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LAWYERING IN THE WAKE: THEORIZING THE PRACTICE OF LAW IN THE MIDST OF ANTI-BLACK CATASTROPHE

James Stevenson Ramsey[†]

> "How does one enact resistance within the space of the permissible or exploit the 'concessions' of slave owners without merely reproducing the mechanism of dominance? What shape does resistance or rebellion acquire when the force of repression is virtually without limit, when terror resides within the limits of socially tolerable, when the innocuous and the insurgent meet an equal force of punishment, or when the clandestine and the surreptitious mark an infinite array of dangers?"
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> Saidiya Hartman, *Scenes of Subjection*, 1997

> "How can the very system that is designed to unmake and inscribe her also be the one to save her?"
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> Christina Sharpe, *In the Wake: On Blackness and Being*, 2016

Lawyers in the United States who consider themselves to be progressive are caught between divergent worlds and realities. We struggle to define "progress" or even to adequately describe it. We are caught between the allures of ambition and professionalism on one hand and an adherence to higher principles of morality on the other. We cannot easily disentangle our understanding of what is right and wrong from the law of the land, and, because of our training and other socialization within the halls of power and privilege, we experience dissonance in the presence of alternatives to our epistemological frameworks; we falsely become convinced that our learned ideals of rule-following—"objectivity," "efficiency," and "fairness"—are generalizable to all. In other words, our interests and investments in those on the margins of society are weakened

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by both internal and external barriers as we ambivalently strive toward whatever "justice" may be.

Put differently, this dilemma is one of divided loyalties: One of these moral commitments is to the people we serve, but the other is a sworn fealty to the law, which hurts and justifies hurt, takes and justifies taking, especially at the expense of those on the margins of society. We want to fight for the oppressed, but we have also promised to uphold the laws of the same state that oppresses them. Of course, lawyers interested in justice may want to change the state—or at least what it does—for the good of all. But the problem that haunts these aspirations, robbing them of their coherence, is not only what this state has done throughout history, which no legal nor any other solution can fully repair, but also what this state *is*, and what has made and continues to make this state possible. This is a dilemma of history, but it is also a problem of ontology and of meaning. If lawyers cannot or refuse to grapple with what this state truly is and has done, we will be unable to fully grapple with who we are, and we will limit our own capacity to provide alternatives to the status quo and to help create spaces of life for those who suffer.

The purpose of this paper, then, is to examine the role of lawyers in the context of state violence—not just something like police violence, but the state *as* violence. In particular, I am interested in exploring a framework for lawyers whose first obligation is the survival of Black people in this context. In other words, what would it mean for lawyers who work on behalf of Black communities and social movements to be willing to resist the law itself, in terms of belief but also in practice? What possibilities for legal practice might open up if we were to theorize lawyering from the underside of society, where the law is an existential problem? From the ground and its graves, and, per Derrick Bell, the "bottom of the well"?[1] Here, my theoretical departure point for this inquiry is the experience of Black people as thought in Christina Sharpe's *In the Wake: On Blackness and Being*. She develops her theory from and in explication of the fact that, while Black people are not the only people who suffer, the suffering of Black people, who live in the wake of slavery, is singular and foundational to personhood as established and conceived of by the state.[2] In this context, this paper explores how this principle

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[1] DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM (1992) (quoting the title of the work).

[2] CHRISTINA SHARPE, IN THE WAKE: ON BLACKNESS AND BEING 22 (2016). The context I focus on here is that of the United States, but Sharpe is concerned with the relationship of

manifests in the law and how lawyers might act accordingly on behalf of those in the wake.

In the Wake illuminates the ongoing experience of Black people—the histories, the suffering, violence both extraordinary and quotidian, the psychological and (meta)physical condition of social death[3]—as taking place in the wake of chattel slavery, a "past not yet past."[4] As Sharpe writes, "I want to think and argue for one aspect of Black being in the wake as consciousness and to propose that to be *in* the wake is to occupy and to be occupied by the continuous and changing present of slavery's as yet unresolved unfolding."[5] One aspect of being in the wake of slavery that Sharpe explores is that of the "hold," which is the lower part of the ship in which slaves were transported, but also logics, technologies, and violences of containment that evolve and extend through time into the present day. Much of the hold's construction and implementation exceed any particular form of governance, taking place in and flowing from the arenas of rhetoric, meaning-making, and snap judgments, "a peculiar disposition of the eyes."[6] However, these violences manifest in and receive broad sanction from governing structures—the state in particular. In addition to slavery itself, Sharpe raises such contemporary examples as poverty, how various governments handle refugee crises, stop-and-frisk policies, the incarceration of Black people and their murder by police, and the education system as constitutive examples of the state-manufactured hold Black people find themselves in.[7] All of these enjoy legality.[8]

Surviving in and working to undo this hold are what Sharpe refers to as "wake work":

> If . . . we join the wake with work in order that we might make the wake and *wake work* our analytic, we might continue to

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chattel slavery to the whole of the African diaspora and humanity more generally, "violence at the level of a structure that required, indeed invented, the Black to be the constitutive outside for those who would construct themselves as *the* Human." *Id.* at 141 n.10.

