fearful revelations made at the trial, the downfall and ruin of young men, and said he only wished he had power to impose a ten years' sentence.

"I would like to send you where you would never again see a man's face," said the judge, "and would then like to rid the city of all other disreputable persons of the same kind. Thieving and petty assaults amount to nothing as compared with the conduct of these people."

Mr. Mulowny, for the prosecution, asked for a year's sentence, but this the court did not impose, but gave him ten months.

The newspaper clipping refers to Swann as both "the colored man" and "a drag."<sup>118</sup> As previously mentioned, the world of drag was hardly recognized and known then—even less than now—revealing the newspaper refers to him as both "a colored man" and "a drag" marking both as integral to his being.<sup>119</sup> It is unclear from the archive whether Swann identified as transgender (mostly because the language did not exist), whether Swann commonly wore women's clothing, or whether Swann performed in drag at his balls.<sup>120</sup> His gender identity is not something recoverable from the archive; we are only given Swann's gender assigned at birth.<sup>121</sup>

118. *Judge Kimball Sends Dorsey Swan Down for Ten Months*, EVENING STAR, Jan. 13, 1896, at 2."

119. *Id.*; see generally Joseph, *supra* note 69 (acknowledging the newspaper article attracted plenty of individuals interested in the group that attended Swann's balls and dressed in woman's clothing. This attraction caused researchers to investigate the "complexities of human sexuality and psychology." Due to the lack of identity terms as used today, psychiatrists used words such as "colored erotopaths" and "lecherous gang of sexual perverts" to describe "drag queens.").

120. See Joseph, *supra* note 69 (recognizing the lack of identity terms in the 1800's, that are currently used today, such as "cross-dresser," "transgender," and "gender-nonconforming" to describe Swann and people like him); Cf. *Petition for Pardon at 10, United States v. William D. Swan*, P-532 (Jan. 3, 1896) (National Archives Catalog) (endorsing being identified as male by signing off on his own petition for pardon, which included a description of him being an "industrious man").

121. See generally *Petition for Pardon at 10, supra* note 120 (referring to the petition and other court documents which reference Swann as a male).

Yet the marking of him as “a drag” echoes the previous criminal charge of being a “suspicious person.”<sup>122</sup> The suspicious characteristic under indictment is his queer and feminine embodiment, made visible by his attire.<sup>123</sup> This embodiment—as well as her embrace of the furtive—is made even more clear in her retort to the arresting officer that he is no gentleman.<sup>124</sup> This exchange alone, as well as the decision to use her body as a shield against the violation of her home and its privacy protections, is particularly illuminating.<sup>125</sup> First, Swann upsets the ascription of her subjugated status by asserting a presumption of dignity that she expects the officer to respect.<sup>126</sup> Further, when he does not respect her privacy rights, nor her dignified status as someone entitled to respect, she attacks the officer’s respectability by noting that he is out of order, by not acting like a gentleman, or operating in the way a man should treat a woman.<sup>127</sup> Her assumption of this status is unique, because she is not asking to be treated like a Black man, or a Black woman, or even a white woman; but as a person who the officer knew or should have known was entitled to a respect-

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122. Compare *Judge Kimball Sends Dorsey Swan Down for Ten Months*, *supra* note 118 (reporting the arrest of William Dorsey Swann after a “drag” was raided at his home, where he was sentenced to ten months in jail for “keeping a disorderly house”) with *Raiding a “Drag.”*, WASH. CRITIC, Jan. 13, 1887, at 3 (“Six colored men, dressed in elegant female attired, were arraigned . . . at the Police Court this morning on a charge of being suspicious person. They were arrested last night at a “drag . . .”) and *Joseph*, *supra* note 69 (describing a previous arrest of Swann’s where he was charged with being a “suspicious person” after a raid resulted in the discovery of men dressed in “elegant female attire”).

123. See *Joseph*, *supra* note 69 (mentioning the charge of being a suspicious person followed by the type of feminine attire worn by the men at the time of apprehension).

124. See *id.* (during a police raid, reported by Washington Post on April 13th, 1888, Swann tried stopping the officers and telling them that they are “no gentleman”); see also *Negro Dive Raided. Thirteen Black Men Dressed as Women Surprised at Supper and Arrested*, WASH. POST, Apr. 13, 1888.

125. See *Joseph*, *supra* note 69 (reporting a brawl ensued between the police officers and the attendants of the drag ball, in which Swann’s dress was torn to shreds); see also *Negro Dive Raided. Thirteen Black Men Dressed as Women Surprised at Supper and Arrested*, *supra* note 124.

126. See generally *Joseph*, *supra* note 69 (supporting the opinion through the description of Swann’s demeanor during the raid. The article describes Swann’s exchange with the police lieutenant as “bold,” lending support to the opinion he demanded to be treated with dignity.); “*The Queen*” *Raided*, NAT’L REPUBLICAN, Apr. 13, 1888, at 1 (pointing out Swann was not impacted by the police raiding the party as Swann was not “paralyzed with fear.” Swann “stood with an attitude of royal defiance. Her arms hung by her side [S]he said with haughty air, [y]ou is no gentleman.”) The officer made a grab for the queen, but the touch was too much for the royal one, and she fought the policeman’s approach and arrest. It may be implied that because Swann stood her ground, not letting herself to be subject to police officers, Swann expected to be treated with dignity.)

127. See generally “*The Queen*” *Raided*, *supra* note 126 (describing Swann was dressed as a woman wearing an extravagant dress, was celebrating her 30<sup>th</sup> birthday, and was self-proclaimed as the “Queen.”); see also *The Emergence of “Women’s Sphere,”* U.S. HIST., <https://www.ushistory.org/us/25e.asp> [<https://perma.cc/CT8D-UWR2>] (describing how women in the 1800s could only be considered a “true woman” if they were virtuous. So long as women were virtuous and acted “flawlessly within the domestic sphere,” they were to be treated with great respect by men and society.)



ful and deferential encounter.<sup>128</sup> Second, Swann's decision to use their body as a barrier to enforce the integrity of her home, provide safety and time to escape for her guests, and underwrite her sense of dignity, is notable because it was daring.<sup>129</sup> In a time where BlaQueer people, particularly those marked as genderqueer or trans, are killed for merely being, it is sometimes uneasy to grapple with the enormity of this scene.<sup>130</sup> Swann, knowing full well, the power of police and the precarity of her life, decided to wield her own body—the very thing the police would likely torture and defile, if not kill—to assert her own prerogatives of dignity, privacy, and the right to simply be.<sup>131</sup>

In this exchange, they charged Swann with “keeping a disorderly house.”<sup>132</sup> The crime of keeping a disorderly house arises from English com-

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128. Cf. Morgan, *supra* note 73 (signifying Swann had a firm belief he, as well as other male individuals, have the right to dress in women's attire because despite being subject to numerous raids prior to this incident, he continued to host the drag balls. Despite Swann being enslaved and living a life of harsh conditions and brutality, he decided to embrace a life of femininity, playfulness, and delicateness that was not reserved only for white women. It is possible to assume that Swann believed he deserved to live a life that he desired, which was to dress in women's clothing and host drag balls for himself and friends. Swann may not have been looking to be treated as a woman, but as a human being that deserved to live a life “unafraid and free”).

129. See generally “*The Queen*” *Raided*, *supra* note 126 (reporting Swann fought the officer as he touched him. The fight was intense because the “room was a scene of disorder after the raid was over” and Swann was almost completely disrobed, transitioning Swann “of white satin loveliness” to “a lightly built man.”); see also Joseph, *supra* note 69 (suggesting that while a dozen people escaped the home during a raid, Swann confronted the policemen and tried to stop their efforts).

130. Cf. Annamarie Forestiere, *America's War on Black Trans Women*, HARV. CIV. RTS.—C.L. L. REV. (Sep. 23, 2020), <https://harvardcrl.org/americas-war-on-black-trans-women/> [<https://perma.cc/4VXL-CUUX>] (reporting Black transgender individuals are most transgender victims of violence, highlighting the Black transgender community is more likely to be subject to violence and murder than other POC and white transgender individuals. The treatment of Black trans individuals is “rooted and reflected in the American legal system,” so it is not shocking why the police officer treated Swann the way that they did.); see also “*I Just Try to Make it Home Safe: Violence and the Human Rights of Transgender People in the United States*,” HUM. RTS. WATCH (Nov. 18, 2021), <https://www.hrw.org/report/2021/11/18/i-just-try-make-it-home-safe/violence-and-human-rights-transgender-people-united#> [<https://perma.cc/B2BF-HZVV>] (demonstrating that transgender individuals are aware of the possible violence they may encounter because they take precautions to avoid being harassed, attacked, or victimized).

131. See generally Joseph, *supra* note 69 (lending support to the notion that Swann asserted his rights of dignity and privacy over fear of physical harm by describing his defiance as “bold” and pointing to both the criminal and social risks that came with hosting these balls. Swann even asked for a presidential pardon, the first recorded legal and political actions taken to “defend the queer community's right to gather without the threat of criminalization,” showing he insisted on being treated with dignity and respect.).

132. Petition for Pardon at 1, *United States v. William D. Swan*, P-532 (July 27, 1896) (National Archives Catalog); Joseph, *supra* note 69 (stating Swann was charged for “keeping a disorderly house,” in which he asked for a pardon from President Grover Cleveland but was denied). See generally Currie, *supra* note 80 (showcasing U.S. District Attorney, A. A. Birney's disdain and scorn towards Swann's lifestyle and his petition of pardon describing it as “wholly without merit” and stating, “[w]hile the charge of keeping a disorderly house

mon law and generally applies to any place that is seen as a public nuisance, offensive to the common good, corruptive, and/or outrages public decency; the charges are most commonly associated with brothels, but also applied to casinos and theaters because these venues were associated with illicit sexual activity.<sup>133</sup> Again, it is important to turn to the language of the law.<sup>134</sup> The charge concerns creating and maintaining a home that operates outside the social order and is a public nuisance that is injurious to the common good.<sup>135</sup> Swann's ascription as "colored" and "a drag," rendered them particularly available for this sort of legal discipline.<sup>136</sup> Further, the periodical clipping notes

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does not on its face differ from other cases in which milder sentences have been imposed, the prisoner was in fact convicted of the most horrible and disgusting offences known to the law; an offense so disgusting that it is unnamed. This is not the first time that the prisoner has been convicted of this crime, and his evil example in the community must have been most corrupting.").

133. See Graham McBain, *Abolishing the Common Law Offence of Keeping a Disorderly House*, 7(7) REV. EUR. STUD. 109, 109 (2015) (explaining the crime of "keeping a disorderly house" was used to police places that allowed socially unacceptable sexual activity to take place such as brothels and common inns, unlicensed places of entertainment, and places considered to be common houses of public nuisance such as those conducting cockfights and gambling houses. As these places tended to be venues including adultery and fornication, they were included within the concept of keeping a disorderly home.); see generally Joseph, *supra* note 69 (clarifying Swann was charged for "keeping a disorderly house" due to hosting a drag ball, in which Black men were dressed in elegant gowns but there were no indications of illicit sexual activity).

134. See generally DAVID MELLINKOF, *THE LANGUAGE OF THE LAW* 11 (Wipf and Stock Publishers eds., 2004) (1963) (defining the language of the law as customary language used in the legal profession. It differs from ordinary speech due to the use of common words with uncommon meanings, the use of terms of art, the purposeful use of words and expressions with flexible meanings, and other characteristics.); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340–41 (1997) (detailing how the Supreme Court interprets statutory language by first looking to the language itself for plain or ambiguous meaning. "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.").

135. See McBain, *supra* note 135, at 111 (explaining the common law meaning of disorderly house to include places where matters that were performed were an outrage of public decency, corruptive or depraved, or injured public interest); see also *Pope v. Commonwealth*, 109 S.E. 429, 434–35 (1921) (holding "keeping a disorderly house" was a location in which "decent people [sought] lawful recreation in the form of wholesome and pleasurable entertainment" that was considered "abnormal, unusual[,] and fortuitous to the public." It is a "plague spot in the community, and a menace to decency and good morals." The Supreme Court of Virginia defined "keeping a disorderly house" as "a house in which people abide, or to which they resort, to the disturbance of the neighborhood, or for purposes injurious to public morals, health, convenience, or safety.").

136. See generally Channing Joseph, *A "Drag Party" Raided*, OUTHISTORY, <https://outhistory.org/exhibits/show/channing-joseph/drag-party> [<https://perma.cc/2QRG-JV6G>] (describing how homosexuality was seen during the 1880's, the period in which Swann was charged. In the late 1880's, homosexuality was considered a "moral abomination" to the public.); *Race and the Criminal Justice System*, EQUAL JUST. INITIATIVE (Oct. 1, 2014), <https://eji.org/news/history-racial-injustice-race-and-criminal-justice/> [<https://perma.cc/QV5V-HVWW>] (highlighting after 1865, when slavery was abolished, the criminal justice system was used as a means of "racial control," in which Black individuals were imprisoned

that white men of “respectable parentage” had frequented Swann’s home, and the evening resulted “in the downfall and ruin of young men.”<sup>137</sup> Here, it is important to note that Swann’s ascription of furtiveness—as uniquely BlaQueer—is read as a condition of character and action and as an act of contagion that must be uprooted.<sup>138</sup> Proximity to Swann, particularly dancing or drinking at his home, was enough to render respectable young men—men who did not claim to be held captive—socially ruined.<sup>139</sup> The portrayal of Swann as an inherently, corruptive, viral force—and pathologized earlier as an erotopath—illuminates the process of sexual profiling experienced by BlaQueer people and the method of subordination meted by courts and community.<sup>140</sup> The judge’s wishes to send Swann to a place he will “never again see a man’s face” and “rid the city of all other disreputable persons of the same kind” speaks to the long, invidious nature of sexual profiling and the legal and extra-legal methods of discipline.<sup>141</sup> The judge further stated that “thieving and petty

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in “unprecedented numbers” and “returned to slavery-like conditions”).

137. *Judge Kimball Sends Dorsey Swan Down for Ten Months*, *supra* note 118.

138. Furtive Blackness, *supra* note 2.

139. *See Judge Kimball Sends Dorsey Swan Down for Ten Months*, *supra* note 118 (displaying the public sentiment towards BlaQueer individuals by noting how Judge Miller wished to impose a ten-year sentence on Swann for hosting the “drag,” calling those who attended such parties “disreputable”).

140. *Compare* GENNY BEEMYN, *TRANSGENER HISTORY IN THE UNITED STATES I* (Laura Erickson-Schroth ed., 2014) (ebook), [https://www.umass.edu/stonewall/sites/default/files/Info forandabout/transpeople/genny\\_beemyn\\_transgender\\_history\\_in\\_the\\_united\\_states.pdf](https://www.umass.edu/stonewall/sites/default/files/Info%20for%20about/transpeople/genny_beemyn_transgender_history_in_the_united_states.pdf) [<https://perma.cc/DVY4-3HV8>] (demonstrating the judicial system’s history of regulating gender expression and identity because of its difficulty understanding, and reluctance to accept, various gender identities. As a result of such reluctance, laws were passed in the mid-1800’s that made it a crime for individuals who appeared in public with outfits of the opposite gender. These laws were passed to limit transgender individuals.), *with* *Petition for Pardon at 6, United States v. William D. Swan, P-532 (July 27, 1896)* (National Archives Catalog) (illustrating the effects of the community’s reluctance to accept various forms of gender expression, U.S. Attorney, Arthur Birney, condemned Swann’s petition for pardon because he believed Swann was “convicted of one of the most horrible and disgusting offenses known to the law; an offense so disgusting that it is unnamed.” Birney further claimed that Swann’s “crime” is an “evil example in the community” and is considered the “most corrupting.” In addition to recommending Swann’s petition be denied, Birney opined Swann should have been sentenced for a long period of time in which “his presence in the community could never again pollute it.”); *See generally* Joseph, *supra* note 69 (reporting men who attended these parties in the late 1800’s were considered an “organization of colored erotopaths” and a “lecherous gang of sexual perverts” by a physician in a medical journal).

141. *Compare Judge Kimball Sends Dorsey Swan Down for Ten Months*, *supra* note 118 (emphasizing how the judge negatively responded to Swann’s identity and lifestyle, for which he wanted to impose a ten-year sentence), *with* Stephenie King, *The Criminal Justice System’s Mistreatment of Transgender Individuals: A Call for Policy Reform to Assist a Marginalized Prisoner Community*, 11(1) *INQUIRIES J.*, 2019 1 <http://www.inquiriesjournal.com/articles/1753/the-criminal-justice-systems-mistreatment-of-transgender-individuals-a-call-for-policy-reform-to-assist-a-marginalized-prisoner-community> [<https://perma.cc/3FK7-BGKG>] (“The criminalization of being anything other than a heteronormative, binary enforced, birth-sex identifying (further referred to as cis-gendered) individual is visible throughout U.S. history . . . Laws were enacted to make gender and sexually variant

assaults [were] nothing compared [to] the conduct of these people,” declaring the state of being BlaQueer—no sex was alleged—a crime more serious than crimes against property and those of violence.<sup>142</sup>

Despite the weight of law and social denigration, Swann engaged in a sustained assertion of dignity and did not wait for it to be bestowed by either law or custom.<sup>143</sup> Like freedom and power, one must take dignity for oneself.<sup>144</sup> By engaging BlaQueer furtiveness as praxis, Swann did so under the penalty of imprisonment, torture, and death.<sup>145</sup> For Swann, the crime of enjoying life while simultaneously being Black and queer went without protection as the notion of Civil Rights had not yet matured (the Civil Rights Act of 1883 was only four years old, had been swiftly struck down as unconstitutional, and spoke nothing of BlaQueer folks).<sup>146</sup> Swann was tortured in prison and nearly

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acts transgressive crimes. From the 1850s through to the 20th century, dressing as the opposite gender was considered a criminal act in some cities, directly affecting transgender individuals. The passage of time and formation of advocacy groups has not eradicated this kind of targeting; issues such as the criminalization of transgender bathroom use and loose antidiscrimination policies still unfairly introduce transgender people to the criminal justice system”).

142. *Judge Kimball Sends Dorsey Swan Down for Ten Months*, *supra* note 118.

143. *See generally* Joseph, *supra* note 69 (highlighting Swann’s resistance to any sort of subordination for hosting his drag balls through his remark to the arresting officer of “[y]ou is no gentleman,” in addition to his petition for pardon to President Grover-Cleveland despite the novelty of his lifestyle in the public eye).

144. *Compare The 7 Pillars of Dignity & Respect*, DIGNITY & RESPECT CAMPAIGN (Jan. 19, 2016), <https://dignityandrespect.org/the-7-pillars-of-dignity-respect/> [<https://perma.cc/WRM6-P8UE>] (listing seven pillars that make up dignity and respect. The first of the seven pillars recognizes that dignity starts with oneself. In order to have dignity, an individual must understand how they see themselves and other self-awareness attributes), and Donna Hicks, *What is the Real Meaning of Dignity?*, PSYCH. TODAY (Apr. 10, 2013), <https://www.psychologytoday.com/us/blog/dignity/201304/what-is-the-real-meaning-dignity-0> [<https://perma.cc/YF5C-U952>] (rejecting the notion that dignity is about respect, in which it is only gained through one’s actions. Dignity is not gained through one’s actions, but it is a right that every individual is born with), *with* *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm’n*, 138 S. Ct. 1719, 1727 (2018) (lending support to the notion that dignity must be demanded at times. Stating, “Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth. For that reason[,] the laws and the Constitution can, and in some instances must, protect them in the exercise of their civil rights. The exercise of their freedom on terms equal to others must be given great weight and respect by the courts.”).

145. *See generally* Channing Gerard Joseph, *Swann, William Dorsey*, OXFORD AFR. AM. STUD. CTR. (May 20, 2021), [https://www.academia.edu/49043126/William\\_Dorsey\\_Swann\\_Oxford\\_African\\_America\\_Studies\\_Center](https://www.academia.edu/49043126/William_Dorsey_Swann_Oxford_African_America_Studies_Center) [<https://perma.cc/F2RM-YX6R>] (recognizing Swann as the “first-known American activist to take legal action to defend the queer community” after requesting a pardon from President Grover Cleveland. In Swann’s petition for pardon, it was introduced that Swann had severe health conditions, which being in jail were only exacerbating. President Cleveland denied the pardon despite such ailments.).