[3] ORLANDO PATTERSON, SLAVERY AND SOCIAL DEATH: A COMPARATIVE STUDY 38 (1982).

[4] SHARPE, *supra* note 2, at 13.

[5] *Id.* at 13-14.

[6] RALPH ELLISON, INVISIBLE MAN 3 (1952).

[7] SHARPE, *supra* note 2, at 71-92.

[8] See, e.g., Richard Gonzales, Supreme Court Broadens the Government's Power to Detain Criminal Immigrants, NPR (Mar. 19, 2019, 7:57 PM), https://perma.cc/H2U4-5YMR; Terry v. Ohio, 392 U.S. 1 (1968); 'What Did Jonathan Ferrell Do?': Juror Says Defense Put Victim on Trial, Guardian (Aug. 23, 2015, 10:03 AM), https://perma.cc/PPF8-JSY3.

> imagine new ways to live in the wake of slavery, in slavery's afterlives, to survive (and more) the afterlife of property. In short, I mean wake work to be a mode of inhabiting *and* rupturing this episteme with our known lived and un/imaginable lives.[9]

Different movements for Black freedom and survival have done this kind of wake work in different ways, and lawyers have variously supported and been a part of these movements.[10] There are also many examples of lawyers fighting alongside activists for the rights of the marginalized more generally in pushes for prison and police abolition, reparations for slavery, protecting the land rights of Native Americans, and various other social causes.[11] And, although much fewer in number, there are some examples of lawyers engaging in protest and resistance tactics like civil disobedience.[12] However, what I am thinking of here is a paradigm and a theory of the practice of law that grounds the lawyer in a full investment in Black people, their survival, and bearing witness to Black life. It is broader and deeper than, though it may include, lawyers' willingness to flout ethical rules for the sake of broader moral principles or occasionally and gingerly engaging in some form of civil disobedience.[13] The frame I am interested in exploring for lawyers is not a default respect for the law with resistance as a last resort, but one that develops legal praxis and theory primarily from within the hold—wake work.

It is something like what Rev. Dr. Martin Luther King, Jr. articulates in his famous *Letter from Birmingham Jail*.[14] In the middle of the letter, Dr. King addresses the consternation felt by other clergy people about his and other activists' "willingness to break laws" with their protests, and he begins to articulate the differences between just and unjust laws, primarily

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[9] SHARPE, *supra* note 2, at 17-18.

[10] *See, e.g.*, KENNETH W. MACK, REPRESENTING THE RACE: THE CREATION OF THE CIVIL RIGHTS LAWYER (2012).

[11] *See, e.g.*, LAW FOR BLACK LIVES, https://perma.cc/NL5Z-6VBA (last visited Oct. 26, 2020).

[12] *See, e.g.*, Op-Ed, *North Dakota Prosecutors Drop All Serious Charges Against Chase Iron Eyes*, HIGH PLAINS READER (Aug. 22, 2018), https://perma.cc/5RF5-JYB9.

[13] *See* Louis Fisher, *Civil Disobedience as Legal Ethics: The Cause-Lawyer and the Tension Between Morality and "Lawyering Law,"* 51 HARV. C.R.-C.L. L. REV. 481 (2016); *see also* Robert M. Palumbos, *Within Each Lawyer's Conscience a Touchstone: Law, Morality, and Attorney Civil Disobedience*, 153 U. PA. L. REV. 1057 (2005).