146. Melvin I. Urofsky, *Civil Rights Cases: Law Cases [1883]*, BRITANNICA <https://iowaculture.gov/history/education/educator-resources/primary-source-sets/reconstruction-and-its-impact/us-supreme-1> [<https://perma.cc/GJ9H-42EJ>] (discussing the 8–1 Supreme Court decision that struck down the critical provision in the Civil Rights Act).

died of heart problems, which the judge dismissed as paling in comparison to the crime of his immorality.<sup>147</sup> This was courage. This was love. This was us. This, a BlaQueer heritage, is the critical practice of love, even when death stares us in the face.

### III. DEFINITIONS

The Merriam-Webster Dictionary defines “profile” as both a verb and a noun.<sup>148</sup> As a noun it is defined in six ways, five of which are material to this section:

1) a representation of something in outline especially: a human head or face represented or seen in a side view; 2) an outline seen or represented in sharp relief; 4) a set of data often in graphic form portraying the significant features of something (a corporation’s earnings profile) especially: a graph representing the extent to which an individual exhibits traits or abilities as determined by tests or ratings; 5) a concise biographical sketch; and 6) degree or level of public exposure.<sup>149</sup>

Put differently, an individual’s profile is a representation of the aftermath of the essential particular physical traits thrown into sharp relief—maximized, enlarged, and hyper-focused upon—which have the effect of creating an identifiable, biographical sketch that is accessible and understandable by the public.<sup>150</sup> Whether one fits a profile or not is determined by various “tests or ratings” identifiable by social or carceral scripts and logic.<sup>151</sup>

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147. See Joseph, *supra* note 69 (“Born in Maryland around 1858, Swann endured slavery, the Civil War, racism, police surveillance, torture behind bars, and many other injustices. But in the beginning in the 1800s, he not only became the first American activist to lead a queer resistance group; he also became, in the same decade, the first known person to dub himself a ‘queen of drag’—or, more familiarly, a drag queen. Swann [was] the earliest recorded American to take specific legal and political steps to defend the queer community’s right to gather without the threat of criminalization, suppression, or police violence.”); see also Petition for Pardon at 5, *United States v. William D. Swan*, P-532 (Jan. 3, 1896) (National Archives Catalog) (listing the chronological order of Swann’s case. On July 20, 1896, the physician of the U.S. jail in D.C. certified that Swann had a heart disease and confining him in jail was “seriously impairing his health.” Five days later, the physician stated that further confinement will “endanger [Swann’s] life and health.”); see generally Currie, *supra* note 80 (explaining Swann was falsely imprisoned for 300 days in jail for “keeping a disorderly house,” implying that he was orchestrating a brothel because that is what the actual charge means, but he was only hosting a drag ball. Swann filed for a petition, and friends of Swann called the U.S. attorney’s office about Swann’s health. It was stressed that Swann had a heart disease, confirmed by a doctor, and that the conditions in jail were making the disease worse. President Grover Cleveland denied the pardon because Swann’s health issues were not enough to alleviate “the character of the offense.”).

148. See *Profile*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/profile> [<https://perma.cc/87U4-MUEZ>] (listing the various grammatical usages of “profile.”).

149. *Id.*

150. See *id.* (reintroducing the meaning of the word ‘profile’ and how it will be used throughout the paper).

151. See *id.* (indicating the use of tests to determine if one fits a profile).

As a verb, the definition of “profile” is 1) to represent in profile or by a profile: produce (as by drawing, writing, or graphing) a profile of; 2) to shape the outline of bypassing a cutter around; and 3) to subject to profiling.<sup>152</sup> To be profiled then is to be presented or represented as something other than one’s full self.<sup>153</sup> It is an unmaking of the whole to be re-rendered as a hieroglyph, made one dimensional and filtered through a controlling lens, and made intelligible and readily, permissibly available to contact, search, seizure and detainment to systems of surveillance by state and kin.<sup>154</sup> To be profiled is to be flattened and reduced to writing, data, or sketch as an identifiable outline.<sup>155</sup> In practice, this outline is a framing, a controlling image, and a description that marks one as necessarily criminal.<sup>156</sup> Profiling is an imminent feature of both strict scrutiny and furtiveness, as it supplies the necessary data—the public logic and de facto permissibility—for a narrative which provides Black and BlaQueer bodies for both furtiveness and disciplining.<sup>157</sup>

#### IV. A REFRACTED LENS: FURTIVENESS IN BLAQUEER (A REMIX OF LAW, CULTURE, AND HISTORY)

The already narrow lens of furtiveness affixed to Blackness is refracted again, or perhaps finessed, to discipline, profile, and make non-citizen those with defiant Black sex/ualities and gender embodiments.<sup>158</sup> The BlaQueer body is not only rendered in and outside of Blackness, but also rendered in and outside of the law; available for discipline afforded to Black bodies and estranged or alienated<sup>159</sup> from cultural and legal protections rhetorically and materially

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152. *Id.* (defining “profile” as a verb- the act of “profiling.”)

153. See generally *Racial Profiling: Definition*, ACLU, <https://www.aclu.org/other/racial-profiling-definition> [<https://perma.cc/9Q2E-Y7ZV>] (describing the destructive effects of racial profiling on communities of color and the changes in attitudes toward the police).

154. Spillers, *supra* note 5, at 67 (“These undecipherable markings on the captive body render a kind of hieroglyphics of the flesh whose severe disjunctures come to be hidden to the cultural seeing by skin color.”); COLLINS, *supra* note 36, at 69–96 (presenting examples of how profiling affects individuals); Simone Browne, *DARK MATTER ON THE SURVEILLANCE OF BLACKNESS* (2015) (explaining how surveillance reinforces racism).

155. See generally ADITI D. SURIE VON CZECHOWSKI, *UNBURDENING HUMANITY OF “MAN”*: BLACK STUDIES AND THE EMANCIPATORY POSSIBILITIES OF THE FLESH (Compar. Stud. of S. Asia, Afr. & the Middle East ed., 2015) <https://academiccommons.columbia.edu/doi/10.7916/D8H70SN4/download> [<https://perma.cc/K39E-6YV9>] (showcasing the results profiling has on an individual).

156. See generally *Racial Profiling: Definition*, *supra* note 153 (presenting the idea that profiling will lead specific groups to be associated with crime.).

157. See generally *id.* (showing the impacts that profiling has on the Black community through multiple examples of profiling throughout the United States).

158. See generally *id.* (describing how racial profiling isolates Black people and puts them at a disadvantage within the legal system and against law enforcement).

159. See generally *End the War on Black Trans, Queer, Gender Nonconforming and Intersex People*, M4BL, <https://m4bl.org/policy-platforms/end-the-war-trans/> [<https://perma.cc/33H8-E6HQ>] (posing the difficulties that Black Queer individuals have in all aspects in their communities).

affixed to it.<sup>160</sup> The BlaQueer subject is at both circumscribed from Blackness and a fugitive within its confines.<sup>161</sup> While Black people—and Blackness—are often marked and positioned as queer, relative to white folks and white culture, anti-Blackness itself is a prevailing intramural practice that has created routine methods of surveilling and state vs. intercommunal violence.<sup>162</sup> Alexandre’s example reveals the confluence of state and intercommunal violence against Black women, detecting the BlaQueer within the queer Black world.<sup>163</sup> In this way, the unique, intersectional violence that can only be enacted against Black bodies, is also subjected against BlaQueer people by Black people.<sup>164</sup> This article will attempt to underscore how state violence is compounded and made more lethal when paired with intramural violence. BlaQueer furtiveness exists as a praxis and ascription in the wake of the confluence of state and intramural violence.<sup>165</sup>

#### V. REMEMBRANCE: AN ACCOUNTING OF THE FLESH, A WITNESSING OF A LURKING PROFILING

“I’ll love you forever and ever and always,” are the words my grandmother spoke to me on a heartfelt loop. She meant it. She needed me to know this—that her love was boundless, vast enough to envelop any mistakes or manifestations of who I might already be or might yet still become. This mantra, repeated at every greeting and parting—at breakfast, before school, when parting for sleepovers, just before my eyes closed—was a type of explicit reassurance policy.<sup>166</sup> My grandmother not only loved me, but she needed me to know she loved me *any* way.<sup>167</sup> My first memory of the word “gay”—its low country synonyms like “sweet,” “fruity,” or having “sugar in the tank”—was inextricably linked to one of my favorite cousins, William.<sup>168</sup> William was a slight and dainty boy only a few years older than me.<sup>169</sup> He was a wonder and a peculiar sight.<sup>170</sup> He moved with willful abandon.<sup>171</sup> There was a rhythm

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160. See generally *id.* (explaining the legal and criminal issues that Queer Black individuals face).

161. Furtive Blackness, *supra* note 2.

162. *Id.*

163. See generally ALEXANDRE, *supra* note 23, at 1 (demonstrating how profiling creates the perpetuation of myths and stereotypical notions in order to further an agenda of oppression and subordination in certain spheres of society).

164. See generally *id.* (summarizing the effects of profiling).

165. See generally *BlaQueer*, IDENTIVERSITY, <https://www.identiversity.org/terte/bla-queer> [<https://perma.cc/47XP-B2GF>] (defining BlaQueer as “individuals of Black/African descent who recognize their LGBTQ+ identity as salient to their Blackness and vice versa”).

166. Furtive Blackness, *supra* note 2.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

to his step and his speech. The family said, “he had sugar in his tank.”<sup>172</sup> At the age of five, with William being ten or perhaps eleven, my mind imagined that it was this sugar that fueled the joy that William always seemed to have about. He had an aura about him, a power that seemed to be at once natural and extraordinary. William wasn’t like other boys. He jumped rope, double-dutched in fact. William braided hair better than any of the women around; they often requested him for finger waves too. William was also a fighter, no one dared to try him. He was otherworldly and full of love. The way he inhabited his body and spirit so fully was not only foreign, but alien. It wasn’t the way *people* moved. He didn’t move, walk, talk, smile, or laugh as men are demanded to, nor did he do so to the women’s standard either.<sup>173</sup> William, it seemed, was free. A person unbridled by anyone’s rules or expectations, governed by his own free will.

But there was something about William, rather, something about the way people spoke of him that tempered my admiration of him. Perhaps this was the cost of his freedom. There was a saltiness in the way they spoke about the sugar in his tank.<sup>174</sup> A sweet disdain for his essence, if even a deep appreciation for his usefulness. William was beloved when he did what he was called to do: entertain, provide a joke, fix so and so’s hair, listen to cousin Mary’s sorrows about her cheating boyfriend or drunk uncle Carl Gene, come help in the kitchen, or sit there and watch the kids. William was best tolerated, even celebrated, as either spectacle or utility. He served at the pleasure of aunts and uncles, as well as cousins much his junior. He provided something to everyone. Community property at best, William was only held for service, but otherwise disregarded. No one asked what William wanted to do with his life. His future was never among the common conversation of grown folks. They didn’t laugh and bet over whether he’d be a star on the football team or a straight A student. No one asked, or even pondered, whether William would go to college or “make it anywhere.” In contrast, the family spent hours—often nearly coming to blows—over which child, or niece, or cousin would play for the Chiefs one day, or make a real difference in the world. There wasn’t any care practice for William, nor any imagination that he might be somebody; at least not outside my grandmother’s (his distant cousin) always welcoming heart and arms. Perhaps that is why he was often present, because only under Willa Mae’s watchful eye was his freedom possible.

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172. See *Sugar in his Tank*, SLANG DEFINE, <https://slangdefine.org/s/sugar-in-his-tank-1864f.html> [<https://perma.cc/RC76-86CL>] (clarifying the use of the term “sugar in his tank”).

173. Cf. Dane Robert Whicker, *Masculinity Matters: Perceptions of One’s Own Gender Status and the Effects on Psychosocial Well Being Among Gay Men*, (Aug. 2016) (Ph.D. dissertation, Marquette University) (on file with Texas Scholar Works Library system) (discussing the relationship between sexual orientation and masculinity and the stigma associated with being less masculine).

174. See *Sugar in his Tank*, *supra* note 172 (defining “sugar in his tank” as a form of slang which refers to the possibility that a man may be homosexual or bisexual).



Now, William is gone. I do not know whether William is dead or alive, but I do know no one knows the truth or has checked into his livelihood, let alone his heart, joy, breathing or love life. In the brief section above, I sketched out a memory and profile of my cousin, William. In this memory, there are clear cultural and social cues on how William was, and perhaps still is, regarded. These cues, rituals of subordination, and violence are communicated and perfected through the rehearsal and maintenance of a quotidian theater of oppression that uses the power of profiling—a form of anti-Blackness and anti-BlaQueerness that calls for swift and unrepentant social or legal disciplining—as a method of gender and racial-sexual order keeping and disavowal.<sup>175</sup> The movement of William’s body (lithe and angelic) translated as a sign to treat him with brutishness and demands of conformity.<sup>176</sup> His behavior was misread as a sign of weakness that signaled to others he deserved ridicule, discipline, and special treatment, and was a sign of how not to act.<sup>177</sup> His sweet voice and ability to be anything was transcribed as a communal demand for service and constant availability that marked him as queer property. His emotional intelligence and dexterity, a core ingredient to his sweetness, was consumed and repurposed as a logic to position him as an emotional mule for the family writ large.

William was a “vexy thing.” His being was the embodiment of the word. His ordinary desire and practice of self-fashioning was vexing. To be clear, William was not a tormentor, a troublemaker, or a troublesome person; rarely did he question or openly defy anyone, though his insistence on existing was defiance enough. He did not engage in lengthy or fiery debates about his predicament; yet, upon his being, others clearly exerted their emotions and values with various methods of subordinating violence. In *Vexy Thing: On Gender and Liberation*, Imani Perry argues that:

[G]ender liberation may not require the evacuation of all categories [ . . . ] it does require us to imagine that each human being might be afforded access to embodying and experiencing and representing all of the beautiful traits we have ascribed according to gender, irrespective of the accidents of birth of body, the ascriptions of our cultures, or the decisions of identity.<sup>178</sup>

That is the call of this article, this project, and this work, and it is in memory of William. Contrary to what our family may have felt or believed,

175. Cf. Nicole Pasulka, *The ‘Criminal’ Black Lesbian: Where Does This Damaging Stereotype Come From?*, NPR (March 17, 2016, 7:01 AM), <https://www.npr.org/sections/codeswitch/2016/03/17/456541972/the-criminal-black-lesbian-where-does-this-damaging-stereotype-come-from>, [<https://perma.cc/U76Y-FSL3>] (using a form of anti-Blackness and anti-BlaQueerness for swift and unrepentant social or legal disciplining).

176. Cf. *id.* (“An assumed link between race, sexual orientation, gender and violence . . . creates this environment where you are on guard because everyone around you perceives you as a threat before they know anything about you.”).

177. Cf. *id.* (creating depictions of queer Black women in the form shunning and ridicule leading to “violent” and “criminal” media stereotypes).

178. IMANI PERRY, *VEXY THING: ON GENDER AND LIBERATION* (Kenneth Wissoker ed., 2018).

William was not requiring the family to evacuate their sense of self or their assumed or self-fashioned identities. To the contrary, he was embodying—and inviting us all to accept—the notion that his body was neither an apology nor in need of routine, gendered disciplining. He was queer, not broken. He was free, not captive to some unholy force. He was human, not property. Yet his being offered a new way forward and likely functioned not only as a visual portal of a different way of living, a different way of being—for all who were blessed to encounter him—but also served as a reminder to all who gazed upon him of the ways in which they had been circumcised from self, the costs of racial/sexual/gender<sup>179</sup> conformity, the desires and pleasures lost, the freedom long since forgotten.<sup>180</sup>

To those unfree, unqueered eyes, William was both the embodiment of a freer tomorrow and the living obituary to a freer self, sacrificed or lynched at the altar of patriarchy and normativity. William embodied freedom to others by operating as a mirror and existed as living testimony to all the ways the adults around us had been made to shed themselves, to become *real* (heterosexual) Black wo/men.<sup>181</sup> He reminded the men that perhaps, maybe, they could've done something other than play sports and perhaps always had the ability to emote and be “soft” when warranted.<sup>182</sup> He reminded women that care, concern, and communication were not beyond the powers of men and not merely the burden of women to carry. He reminded the women of who their husbands, sons, kinfolk could be, but had for some reason chosen not to be. He reminded me of the public service announcement to dare to be free, but also warned me of the costs of unfreedom, a life like that of his tormentors, a hell of iniquity.

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179. Cf. CHRISTINA SHARPE, *IN THE WAKE: ON BLACKNESS AND BEING* 43 (2016) (denoting the importance and complexities of race, sexuality, and gender when viewed together).

180. *Id.*

181. Cf. Craig Washington, *The Liberation of Lil Nas X*, RECKONING (Sept. 14, 2021), <https://www.thereckoningmag.com/the-reckoning-blog/the-liberation-of-lil-nas-x> [<https://perma.cc/2FQX-4KFQ>] (sharing Lil Nas X's experience as a queer person. “I am insecure about my sexuality. I still have a long way to go. I've never denied that. When you're conditioned by society to hate yourself your entire life, it takes a lot of unlearning. Which is exactly why I do what I do.” Lil Nas X refuses to hide his gender, race, and sexuality, being a source other queer folks may mirror.).

182. See *Soft*, URB. DICTIONARY (June 15, 2010), <https://www.urbandictionary.com/define.php?term=Soft> [<https://perma.cc/9MFF-ZQVT>] (“To be un-tough or show a little too much heart for things.”); Cf. Kiersten Alexis, *Let Them Cry: Toxic Masculinity & Black Male Vulnerability*, MEDIUM (July 8, 2019), <https://medium.com/@akierstena/let-black-boys-cry-699752601f2> [<https://perma.cc/DAV4-QSLG>] (describing the self-perception of black men and their masculinity).

VI. LMJ BRUCE ON TARRELL ALVIN MCCRANEY'S *MOONLIGHT*:

## "LOITERING AS A WAY OF LIFE," INTRAMURAL PROFILING &amp; VIOLENCE EVASION

In the section immediately above, we are introduced to my cousin William, through the eyes of a child witness, a BlaQueer in bloom. This personal story enables a type of firsthand witnessing and truth-telling purposely unavailable, disabled, and obscured in case law and most scholarly legal commentary. This is due to standard, yet obscure, laws of evidence—particularly jurisprudential concerns around relevance and hearsay—but also due to foundational features of a system that centers white, cisgender men as *the* reasonable person and, his property and interests, as the subject of the law's protection.<sup>183</sup> On their face, and in legal instruction, the laws purport to protect and ensure the neutrality of the adversarial process of litigation.<sup>184</sup>

In reality, particularly where Black and BlaQueer life are concerned, the laws obscure, erase, and often pervert the truth.<sup>185</sup> As my evidence professor at Herbert of Howard University School of Law often said, "evidence—and this adversarial system—is about proof, not truth." In turning to the personal—and now the cultural—we can more accurately portray the role of law in constructing power differentials and sustaining permissible, deputized violence against racial-sexual minorities, particularly BlaQueer people. This power deferential is possible primarily through profiling and the practice of jurisprudential violence enacted by law, lawyers, and other officers of the court.<sup>186</sup> Put differently,

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183. See Mia Carpiniello, *Striking a Sincere Balance: A Reasonable Black Person Standard for "Location Plus Evasion" Terry Stops*, 6 MICH. J. RACE & L. 355, 358 (2001) ("In our criminal justice system, reasonable behavior is defined as white behavior. By painting the reasonable white person standard as a race-neutral reasonableness standard, courts undermine the significance of race. Race does matter when it comes to a person's decision to flee from police, a police officer's decision to stop a person, and a court's decision whether to accept a police officer's judgment. As such, a criminal justice system predicated on equality under the law should aim to cure this discriminatory reality."); Cf. Peter Nicolas, "They Say He's Gay": *The Admissibility of Evidence of Sexual Orientation*, 37 GA. L. REV. 793, 844–46 (2003) (admitting evidence of sexual orientation may be prejudicial due to jury's potential bias against non-heterosexual individuals. Judges should exclude evidence where the reason proffered for the admittance of the evidence is simply a pretext for appealing to juror's nonheterosexuality biases.)

184. See Scott Astrada & Marvin L. Astrada, *The Enduring Problem of the Race-Blind Reasonable Person*, AM. CONST. SOC'Y (May 11, 2020), <https://www.acslaw.org/expertforum/the-enduring-problem-of-the-race-blind-reasonable-person/> [<https://perma.cc/BK2M-Z4XG>] (using the color-blind reasonable person standard is a problem because it further marginalizes minorities).