[14] Martin Luther King, Jr., *Martin Luther King Jr.'s 'Letter from Birmingham Jail,'* ATLANTIC, https://perma.cc/43ZB-VM9V (last visited Nov. 2, 2020).

from a theological perspective.[15] He, for example, uses concepts from such thinkers as St. Augustine and St. Aquinas, ending the introduction of this section about civil disobedience with St. Augustine's famous quote, "An unjust law is no law at all."[16] In delineating between just and unjust laws, Dr. King writes that he is primarily beholden to what is "morally right," and, as such, there is no contradiction for him in urging people to both obey *Brown v. Board of Education*—because it is a just law[17]—and disobey segregation ordinances—because they are unjust.[18] This ongoing moralistic calculation of which laws are valid and which are not, along with the broader struggle for civil rights, are to Dr. King a part of the United States' natural movement toward justice as he understood it: "We will reach the goal of freedom in Birmingham and all over the nation, because the goal of America is freedom."[19] In this letter, Dr. King thus collapses patriotism onto his moral framework for civil disobedience and onto freedom struggles (or, at least, what he considers to be freedom struggles) more broadly, even likening such disparate figures as Jesus, early Christians, people who resisted the Nazi regime, and Thomas Jefferson to one another.[20]

One problem in Dr. King's theory of civil disobedience lies in the historical record he lays out to prove his case. Is the goal of America freedom? Whose freedom? We might attempt to derive some principles for freedom from, say, the Constitution; but we, like Dr. King does here, would have to omit from the record who had to be killed for something like the Constitution to exist. Put differently, a freedom founded on and funded through domination, through genocide and slavery, is not true freedom. A severe abstraction of the dead and their dying descendants is required to postulate the moral intentions or destiny of a nation whose existence and subsistence is killing and stealing. True freedom, true justice, whatever they are, cannot exist in the same space as that kind of abstraction, and the United States could not exist without it. The slaughter and disempowerment of Native Americans and the enslavement of Black

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[15] *Id.*

[16] *Id.*

[17] *Id.* (arguing that just laws are laws that are morally right and uplift human personality, and that *Brown v. Bd. of Educ*., 347 U.S. 483 (1954), which held that public school segregation based on race violated the Fourteenth Amendment, is one such law).

[18] *Id.* ("Any law that degrades human personality is unjust. All segregation statutes are unjust because segregation distorts the soul and damages the personality.").

[19] *Id.*

[20] *Id.*

people were not blemishes on the United States' record; they give the United States and the peoples thereof shape. What does it mean, for example, that we have a category of personhood and identity like "Native American"? Who were Black people before they were Black? And how do others relate to and build their identities by distinguishing themselves from people in these categories? Such a construction of the state and the peoples in it makes "just" decisions like *Brown* possible, even while limiting that decision-making power to a few individuals. In other words, we might say that the existence of law is itself unjust here, and appealing to the moral force of the law legitimizes the state, which establishes it. This implicit recognition of the state's sovereignty reinforces its authority, strengthening the hold it constructs.

Wake work, thinking intentionally from within the hold, would have us see something different from this nation's romanticized past. Theorizing from this place would cause us to see fewer similarities between Black freedom fighters and slave owners like Jefferson and more between Dr. King and the Black nationalists he decries elsewhere in his letter.[21] It would require us to see the state itself as a problem, not just an institution with problematic actors or tendencies. It would illuminate prisons and Native American reservations as witnesses to the state's moral illegitimacy, and it might allow us to see how the terms of engagement have already been set against marginalized peoples from the start, not just with hostile institutions or state agents. Theorizing from within the hold would heighten the stakes and allow us to see with clear eyes the disaster in which Black and Indigenous people in the United States live. It might also deepen our dissatisfaction with the status quo and cause us to realize, like Bell, that the same state granting us our so-called rights can take them away.[22]

What Candice Delmas advocates for in *A Duty to Resist: When Disobedience Should Be Uncivil* seems, like Dr. King's letter, to tie some version of political obligation to resistance.[23] However, as the title indicates, she explores different philosophical and practical grounds for resistance from what Dr. King describes in his letter, not only embracing protest and civil disobedience, but also thinking critically about the costs and benefits of such tactics as violence or depriving opponents of the

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[21] *See id.*

[22] *See* BELL, *supra* note 1, at 12-14.

[23] *See* CANDICE DELMAS, A DUTY TO RESIST: WHEN DISOBEDIENCE SHOULD BE UNCIVIL (2018).

opportunity to speak.[24] For Delmas, this line of inquiry flows from citizenship, the political obligations thereof, and the "universal," "natural dut[ies] of justice" that accompany them. As she argues, citizens are at times morally and politically obligated to resist, even through illicit means.[25]

But what of the noncitizen, not in the traditional sense of someone from another place,[26] but of someone with a liminal (non)status—here, but not *of* here? Scholars such as Anthony Farley observe that Black people in the United States are not truly citizens of the United States:

> Citizenship must be distinguished from its documents. Citizenship is not the passbook, rather it is the ability to *demand* the passbook. This executive power is reserved for white men. Merely *documented* citizens live in back of the real. The documents we all have . . . are all we have. Documents are nothing. The real, that is, the representation that we Others live behind, is the white man.[27]

Delmas mentions that the duty to resist can sometimes extend to noncitizens,[28] and that, at the very least, citizens' duty to resist should cover the marginalized, which includes noncitizens.[29] However, her work is not fundamentally concerned with the meaning of concepts like duty and resistance from within non-citizenship or from the margins of society. In other words, Delmas's frame is different from Sharpe's; emphasis on survival in the wake is not the same lens as Delmas's deontological ethics.

Conversely, wake work is about paradoxically clinging to life amidst death and catastrophe. The game has been lost. There is no pre-slavery Blackness. There is no un-murdering, no un-spilling of blood. There is no available expulsion of a foreign power, as in the case of Gandhi's India, nor is there any reason to foresee or hope for a surrender of our government structures to Indigenous folk, as in Mandela's South Africa; apartheid is perfected here. Outside of worldwide upheaval, the state – this crystallized settler colony – is here to stay, as are the scars on the peoples residing in the underbelly of society, which holds up the rest of

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[24] *Id.* at 17-18.
[25] *E.g.*, *id.* at 8, 57.
[26] *Id.* at 16.
[27] Anthony Paul Farley, *Thirteen Stories*, 15 TOURO L. REV. 543, 551 n.15 (1999).
[28] DELMAS, *supra* note 23, at 16.
[29] *Id.* at 77-84.

it.[30] The hold is sturdy, and those who have been disposable are still disposable; as a matter of policy, the starved in history can still be starved, the historically captured can still be captured (e.g., arrested and incarcerated), and so on.[31] What would it mean for lawyers to practice from this place of containment, from apparent defeat? Not primarily from an obligation to universal ideals or political affiliations as Delmas describes, but from a collective mourning and hunger? How might "politics" and "obligations" be recast in the wake, and how might we triage them? Starting from the first analysis of divided loyalties, how might lawyers thinking from within the wake determine the relative weights of our obligations to the law and to those on the margins? What does the law mean to us who are already always the living dead, those whose deaths make the world possible?[32]

As scholars and movement lawyers have long explained, a singular focus on legal remedies for the marginalized in our context has several pitfalls and other shortcomings. First, concentrating solely or even primarily on the systemic reform of the legal system and/or direct client services has not worked. To be sure, it is no longer legal, strictly speaking, to segregate schools based on race,[33] but housing and school segregation persist.[34] Lynching is technically illegal, but it persists.[35] Police still kill Black people, Black children, legally and illegally.[36] Mass incarceration has been decried by some,[37] and yet prisons, along with a visceral, systemic need to punish, also persist and are levied against Black people

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[30] *See* LOÏC WACQUANT, PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY 43 (2009).

[31] *See* RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017); *see also* Mariame Kaba, Opinion, *Yes, We Mean Literally Abolish the Police*, N.Y. TIMES (June 12, 2020), https://perma.cc/WGG7-7D57.

[32] *See* Jared Sexton, *Ante-Anti-Blackness: Afterthoughts*, 1 LATERAL (2012), https://perma.cc/7ZM7-4BU5 (arguing that, although the world "knows itself" through the impositions of anti-Blackness and the (social) death of Black people, there may yet be possibilities for resistance to be found in and for Black life).

[33] Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 717, 78 Stat. 241.

[34] *Photos: Where the Kids Across Town Grow Up with Very Different Schools*, NPR (July 25, 2019, 11:06 AM), https://perma.cc/L2M9-5RNT.

[35] *See, e.g.*, Amir Vera, *A Georgia Man Was Chased and Killed While Jogging, His Mother Says*, CNN (May 4, 2020, 10:48 AM), https://perma.cc/H88A-92H8.

[36] *See, e.g.*, Cory Shaffer, *Cleveland Police Officer Shoots 12-Year-Old Boy Carrying BB Gun*, CLEVELAND.COM (Nov. 22, 2014), https://perma.cc/2NYU-394V (last updated Jan. 11, 2019).