185. See *id.* (noting how using the reasonable person standard subverts minorities' Fourth Amendment rights due by not including the race, gender, or ethnicity of defendants in a meaningful way).

186. See Valeria Vegh Weis, *Criminal Selectivity in the United States: A History Plagued by Class & Race Bias*, 10 DEPAUL J. SOC. JUST. 1, 4–12 (2017) (developing the idea of criminal selectivity, which describes observed existence of inequalities throughout the criminal justice system. This includes racial profiling, inequality in the administration of punishment, and impact of disproportionate collateral consequences to the lives of

the story of William and now the story of Chiron in *Moonlight*, allow the reader to enter and analyze the logics of law as they operate on the ground in Black life. We are now exploring the ways in which Black, specifically BlaQueer, folks have come to often operate as the “Black” in Black Letter Law, with our blood being the ink that binds it. Further, this method of exploring law, and the way that it is enforced, decenters the mythologies and promises of Black Letter Law which centers the people who experience its manifestation in ways that are both corporeal and carceral; the law is inscribed on their bodies and psyches daily, through both contact with police and policing, as well as through the normalized, intramural violence that is the result of being marked as *other* or detestable by law and its enforcement.

Later, we will return to local and national Black Letter Laws and ordinances. Through these explorations, as well as the upcoming section on “walking while trans,” I want us to begin to understand sexual profiling and furtive Blackness (and/or BlaQueer furtiveness) as a sport and theater learned and practiced shortly after exiting the womb.<sup>187</sup> Indeed, Black and BlaQueer people existing anywhere—let alone clamoring for fundamental rights—are rendered as furtive gestures and as physical, menacing threats to police and deputized white and cisgender, heterosexual people across the nation.<sup>188</sup> They are then profiled based upon racial and sexual identity and cultural markers; making them available for harassment, police contact, and routine violence.<sup>189</sup> These things are part and parcel of the American jurisprudential project.

*In Moonlight Black Boys Look Blue* is a film based upon the semi- autobiographical play, written and produced by Tarell Alvin McCraney.<sup>190</sup> The film adaptation, written and directed by Barry Jenkins, was released in 2016.<sup>191</sup> The coming-of-age story follows the life of Chiron, a dark-skinned, low-income

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minorities. To accurately describe this unjust inequality, the phrase differential punishment fits.)

187. See generally ALEXANDRE, *supra* note 23, at 5 (expounding on sexual profiling and its effects on men, women, and marginalized other-identifying groups).

188. See, e.g., Lucy Tompkins, *Here’s What You Need to Know About Elijah McClain’s Death*, N.Y. TIMES (Oct. 19, 2021) <https://www.nytimes.com/article/who-was-elijah-mcclain.html> [<https://perma.cc/274Z-3866>] (detailing Elijah McClain’s death at the hands of police officers while he was walking home. A stranger called 911 to report a man who was walking and looked “sketchy.” After McClain had been restrained by officers, one can be heard on audio telling the others McClain was “acting crazy.”)

189. See Chase Strangio, *Arrested for Walking While Trans: An Interview with Monica Jones*, ACLU: SPEAK FREELY, (Apr. 2, 2014, 11:19 AM) <https://www.aclu.org/blog/criminal-law-reform/arrested-walking-while-trans-interview-monica-jones> [<https://perma.cc/A8LD-XYMJ>]. (explaining how normal daily things can be seen as criminal acts for transgender women of color).

190. See Dan Allen, *Tarell Alvin McCraney: The Man Who Lived ‘Moonlight,’* NBC NEWS (Oct. 20, 2016, 4:25 PM), <https://www.nbcnews.com/feature/nbc-out/tarell-alvin-mccraney-man-who-lived-moonlight-n670296> [<https://perma.cc/BR74-XS32>] (crediting McCraney’s play as the inspiration behind the film *Moonlight*).

191. See *MOONLIGHT* (Plan B Entertainment & A24, 2016) (providing details on the year the film was released and who it was directed by).

Black boy thrust into his BlaQueerness.<sup>192</sup> *Moonlight* was the first all-Black, LGBTQ focused film to win an Oscar for Best Picture.<sup>193</sup>

In an opening scene, Chiron (known as “Little”), no more than ten years old, is seen running through a field towards his neighborhood while he is chased by a group of peers.<sup>194</sup> They are wielding sticks and saying “you better run you little faggot . . . yo, we gotta go and get his gay ass.”<sup>195</sup> In an attempt to evade the students, and save himself from a terrible beating, Chiron frantically tries to open the front door of several apartments.<sup>196</sup> He finally finds an abandoned unit and frantically looks for a place to hide.<sup>197</sup> In this scene, it is nearly impossible to mark why or how Chiron is understood to be a “faggot,”—used interchangeably with BlaQueer here—or “gay.”<sup>198</sup> He is merely a student at a school with other students, walking home alone.<sup>199</sup> Yet it is this obscure reference to profiling that makes it more ubiquitous. One need not actually be LGBTQ or have developed any sexual or gender identity to be subject to the surveillance, stalking, violence, and harassment evidenced in this scene; one might merely be understood to not be like *other* boys.<sup>200</sup> Existing as outside of normative gender or racial/sexual/gender roles marks one as readily and necessarily available for public discipline and, often, sexualized violence. In this scene, Chiron has yet to see himself as BlaQueer as a child, but it is here that he understands the consequences of being seen or known as a faggot.<sup>201</sup> He is beginning to understand the profile and furtiveness ascribed to him, and is creating a navigational practice for safety, survival, and sanity.<sup>202</sup> In the article *Shore, Unsure: Loitering as a Way of Life* by La Marr Jurelle Bruce,

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192. See *id.* (examining the life and struggles of a Black queer male in the south); see also Allen, *supra* note 190 (discussing the background of Chiron, the main character in *Moonlight*).

193. See Mary Emily O’Hara, ‘*Moonlight*’ Makes Oscars History as 1st LGBTQ Best Picture Winner, NBC NEWS (Feb. 27, 2017, 1:16 PM), <https://www.nbcnews.com/feature/nbc-out/moonlight-makes-oscar-history-1st-lgbtq-best-picture-winner-n726116> [https://perma.cc/A5 ZX-L8XQ] (lauding the film’s historic Oscar status as the first LGBTQ film to win an Oscar for Best Picture. Not only was it historical for its LGBTQ perspective but the cast was an all-Black cast.).

194. See *MOONLIGHT*, *supra* note 191 (being attacked was common for Chiron. This scene is one of a few scenes demonstrating the prospective violence placed on Black queer young male bodies by their Black community.).

195. *Id.*

196. See *id.* (facing a desperate situation, Chiron rattles doorknobs hoping they will open and give him an escape).

197. See *id.* (conveying the urgency of the situation).

198. See *id.*

199. See *id.* (illustrating how non-gendered activities are used against Chiron to taunt an assumed sexuality).

200. See *id.* (highlighting how social nuances may confer one’s “otherness” despite not having realized or determined one’s own gender or sexuality).

201. See *id.* (displaying societal anti-queerness confrontations and taunting as an early pressure against BlaQueer identity).

202. See *id.* (developing coping mechanisms is necessary for Chiron’s survival against anti- queer violence).

we are encouraged to think about how Chiron's movements and stillness, his refusal to go when called or remain still when commanded, illustrate a historical ancestral paradigm reminiscent of both loitering and vagrancy.<sup>203</sup> Bruce's analysis follows:

[Chiron] loiters, too. The prepubescent protagonist in act 1 of Barry Jenkins's *Moonlight*, [Chiron] inhabits a lifeworld gridlocked with great hardship. He is a black, queer, quiet, diminutive, latchkey, and eventually indigent child—son of a mother beset by addiction and an absent father—who traverses the awful precarity and awesome beauty of his Liberty City, Miami hometown in the 1980s. Along the way, he often lingers. In fact, it is possible to plot key events in [Chiron's] youth as a litany of loiterings: in a trap house, where he seeks shelter from grade school bullies who chase and hurl “faggot” at him; on a football field, where a group of boys egg him on to play and taunt him once he lags and falters; or in the backyard of Teresa and Juan, a young couple that cares for him when his mother, Paula, is spellbound by crack cocaine . . . .<sup>204</sup>

In the exploration above, Bruce supplies a cultural and sociolegal analysis that allows us to imagine Chiron as simultaneously inhabiting a space unique to his circumstances, while also inhabiting a well-worn space on the long, elusive road to emancipation.<sup>205</sup> Here, we mark where the personal and legal collide and co-conspire.<sup>206</sup> Bruce references the Black and Slave Codes to call attention to a past that is ever present in our cultural and legal memory and jurisprudence.<sup>207</sup> Reading this alongside the chapter “The Strict Scrutiny of Black and BlaQueer Lives” we can come to understand how the State of

203. See La Marr Jurelle Bruce, *Shore, Unsure: Loitering as a Way of Life*, 25 GLQ: J. LESBIAN & GAY STUD. 352, 352–61 (2019) (tying Chiron's behavior to generations of learned behavior before him).

204. *Id.* at 352–53 (continuing Bruce's analysis: “To ‘loiter’ is ‘to remain in an area for no obvious reason,’ according to Merriam-Webster, and ‘to linger aimlessly or as if aimless,’ per Dictionary.com. Both definitions hold that loitering appears to lack purpose, but the appearance of aimlessness might conceal a truth of deliberation, strategy, and care. I pose a praxis of loitering: a willful, ethical, critical, radical inertia when the antiblack officer barks “keep it moving”; or the gentrifying sign reads “no loitering”; or the right-wing cable news pundit insists that you just “get over” and “move past” the still-unfurling devastation of chattel slavery and Jim Crow. This loitering queers and signifies upon the legal category of “vagrancy,” which was enshrined in anti-Black Codes throughout the US South after the Civil War. Furthermore, this loitering converges and conspires with Fred Moten's “fugitivity” (2007), with Tina Camp's “fugitivity” (2014), with Sarah Cervenak's “wandering” (2014), with Saidiya Hartman's “waywardness” (2015), and with my own “derangement” (Bruce 2017)—all captioning blackness out of (legally and culturally sanctioned) place. Whereas fugitivity, wandering, waywardness, and derangement are modes of motion defying modern mandates for “proper” movement, loitering is slowness or stillness that violates said mandates. The fugitive goes when told to stay, while the loiterer stays when told to go.”).