[37] *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (Diane Wachtell ed., 2010).

in particular, who have always been necessarily capturable.[38] Some voting rights for Black people were secured on paper,[39] but they have since been both resisted in practice and rolled back formally.[40] Wealth inequality between Black people and white people has ballooned over time, and, even more harrowingly, inequalities in life expectancy between Black people and white people still exist.[41] I do not mean to dismiss the steps toward reducing these inequities that have been made through the law or by legal actors. But, as discussed earlier, these injustices are not accidents or anomalies; they are constitutive parts of the system as it currently exists, and they mean something about who in this country can (still) be hurt and stolen from and about what this country *is*. Appealing to such a system to change itself has not been proven effective on its own, as many scholars have observed; forms of state oppression merely shift from one form to another.[42] These so-called reforms leave the violent core of the nation intact because they must; the underlying, necessary penchant for anti-Blackness and the domination of Indigenous peoples has remained as the lifeblood of the nation-state.[43]

Second, along these lines, appealing to the state for relief reinscribes the state, the coercive power it uses to effectuate its ends, and our own status as Black (non)subjects.[44] As Anthony Farley explains, praying to the state for relief is to accept the power of the state to say "yes" but also its power to say "no": "To request equality is to surrender before one begins. To request equality is to grant one's owners the power to grant or deny one's request. To grant one's owners such a power is to surrender

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[38] *See* David Remnick, *Ten Years After "The New Jim Crow,"* NEW YORKER (Jan. 17, 2020), https://perma.cc/2LSM-PEAT.

[39] *See* Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437.

[40] *See* N'dea Yancey-Bragg, *Voting Rights Act Was John Lewis' Life's Work. 55 Years Later, Minority Voter Suppression Remains*, USA TODAY (July 31, 2020, 5:03 AM), https://perma.cc/3MU5-DLWP (last updated Aug. 5, 2020); *See* Shelby Cty. v. Holder, 570 U.S. 529 (2013) (striking down certain provisions of the Voting Rights Act of 1965).

[41] *See* Katherine Schaeffer, *6 Facts About Economic Inequality in the U.S.*, PEW RESEARCH CTR. (Feb. 7, 2020), https://perma.cc/22GA-BCT8; *see also* Press Release, N.Y. Univ. Langone Health, Large Life Expectancy Gaps in U.S. Cities Linked to Racial & Ethnic Segregation by Neighborhood (June 5, 2019), https://perma.cc/D934-QMQR.

[42] *See* BELL, *supra* note 1, at 9, 12; *see also* ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 22-39 (Greg Ruggiero ed., 2003).

[43] *See* Fred Moten, *Blackpalestinian Breath*, SOC. TEXT ONLINE (Oct. 25, 2018), https://perma.cc/R69N-PJX9 (discussing the anti-Black and anti-Indigenous practices of states).

[44] *See* FRANK B. WILDERSON III, AFROPESSIMISM 15 (Bob Weil ed., 2020) (discussing how Blackness is denied subjectivity).

oneself to one's owners entirely and completely."[45] To recognize this power is to submit to the law's (necessary) privileging of its interests—those that give it coherence and legitimacy: the erasure of Native American peoples and the infliction of perpetual suffering upon Black people as punishable, malleable, detestable flesh[46]—over our own:

> To pray for legal redress is to bow before the authority of law . . . . Law is only the relation of white-over-black to white-over-black to white-over-black. When we follow a legal rule we follow only the track that *we have ourselves laid down*. In other words, we ourselves are track, we become the track when we lay down, and we follow that track white-over-black into the future that lasts forever.[47]

Third, as various scholars have observed, focusing on legal redress to the exclusion of other tactics and remedies, which lawyers are prone to do, has the potential to block the building of power in the communities those lawyers serve, creating serious problems in movement work.[48] For example, such a focus often contains social action and energy within the domain of the courts, as opposed to building sustainable structures and practices within the community itself.[49] There is a lurking tendency for lawyers, because of our conservative, risk-averse training, to quell radical thought and tactics—in the name of precedent and rationality—and instead bow to the law.[50] Because strictly legal approaches often rely on the unique credentials, skill set, and language of lawyers, such approaches can center and empower lawyers in movement strategy, rather than empower activists and members of the community.[51] A law-focused

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[45] Anthony Paul Farley, *The Apogee of the Commodity*, 53 DEPAUL L. REV. 1229, 1238 (2004).

[46] *See* ZAKIYYAH IMAN JACKSON, BECOMING HUMAN: MATTER AND MEANING IN AN ANTIBLACK WORLD (2020) (arguing that Western science and philosophy have conceived of and violently rendered Black people as malleable containers for various anti-Black ideas, which, through contrast and hierarchy, stabilize the self-perception of the Western (i.e., white) subject.).

[47] Farley, *supra* note 45, at 1238-39.

[48] *See* Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. REV. 443, 490 (2001); Charles Elsesser, *Community Lawyering—The Role of Lawyers in the Social Justice Movement*, 14 LOY. J. PUB. INT. L. 375, 376 (2013); Eduardo R.C. Capulong, *Client Activism in Progressive Lawyering Theory*, 16 CLINICAL L. REV. 109, 109 (2009).

[49] *See* Capulong, *supra* note 48, at 147.