205. *Cf. id.* at 352–53 (describing instances of Chiron's life struggles as a loiterer).

206. See generally *id.* (explaining the legal category of “vagrancy” to mean the act of moving from place to place).

207. See *id.* at 352 (expounding on the significance and history of what influenced the meaning for the term loitering).

Florida, where Chiron resides, was built on slavery, Black Codes and convict leasing, and can come to understand how Chiron is put in the position of essentially navigating the material, intramural afterlives of slavery and the Black Codes.<sup>208</sup> To understand this further, it's helpful to reference the work of historian Joe M. Richardson.<sup>209</sup>

In the historical accounting above we are able to understand the role the state plays in white, anti-Black anxieties by re-subordinating Black people and limiting the practice and reality of Black emancipation.<sup>210</sup> Black presence, stillness, movement, and organizing and appeals to justice are not only viewed as suspect, but furtive gestures in need of immediate, proactive legal discipline.<sup>211</sup> However, as shown above—and reinforced in the work of Ida Barnett Wells—the violence and restrictions placed upon Black people were

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208. See Bryan Bowman & Kathy Roberts Forde, *How Slave Labor Built the State of Florida—Decades After the Civil War*, WASH. POST. (May 17, 2018), <https://www.washingtonpost.com/news/made-by-history/wp/2018/05/17/how-slave-labor-built-the-state-of-florida-decades-after-the-civil-war/> [https://perma.cc/ME5W-6ULT] (detailing how Henry Flagler created Florida to preserve white supremacist agendas, which targeted African Americans).

209. See Joe M. Richardson, *Florida Black Codes*, 47 FLA. HIST. Q. 365, 373–74 (1969) (“A three-man committee appointed at the request of the constitutional convention to recommend legislation relating to the freedmen bears much of the blame for the severity of Florida’s black codes. As one historian noted, the committee presented a “report ridiculous for its pompous bigotry.” The committee quoted the Dred Scott case to prove that the Negro was not a citizen, and that Congress had no power to make him such. After praising the institution of slavery and reminding the legislature that it had been destroyed without their concurrence, the committee members recommended legislation which would “preserve as many as possible” of the “better” features of slavery. Ignoring the reaction of federal officials and Governor Marvin’s warning, the legislature proceeded to enact most of the committee’s recommendations. The freedmen were given no political rights whatsoever. They were permitted to testify only in cases involving other Negroes and even then the jury was to be white. Freedmen were forbidden to carry firearms of any kind. A county criminal court was created to aid in handling the increase in crime caused by emancipation. These courts were considered necessary to replace the household tribunals that had previously punished slaves. The act creating the county courts provided that anyone who could not pay a fine would be sold at public auction to any person who would take the delinquent, pay the fine and court costs. This of course was supposed to apply to Negroes. Special punishments for freedmen were also created. When the law called for line and imprisonment, there was super- added the alternative of thirty-nine lashes, standing in the pillory, or both. The discrimination, the legislators claimed, was based on the difference in the two races. “To degrade a white man” by whipping would make a bad member of society; to fine and imprison a Negro, on the other hand, would punish the state rather than the individual. Furthermore, to imprison a Negro petty offender would mean his withdrawal from the plantation but whipping meant a speedier return to work. The laws attempted to separate the two races. “A person of color” was defined by the legislature as anyone with one-eighth or more Negro blood.”).

210. See *id.* at 373–74 (emphasizing that the committee was deliberately encouraging the institution of slavery).

211. See P.R. Lockhart, *Living While Black and the Criminalization of Blackness*, VOX (Aug. 1, 2018, 8:00 AM), <https://www.vox.com/explainers/2018/8/1/17616528/racial-profiling-police-911-living-while-black> [https://perma.cc/PTB3-H2PF] (demonstrating that a Black woman who was using the private pool in her gated community was seen as suspect and the cops were called on her).

not limited to acts of law but were also demanded and exasperated by violence and terroristic acts by white citizens.<sup>212</sup> Put differently, in this case, if not most cases, the law acts as a reflection of and reaction to public demands of power, violence, discipline, and notions of access in humanity and citizenship and accompanies violent lessons of comportment.<sup>213</sup> Those marked outside of the legal and social category of citizen or human were contained by law and guarded and disciplined by a deputized white citizenry.<sup>214</sup> This inside/outside of law dichotomy, as well as the insider/outsider social dynamic is a prominent feature in spaces wherever a denigrated or despised minority is present.<sup>215</sup> The power of this predicament is such that it reverberates in and outside of despised, minoritized communities.<sup>216</sup> It echoes the previous discussion—in *Furtive Blackness: On Blackness and Being*—how, upon passing of the Fugitive Slave Law, even sympathetic white people in free states, were compelled, upon threat of life ruining fines and incarceration, to hand up any Black person (whether actually free or not) to U.S. Marshals or slave catchers.<sup>217</sup> The law and its tentacles began to disrupt everyday life and culture for those who had lived relatively peacefully, given the context, before its enforcement.<sup>218</sup> This was also true for free Black folks and their interactions with those who had recently escaped or arrived from slave states. Their proximity to those who were assumed to be runaways made their freedom more tentative and their subordination into enslavement ever-present; resulting in the closure of a myriad of safe houses and avenues for care and connection between those born free and those recently enjoying its fruits.<sup>219</sup>

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212. See Becky Little, *When Ida B. Wells Took on Lynching, Threats Forced Her to Leave Memphis*, HIST. (Aug. 2, 2018), <https://www.history.com/news/ida-b-wells-lynching-memphis-chicago> [<https://perma.cc/8EWL-7LRP>] (explaining how Ida B. Wells advocated that lynching is a form of terrorism); see also Richardson, *supra* note 209, at 374–75 (emphasizing the punishments imposed on Black people, such as getting whipped thirty-nine times standing in the pillory, were extremely gruesome).

213. Richardson, *supra* note 209, at 374 (emphasizing extensive laws and punishments were created as a reaction to Freedmen).

214. See *id.* at 373 (explaining that Black people were not only harmed by white people, but when charged with a crime their punishment was decided by an all-white jury).

215. See *A Brief History of Jim Crow*, CONST. RTS. FOUND., <https://www.crf-usa.org/black-history-month/a-brief-history-of-jim-crow> [<https://perma.cc/GC7K-GXM7>] (explaining that Jim Crow laws were designed to implement different rules for Blacks and whites).

216. See *id.* (identifying how racial segregation in public schools hurts minority children).

217. See Wilson, *supra* note 1, at 153 (noting that Federal marshals were fined for refusing to detain fugitives).

218. See Stefanie Lindquist, *Jim Crow Tact Reborn in Texas Abortion Law, Deputizing Citizens to Enforce Legally Suspect Provisions*, CONVERSATION (Sept. 13, 2021, 8:13 AM), <https://theconversation.com/jim-crow-tactics-reborn-in-texas-abortion-law-deputizing-citizens-to-enforce-legally-suspect-provisions-167621> [<https://perma.cc/S5JY-NWYN>] (showing that the government delegates enforcement duties to private individuals).

219. See *A Brief History of Jim Crow*, *supra* note 215 (explaining that Black people were not able to vote or work in the same room as white people and the impacts these



In *Moonlight*, Chiron is grappling with the ongoing manifestations of these histories; he is caught, in a “matrix of domination.”<sup>220</sup> An intersectional approach requires we understand the confluences of matrices from the standpoint of Chiron, while also being cognizant of the silent histories that are bearing down upon him through his peers via the systems and sociocultural scripts that mandate their violent performance to keep the current power equation stable, while also providing stability for what power and claims to authenticity they have.<sup>221</sup> This is not dissimilar from the argument rendered by Russell Robinson in *Uncovering, Covering* where Robinson details and expounds upon his theory of minority-imposed covering.<sup>222</sup> Here, Robinson speaks to the intramural workings of power, demands, and consequences for ingroup authenticity.<sup>223</sup> In short, he illustrates the demand to assimilate to dominant norms as they occur within racial and racial-sexual minority communities.<sup>224</sup> This is what Chiron is experiencing.<sup>225</sup> When people mark Chiron as “faggot,” “strange,” or “soft” he is verbally castigated as a reminder of his outsider status.<sup>226</sup> Put differently, to call Chiron these epithets is not only to signal to Chiron that he is *other* and does not belong, but also functions as a warning to the other boys in the community as how not to comport themselves.<sup>227</sup>

The constant policing and surveillance of his presence and his treatment as both loiterer and vagabond, are disciplining practices; patterns whose rituals find their roots nestled in both law and culture.<sup>228</sup> When Chiron is chased, beaten, and denigrated, it is not because he is Black or gay, but because he is simultaneously Black and Queer—BlaQueer—and that embodiment is read as

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environments made on the African American community overall).

220. See Bruce, *supra* note 203, at 352 (describing Chiron’s hardship as a Black and queer child while being bullied and taunted by peers); see also *The Matrix of Domination and the Four Domains of Power*, BLACK FEMINISMS (2019), <https://blackfeminisms.com/matrix/> [https://perma.cc/8SC9-HD3R] (explaining in the words of Patricia Hill-Collins that matrix of domination is a concept which explains how structural, disciplinary, hegemonic, and interpersonal domains shape human action).

221. See Bruce, *supra* note 203, at 353 (describing Chiron being tormented by teenage peers).

222. See generally Russell K. Robinson, *Uncovering Covering*, 101 NW. U. L. REV. 1809, 1809 (2007) (responding to and reviewing Kenji Yoshino’s book and article, *Covering*).

223. See generally *id.* (illustrating the difficult, repressed, and frustrated feelings that come with coming out).

224. See generally *id.* at 1815 (explaining that some African Americans wear their hair in braids, while others refuse to do so in fear of looking “unprofessional”).

225. See *id.* (explaining that Chiron is lacking the will to resist the pressure of assimilation).

226. See Bruce, *supra* note 203, at 352 (depicting situations where Chiron is taunted and treated differently); see also Robinson, *supra* note 222, at 1812 (defining outsider as someone part of a disadvantaged and subordinated social group).

227. See generally MOONLIGHT, *supra* note 191 (discussing that taunting Chiron deters others like him from showing their true selves).