[50] *See id.* at 152.

[51] *See id.* at 151-53.

approach tempts lawyers and community members alike to conflate the lawyer's role with that of an organizer, which is problematic because lawyers and organizers tend to employ different frameworks and techniques.[52] Our legal system tends to atomize legal disputes and claims, often forcing legal proceedings into person-against-person conflicts and making it difficult for collective legal action, coalition building, and redress of harms on a community level.[53]

Furthermore, an adversarial solution may not be what is needed at all, but that is the default problem-solving disposition of courts and, therefore, lawyers. The very presence of lawyers can turn what ought to merely be a difficult conversation into something else entirely, substituting state coercion for community-led solutions. And, importantly, if and when legal relief is denied to a community that has put all of their hope and energy into such a remedy, momentum for the underlying movement may evaporate or be critically wounded.[54] Of course, all of these can be mitigated at least somewhat by a lawyer in a community who is aware of and trained to recognize and avoid these dangers, but these harmful tendencies inherent to traditional legal practice often exceed our best intentions and are not limited by our competency. The law is the law, after all.

However, there may be alternative theories and praxes for lawyers seeking to live and encourage life in the wake. In her work, Sharpe names "aspiration" as a form of wake work, and this form can itself take several different shapes.[55] Referring to this concept of aspiration, she writes, "What is the word for keeping and putting breath back in the body?"[56] I add: How might lawyers participate in this guarding and return of the breath? She writes further:

> What is the word for how we must approach the archives of slavery (to "tell the story that cannot be told") and the histories and presents of violent extraction *in* slavery *and* incarceration; the calamities and catastrophes that sometimes answer to the names of occupation, colonialism, imperialism, tourism, militarism, or humanitarian aid and intervention?[57]

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[52] *See* Cummings & Eagly, *supra* note 48, at 493-96.
[53] *See* Elsesser, *supra* note 48, at 376.
[54] *See* Capulong, *supra* note 48, at 130.
[55] SHARPE, *supra* note 2, at 113.
[56] *Id.*
[57] *Id.*

And how might lawyers in particular tell these untellable stories or make space for their telling in a system that does not want to hear them? What other words, lexicons, and media might we employ? Sharpe probes more: "What are the words and forms for the ways we must continue to think and imagine laterally, across a series of relations in the hold, in the multiple Black everydays of the wake?"[58] Relatedly, what are the ways in which lawyers might be able to help build and develop relationships in the wake and not just intervene in their abuse? And what are ways of addressing abuse that do not replicate the punitive impulses and harms of the carceral state?

The stakes of this—of aspiration—for Sharpe are no less than life itself:

> I've been thinking about what it takes, in the midst of the singularity, the virulent antiblackness everywhere and always remotivated, to keep breath in the Black body. What ruttier, internalized, is necessary now to do what I am calling wake work as aspiration, that keeping breath in the Black body?[59]

Elsewhere, Sharpe mentions the guilty verdict returned for Ted Wafer, Renisha McBride's murderer, describing it as something that "brought, perhaps, a little breathing room before the next onslaught, the next intake of air, the held breath."[60] She goes on to qualify this, though: "In the weather of the wake, one cannot trust, support, or condone the state's application of something they call justice, but one can only hold one's breath for so long."[61] Like Sharpe, I think guilty verdicts for murderers of Black people can feel like breathing room to some of us, giving us a sense of relief, because harm was recognized. But I do not think that guilty verdicts such as these can sustain our people. They feel like false breaths to me, like breathing in air that has insufficient oxygen, not quite enough for our lives and potentially toxic. And importantly, they are only retrospective; punishment will not raise the dead, and its deterrent effect is minimal in a society that knows itself through the death of Black people.[62]

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[58] *Id.*
[59] *Id.* at 109.
[60] *Id.* at 111.
[61] *Id.*
[62] *See* Sexton, *supra* note 32.

But are there ways that lawyers can cultivate the recognition of harm that are not motivated by a desire to punish? And are there ways lawyers can participate in the prevention of harm—insisting on the sacredness of Black breath—that are more effective than punishment? Protest and shame have long been tools of liberation movements all over the world, and lawyers have defended those protestors.[63] However, if survival is the question (and it is), lawyers in the wake ought to broaden their scope and consider desperate actions for these desperate circumstances, taking less timid steps toward helping people survive, even and especially those who are not meant to. For example, what would it look like for more lawyers to be the disruptors in court? To be willing to be held in contempt? What would it mean for lawyers, alongside (and accountable to) the communities they serve, to overrun media outlets, legislative offices, law firms, and prosecutors' offices? To occupy judges' chambers?