228. See generally *id.* (expounding on the disciplinary practices that are ingrained into individuals through perceived societal norms, law and most importantly culture which are then used to mold the actions of younger generations).

a type of racial-sexual trespass upon the identities assumed and inherited by the boys around him.<sup>229</sup> Chiron's performance or embodiment of self, serves as a threat to and a trespass against the authentic Black male-self naturally assumed or likely disciplined into by peers.<sup>230</sup> In the same way the state deputized white citizens to police, surveil, and discipline formerly enslaved and contemporary Black people, these children reenacted this script on Chiron daily, as a type of neighborhood watch for safety and security of both normative Black boyhood and their own sense of security within it.<sup>231</sup>

## VII. MONICA JONES: PROFILING & THE MANIFESTATION OF LOITERING

*The presence of evil was something to be first recognized, then dealt with, survived, outwitted, triumphed over.*

—Toni Morrison, *Sula*

“Walking while trans” is a saying we use in the trans community to refer to the excessive harassment and targeting that we as trans people experience on a daily basis. “Walking while trans” is a way to talk about the overlapping biases against trans people—trans women specifically—and against sex workers. It's a known experience in our community of being routinely and regularly harassed and facing the threat of violence or arrest because we are trans and therefore often assumed to be sex workers. I have been harassed by police four times since my initial arrest last May. The police have stopped me for no real reason when I have been walking to the grocery store, to the local bar, or visiting with a friend on the sidewalk. The police have even threatened me with “manifestation with intent to prostitute” charge, while I was just walking to my local bar!

—Monica Jones, Black Transwoman, Phoenix, Arizona

Phoenix's law against prostitution actually defines what constitutes an arrest worthy offense. In addition to literally offering or soliciting prostitution, the law also enumerates a number of actions that can constitute an “intent” to break the law: Is in a public place, a place open to public view or in a motor vehicle on a public roadway and manifests an intent to commit or solicit an act of prostitution. Among the circumstances that may be considered in determining whether such an intent is manifested are: that the person repeatedly beckons to, stops or attempts to stop or engage passersby in conversation or repeatedly, stops or attempts to stop, motor vehicle operators by hailing, waiving of arms or any other bodily gesture; that the person inquires whether a potential patron, procurer or prostitute is a police officer or searches for articles that would identify

229. *See generally id.* (explaining the ramifications Chiron faces for being BlaQueer).

230. *See generally id.* (comparing the complexity of Chiron's identity with that of his peers).

231. *See generally id.* (emphasizing that Chiron's peers acted as deputies to warn other boys not to comport themselves similarly to Chiron).

a police officer; or that the person requests the touching or exposure of genitals or female breast.

—Phoenix Municipal Code Section 23–52(A)(3).<sup>232</sup>

The city of Phoenix, Arizona operates a controversial sex work “diversion” program called Project ROSE (Reaching Out to the Sexually Exploited).<sup>233</sup> The project claims to operate as a traditional diversion program that serves as a second-chance, alternative entry into the criminal justice system.<sup>234</sup> Project ROSE is uniquely tailored to tackle alleged or assumed violations of the city’s anti-sex work ordinances.<sup>235</sup> It targets, initiates contact with and arrests those who are allegedly sexually exploited or have been accused or convicted of soliciting sex in the past.<sup>236</sup> As VICE put it, “they are arresting sex workers to save them.”<sup>237</sup> As part of this program:

Over the course of two weekends each year, police do a sweep of the streets and pick up anybody who might be suspected of sex work per the vague definitions in the laws. They are placed in handcuffs and brought to Bethany Bible Church, though the police claim that this custody is simply “contact” and that these individuals are not actually arrested. They are not allowed to contact a lawyer even though they are held against their will. Any individuals with outstanding warrants or who are found in possession of drugs are automatically arrested. Of those remaining, they can choose between entering a diversion program run by Catholic Charities or facing criminal charges. Those who fail to complete the program, which can last as long as six months, face the same criminal charges.<sup>238</sup>

In May of 2013, Monica Jones, a Black transwoman and activist, was speaking out against the program and its harmful impact on transwomen and sex workers at a community event while the Phoenix police department was conducting a ROSE sweep.<sup>239</sup> She was arrested the next evening after

232. Zach Ford, *How Phoenix Convicted a Transgender Woman for Walking down the Street*, THINKPROGRESS (Apr. 16, 2014, 9:08 PM), <https://thinkprogress.org/how-phoenix-convicted-a-transgender-woman-for-walking-down-the-street-1d8d8b15ea19/> [https://perma.cc/K4Z8–7X49].

233. *See id.* (claiming that the program has led to a number of unusual forms of profiling against sex workers).

234. *See id.* (mentioning that the alleged alternatives include education and support opportunities).

235. *See id.* (“Phoenix developed its own diversion program called Project ROSE (Reaching Out to the Sexually Exploited), in collaboration with the Arizona State University (ASU) School of Social Work. Over the course of two weekends each year, police do a sweep of the streets and pick up anybody who might be suspected of sex work per the vague definitions in the laws.”).

236. *See id.* (explaining that the police claim that these individuals are not actually arrested, but emphasizing they are not allowed to contact a lawyer).

237. Molly Crabapple, *Project ROSE is Arresting Sex Workers in Arizona to Save Their Souls*, VICE (Feb. 26, 2014, 9:56 AM), [https://www.vice.com/en\\_us/article/in-arizona-project-rose-is-arresting-sex-workers-to-save-them](https://www.vice.com/en_us/article/in-arizona-project-rose-is-arresting-sex-workers-to-save-them) [https://perma.cc/F9B2-JPWK].

238. Ford, *supra* note 232.

239. *See id.* (elaborating that Monica Jones is a student at Arizona State University’s

accepting a ride from an undercover Phoenix police officer.<sup>240</sup> During her trial the arresting officer, continually misgendering her as a man, testified that Jones' neighborhood was known for prostitution, that she was a known prostitute, and that she was wearing a "black, tight-fitting dress" which signaled to him that she was about to engage in prostitution.<sup>241</sup> Notably, the officer does not claim that she was engaged in prostitution, nor does he claim she petitioned him for sex or money.<sup>242</sup> In this instance, the only indication of her *likely* engagement in prostitution—according to the officer—was her community, her choice of clothing, gender identity and supposed, past reputation.<sup>243</sup> Put differently, her alleged intent to "manifest prostitution" was solely based on what she looked like and where she lived.<sup>244</sup>

In the quote above, explaining the concept of "walking while trans"—both a play on and echoing of "walking while Black"—Monica remarks on how quotidian and routinized these police contacts and harassments are. In this instance, and throughout this section as a whole, I'm reading what I've titled "the strict scrutiny of Black and BlaQueer life" alongside the theory of sexual profiling. Because she is a Black transwoman, she is assumed to be a sex worker; a threat to the public good, while simultaneously being rendered as a type of moving contraband in need of seizure. She is stopped while doing things necessary to any human life, things routine for all citizens. She stopped while walking to the grocery store, attempting to grab a drink at the bar and talking to friends on the sidewalk. Her movement, her stillness, her attire and her associations are strictly scrutinized by officers as matters of public safety. In essence, she is rendered the embodiment of a trespass, either always, already loitering or a vagabond in search of an untoward cause; without an affirmative defense, if any.

The language of the statute is uniquely and intentionally vague. It operates as a supplementary net that situates Monica as a threat—marked as both moving contraband and as a loitering dealer—to be consistently available for police contact. Where the general prohibition against prostitution allows for Monica to be seized if caught explicitly engaging in or soliciting sex work, the vague "manifestation" ordinance creates a wider berth for police contact and Monica's entrapment, based merely on her appearance, a hieroglyph of criminality is enmeshed on her flesh. It

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School of Social Work and a sex worker rights advocate for the Sex Workers Outreach Project).

240. *See id.* (reporting that Jones was not eligible for Project ROSE due to a prior prostitution conviction and was eventually sentenced to 30 days in a men's prison).

241. Jamie Ross, '*Manifesting*' Prostitution Law Challenged, COURTHOUSE NEWS SERV. (Aug. 6, 2014), <https://www.courthousenews.com/manifesting-prostitution-law-challenged/> [<https://perma.cc/4WD3-UU4K>].

242. *See id.* (acknowledging the officer only testified to Jones' behavior which indicates displayed prostitution).

243. Furtive Blackness, *supra* note 2.

244. *Id.*

allows the officer to move from specific, articulable cause to an obscure suspicion based on the embodiment of an inherent or foreboding guilt. The legal battlefield moves from the Monica's actions—and the duty to prove mens rea—to Monica's body and the queer nature of its movements or non-movements; with this queerness not being specific to her specific actions, but those actions as filtered through the refracted frame of her differences, her gender identity and trespass, her sexuality, her neighborhood and style of dress. That someone assigned male at birth is wearing a “tight fitting, black dress” becomes a signifier and forewarning of criminality and danger, both afoot and present. Monica's crime is to be out of place, any and everywhere, and the proof her intent to “manifest” the intent of prostitution is made clear through a white supremacist, cisheterosexual gaze; she is always, already reduced and profiled as a sexual object and product, but one that is not desirable, a contraband.

Data collected in 2013 by the Anti-Violence Project provides further context surrounding the profiling, surveillance and police harassment faced by trans people and trans people of color.<sup>245</sup>

According to the report, transgender people are 3.7 times more likely—six times more likely for transgender people of color—to experience police violence than their cisgender counterparts and seven times more likely to experience physical violence when interacting with police.<sup>246</sup> In 2015, the U.S. Transgender Survey (USTS) reported that among transgender people who interacted with police in the past year and said officers were aware they were transgender, 58% reported some form of mistreatment, 49% reported being repeatedly misgendered, and 6% reported a physical or sexual assault.<sup>247</sup> This data not only shows how widespread violence against transwomen is but also how routine and extreme it is, in and outside of law enforcement.<sup>248</sup> Monica's position as a Black, queer, low-income woman of trans experience renders her distinctly outside of the social order and available for violent lessons of

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245. *Id.*

246. See HATE VIOLENCE AGAINST TRANSGENDER COMMUNITIES I, NAT'L COAL. OF ANTI-VIOLENCE PROGRAMS (2013), [https://avp.org/wp-content/uploads/2017/04/ncavp\\_transhv\\_factsheet.pdf](https://avp.org/wp-content/uploads/2017/04/ncavp_transhv_factsheet.pdf) [<https://perma.cc/2LMQ-2JQ6>] (comparing the statistics showing how likely cisgender individuals are to experience police violence during a police encounter with statistics showing an increased likelihood for transgender people during police encounters).