Similarly, if we have to fight for our breath, if violent self-defense (and violent resistance, more generally) is a preventative solution that a community embraces, what might the lawyer's role be? Of course, the lawyer can defend members of this community in court. But perhaps, at times, what survival demands, what wake work is, is for lawyers to be willing to take up arms themselves, as Mandela was during his own legal practice.[64] There is a practical bar to widespread violent rebellion here; Black people in the United States are not likely to survive a war with the United States, and regardless, that is not what I am thinking of here. I am more interested in the question of framing and of which principles—with all of their philosophical legacies and racialized baggage—emerge victorious when survival in the wake is the guiding theory for legal practice. Along these lines, and within the hold, non-violence may appear to more closely resemble an available strategy than an ethic to be adhered to, and lawyers should think critically about their role in participating in and, if appropriate, helping in the strategic guidance of violence *and* non-violence.

Within Sharpe's conception of aspiration, there is also the question of fugitivity. In *Stolen Life*, Fred Moten explicates the always-fugitive quality of Black existence as expressed in Black artistic and aesthetic formations:

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[63] *See, e.g.*, Mackenzie Shuman, *Tianna Arata Appears on ABC News; Attorney Says Charges Aim to 'Discourage Protests*,*'* TRIBUNE (San Luis Obispo) (Aug. 13, 2020, 12:26 PM), https://perma.cc/5EEV-NLVG.

[64] *See* NELSON MANDELA, LONG WALK TO FREEDOM 156-58 (1994).

> Fugitivity, then, is a desire for and a spirit of escape and transgression of the proper and the proposed. It's a desire for the outside, for a playing or being outside, an outlaw edge proper to the now always already improper voice or instrument. This is to say that it moves outside the intentions of the one who speaks and writes, moving outside their own adherence to the law and to propriety.[65]

What would it mean for wake lawyers to harness this fugitivity, this breath-in-secret, to embrace it and weaponize it? We may consider this as an extension of abolitionist resistance to the Fugitive Slave Acts of 1793 and 1850,[66] where, today, lawyers—again, in consultation with and with consent and input from communities to which they are accountable—can truly act as accomplices to the cause of freedom and survival for those who resist. I think of those like Assata Shakur and Angela Davis. Are there more Assatas—the already persecuted, already convicted (truth be damned),[67] already dead, who yet dare to resist and/or escape—to be found and supported? Might lawyers more often expand and support the fugitivity inherent in Blackness? Consider Judge Shelley Joseph, the Massachusetts district court judge accused of helping an immigrant elude U.S. Immigration and Customs Enforcement agents.[68] Might her alleged behavior be an available blueprint for lawyering in the wake, a way for lawyers to subversively embody the "ordinary note of care" Sharpe is concerned with in her work?[69]

In addition to aspiration, Sharpe also raises the twin practices of Black annotation and Black redaction as forms of wake work. She takes these practices as ways of refusing "to accede to the optics, the disciplines, and the deathly demands of the antiblack worlds in which we live, work, and struggle to make visible (to ourselves, if not to others) all kinds of Black pasts, presents, and possible futures[.]"[70] In other words, they are methods of reducing (i.e., redacting) or expanding and/or commenting on (i.e., annotating) words, images, stories, and worlds of

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[65] FRED MOTEN, STOLEN LIFE 131 (2018).

[66] *See, e.g.*, *Fugitive Slave Acts*, HISTORY.COM (Dec. 2, 2009), https://perma.cc/C824-9F4F (last updated Feb. 11, 2020).

[67] *See* Angela Davis, *Foreword* to ASSATA SHAKUR, ASSATA: AN AUTOBIOGRAPHY, at vii-x (1988).

[68] Ellen Barry, *When the Judge Became the Defendant*, N.Y. TIMES (Nov. 16, 2019), https://perma.cc/AM6S-EE5T (last updated Feb. 10, 2020).

[69] SHARPE, *supra* note 2, at 132.