247. See SANDY E. JAMES ET AL., THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY (Nat'l Ctr. for Transgender Equal. ed., 2016) <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf> [<https://perma.cc/FA2S-6CRM>] (discussing transgender peoples' mistreatment, misgendering, and physical or sexual assault experiences with police officers).

248. See generally *id.* (explaining violence against transwomen is common and severe even outside of police officer interactions).

comportment by both police and deputized citizens.<sup>249</sup> Monica exists in the wake of William Dorsey Swann, and others lost to the archive over a century later.<sup>250</sup>

## CONCLUSION

*If you surrender to it, you could ride the air*  
—Toni Morrison, *Song of Solomon*

In this article, I've begun to recount a story that has been told hundreds of times by those whose voices remain ignored and whose truths are rendered ineligible by the crafters and enforcers of the law.<sup>251</sup> Indeed, this story is now being told to a BlaQueer youth living in a house overseen by a Ballroom Mother or Father; it is being told to a nonbinary adult, beginning to question whether to reveal their gender identity; it is being committed to memory by Black Trans people across gender embodiments as a litany for survival.<sup>252</sup> This story is being told in film (*Moonlight*), television (*Pose*), prose and poetry.<sup>253</sup> Yet is rarely heard in the places where law is taught, practiced, or enforced.<sup>254</sup> In many cases, it appears that BlaQueer, and especially trans folks, lack standing for the call of equal protection.<sup>255</sup> Instead, we are often rendered habitual conjurers and omens of social disorder and unlawfulness that must be surveilled, seized, incarcerated, subdued, or put down.<sup>256</sup>

BlaQueer and trans people contend with and survive, despite being subject to various practices of subordinating dehumanization daily.<sup>257</sup> From the examples of Micky B, William Dorsey Swann, Monica Jones and my cousin William, we see that BlaQueerness is marked as an ascribed condition of being one made manifest by an undying matrix of domination consisting of racial, gender, class and sexual hierarchies and anxieties.<sup>258</sup> BlaQueer people are rendered furtive—both in and outside the law—our bodies marked as ominous breeding grounds for deviance and foreshadowing of coming intimate, social, and legal danger.<sup>259</sup> We are strictly scrutinized and surveilled wherever we go and wherever we remain. Movement is criminal.<sup>260</sup> Stillness is criminal.<sup>261</sup>

249. See generally Crabapple, *supra* note 237 (highlighting that Monica's particular situation places her outside of social norms).

250. See generally *id.* (narrating Monica Jones' story about when she was arrested by Phoenix police officers for "manifesting prostitution").

251. Furtive Blackness, *supra* note 2.

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.*

259. See generally, ALEXANDRE *supra* note 23, at 1 (discussing how sexual profiling BlaQueer people creates inefficient and oppressive systems).

260. Furtive Blackness, *supra* note 2.

261. *Id.*

Speech.<sup>262</sup> Dress.<sup>263</sup> Inflection.<sup>264</sup> Affect.<sup>265</sup> Are all criminal.<sup>266</sup> This form of scrutiny and surveillance is practiced by police and deputized white citizens in the name of public order or safety, as well as intramurally whereby Black and BlaQueer people become police of our own lives, in effort to have stable access to relative power and normativity and to shield oneself from the virus of targetability.<sup>267</sup> This sort of sexual profiling is insidious, as it moves from the state—with its once explicit but now vague laws—to majority communities and then intramurally and individually among racial, sexual, and racial-sexual minority communities in waves that are cyclical and without end.<sup>268</sup> This exchange allows for such ongoing violence and trespasses to be explained away by both the neutrality and tradition of law and the non- intersectional, individualistic approach to minority-imposed disciplining in intramural, ingroup experiences.<sup>269</sup>

This paradigm, this matrix of domination—as evidenced by my cousin William, the semi-autobiographical character of Chiron and the experiences of Monica Jones—shows how BlaQueer and trans people are left with little means to justice and protection outside of themselves.<sup>270</sup> Marked as furtive, due to their race, gender identity and sexuality, the three are forced to respond to ascription with a furtive navigational politic of their own.<sup>271</sup> BlaQueer fur-

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262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.*

267. *See*, Joseph, *supra* note 69 (referencing a first person account of the systemic surveillance and scrutiny that police implemented and contrasting it to the efforts towards power equalization); *see also* Furtive Blackness, *supra* note 2.

268. *See generally* CHRISTY MALLORY ET AL., DISCRIMINATION AND HARASSMENT BY LAW ENFORCEMENT OFFICERS IN THE LGBT COMMUNITY (The Williams Inst. ed., 2015), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Discrimination-by-Law-Enforcement-Mar-2015.pdf> [<https://perma.cc/V8T2-JMND>] (recounting the history of explicit discrimination of LGBTQ people through laws that criminalized same-sex sexual behavior which set the foundation to the community's mistreatment); *see generally* Tasha Hill, *The Impact of Incarceration and Policing in Our Community*, AM. BAR ASS'N (Jul. 29, 2019), [https://www.americanbar.org/groups/diversity/sexual\\_orientation/publications/equalizer/2019-july/impact-of-incarceration-and-policing-in-our-community/](https://www.americanbar.org/groups/diversity/sexual_orientation/publications/equalizer/2019-july/impact-of-incarceration-and-policing-in-our-community/) [<https://perma.cc/YBD8-R4XU>] (acknowledging how the LGBTQ community remains vulnerable to being profiled and experiencing harassment from police as a result of living authentically).

269. *See* Hill, *supra* note 268 (addressing the disproportionate rates of contact with the criminal justice system by the LGBTQ community compared to their heterosexual, cisgender peers while explicitly excluding the factor of race).

270. *See* MALLORY ET AL., *supra* note 268, at 5 (noting an incident in which a man was beaten by Philadelphia police who called him racial and homophobic slurs, as well as an incident in Michigan where African-American members of the LGBTQ+ community were inhumanely arrested while also being berated).

271. *See* SOON KYU CHOI ET AL., BLACK LGBT ADULTS IN THE US: LGBT WELL-BEING AT THE INTERSECTION OF RACE, 6 (UCLA Sch. L.: Williams Inst., 2021), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Black-SES-Jan-2021.pdf> [<https://perma.cc/M574-6VR4>] (finding that the vast majority of Black LGBTQ adults reported

tiveness then, operates not only as an ascription and profile, but it also operates as a complex practice and politic of self-fashioning and of harm and death evasion that requires one to look at world—and oneself—through the eyes of a handsy and trigger-happy police officer, a deputized white citizen, a trans and queer phobic cis Black person, and a Black gay person demanding an ill-fitting covering and oneself.<sup>272</sup> It begs the question, “how does one live while surviving?”<sup>273</sup>

Neither Monica, William, or Chiron submit to the violence of the world and people around them, nor do they singularly focus on becoming the *other* that would have them bloody, beaten or disappeared.<sup>274</sup> Instead, they live wayward lives with clear eyes, taking care of themselves and those like them, caught up in the afterlives of slavery and a long emancipation that never envisioned their enfranchisement.<sup>275</sup> They live furtively, embracing a BlaQueer furtiveness that is neither based on mere survival nor surrender.<sup>276</sup> They self-fashion, grasping and conjuring freedom and care where others see carcerality and negligence.<sup>277</sup> They foment and nurture possibilities and realities of being both in and outside the view of law and law enforcement.<sup>278</sup> Because their speech is not free, they speak in evolving languages, sometimes with gusto, other times in shadows.<sup>279</sup> The search and seizure of their person is

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concealing their sexual orientation or gender identity and expressed fear that expressing their identity would affect the quality of support they would receive).

272. *See id.* (highlighting the disparity between Black people who disclose their gender identity compared to cis queer Black people and noting a lingering percentage of internalized transphobia within Black trans people).

273. Furtive Blackness, *supra* note 2.

274. *See* Strangio, *supra* note 189 (highlighting Monica’s efforts to avoid imprisonment due to fear of being placed in a men’s prison); *see also* Currie, *supra* note 80 (noting that William’s effort to avoid imprisonment included letters promising to “live a proper and law abiding life”); *see generally* MOONLIGHT, *supra* note 191 (depicting a gay man’s coming of age as he struggles with sexuality, identity, and the culture of poverty).

275. *See* Strangio, *supra* note 189 (characterizing William as someone who did not have a vice and was “refined” in their habits); *see also* Currie, *supra* note 80 (narrating Monica’s continuous harassment by police without cause); *see generally* MOONLIGHT, *supra* note 191 (portraying the life of Chiron, as a gay man who does not seem to address his identity while being engulfed and assimilated by the culture of where he grows up).

276. *See* Strangio, *supra* note 189 (stating that Monica is inspired to continue to stand up for what is right but also alludes to her understanding of the prevailing pushback); *see also* Currie, *supra* note 80 (recounting William’s unwillingness to plead guilty to the charges against them running a brother and highlighting characteristics of their good character); *see generally* MOONLIGHT, *supra* note 191 (symbolizing the resiliency of a queer character).

277. *See* Strangio, *supra* note 189 (“The police have even threatened me with ‘manifestation with intent to prostitute’ charge, while I was just walking to my local bar!”); *see also* Currie, *supra* note 80 (pointing to William’s impact in defending the queer community’s right to gather).

278. *See* Strangio, *supra* note 189 (accounting for William’s trailblazing advocacy for the liberalization of queer people from police violence); *see also* Currie, *supra* note 80 (signaling to Monica’s aspirations and educational goals which speaks to her journey towards normative existence).

279. *See* Strangio, *supra* note 189 (portraying Monica’s enthusiastic outlook in life



always permissible; therefore, they walk new paths while profiling and strictly scrutinizing all their presence.<sup>280</sup> Because they have been rendered furtive—and outside of the equal protection promised—they move and dance furtively, telling tales and remembrances with their bodies and clothes.<sup>281</sup> Loitering, waywardness, and vagrancy become ways of life—of living secretly in plain sight—for those attempting life while marked in and outside of law.<sup>282</sup>

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despite the persecution she endures).

280. Currie, *supra* note 80 (noting that Willian was holding secretive drag balls).

281. *See id.* (discovering the creative ways in which William created opportunities to express them while also keeping within themselves in furtiveness).

282. Furtive Blackness, *supra* note 2.