[70] *Id.* at 115.

and about Black people, which are often shrouded in anti-Black rhetoric and/or violence, in order to illuminate possibilities for resistance in the wake and Black lives as they are lived: "Redaction and annotation toward seeing and reading otherwise; toward reading and seeing something in excess of what is caught in the frame; toward seeing something beyond a visuality that is . . . subtended by the logics of the administered plantation."[71]

In Sharpe's book, one example of these kinds of practices is the independent autopsy of Michael Brown's body along with her meditations on the story it tells—of an unarmed teenager shot down as he surrendered.[72] Another example she points to is filmmaker Julie Dash's representation of the violence of slavery in her film *Daughters of the Dust* through indigo dye, with which Sharpe contrasts the mutilated bodies often featured in other films about slavery.[73] In sum, Black annotation and redaction are about "say[ing] more than what is allowed by an archive that turns Black bodies into fungible flesh and deposits them there, betrayed."[74]

Lawyers can also participate in this wake work. There are particular archives lawyers must access and manipulate as a part of our profession: case law, statutes, narratives, police reports, evidence, testimony, and documents produced in discovery, to name a few. What new things might be revealed, what untellable stories might be articulated, when lawyers break free of traditional forms and norms of legal and academic discourse and into something like Sharpe's notions of annotation and redaction? If lawyers approached the law and its materials less as talismans to hide behind and more as a set of materials to be creatively grappled with and severed and spliced? The task of lawyers is to parry the legal record, to render Black life visible as it exists, which means fostering a counter-hegemonic imagination, even and especially against our systems and the narratives grounding them: "Put another way, with our own Black annotations and Black redactions, we might locate a counter to the force of the state . . . ."[75] For lawyers, this annotation may look like poetry or visual art in the middle of a brief, or a song in the middle of a trial, or more editorializing of the law in arguments, using the law as an occasion

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[71] *Id.* at 117.
[72] *Id.* at 123.
[73] *Id.* at 124-26.
[74] *Id.* at 131.
[75] *Id.* at 123.

to speak to, see, and honor Black life, as opposed to a divine tablet to be enshrined.[76] Black annotation for lawyers is to insist on the speaking of the unspeakable thing.

As the other side of Black annotation, Black redaction for lawyers may resemble something like focus, a cutting away of noise in order to foreground what matters. What radical forms of focus are available to lawyers in the wake, and how might they be implemented? Which archives may be distilled, and to what? In what form? As in annotation, lawyers should seek to not only uncover the hidden through the act of covering, as in Sharpe's focusing on the eyes in the pictures of enslaved people,[77] but they should also seek to resist the necropolitics of Black hypervisibility. There is a real temptation to broadcast Black suffering in an attempt to shock the powers that be into submission or into being moved to a particular remedy.[78] However, as Sharpe and many others have observed, such portrayals normalize the Black suffering that is already a constitutive part of the world in which we live: "That is, these images work to confirm the status, location, and already held opinions within dominant ideology about those exhibitions of spectacular Black bodies whose meanings then remain unchanged."[79] Black redaction as a frame and method, then, may allow lawyers to tell Black stories and bear witness to Black lives in the fullness of their hardship and beauty, without adding to the atmospheric suffering around us. This might mean that photographic evidence needs to be curated or portrayed in some other way. It could involve different, innovative objections being raised in court proceedings, more than objections to graphic evidence for being unfairly prejudicial, but objections on the grounds of dignity and to the kind of suffering we will accept as normal. As a strategic matter, Black redaction may mean subversive resistance through concealing something (e.g., from prosecutors, police, the courts, and other state actors and apparatuses

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[76] *See, e.g.*, N.Y. JUD. LAW § 466 (Consol. 2020) (requiring attorneys to "take the constitutional oath of office in open court" and swear to uphold the constitutions of New York and the United States upon admission to the New York Bar). The constitutional oath is an example of the orientation of lawyers to see the law as something to be enshrined rather than challenged for the sake of Black life.

[77] SHARPE, *supra* note 2, at 118-19.

[78] *See* Alisha Ebrahimji, *Some Say Sharing Videos of Police Brutality Against Black People Is Just 'Trauma Porn*,*'* CNN (Aug. 25, 2020, 2:00 PM), https://perma.cc/6V22-F3HL (explaining that some advocates believe showing such videos is necessary to hold police officers accountable for their actions).

[79] SHARPE, *supra* note 2, at 116.

—again, in partnership with and deference to the community to which the lawyer is accountable) that would bring about death.

But Black redaction does not merely limit—it also offers us a way to see differently, to imagine otherwise. Here, lawyers may explore what new stories may be told *through* the act of limiting and reducing. For example, what might a judicial opinion or police report generate if everything were redacted but the words "Black" and "resist" (as in resisting arrest)? What if we could perform some sort of statistical study on the relationship between these words in government documents? The Department of Justice (although they must never be mistaken for performers or proponents of wake work) did something like this in their investigation of Ferguson, Missouri:

> African Americans [67% of Ferguson's population] account for 95% of Manner of Walking charges; 94% of all Fail to Comply charges; 92% of all Resisting Arrest charges; 92% of all Peace Disturbance charges; and 89% of all Failure to Obey charges.[80]
>
> In the officers' view, the man resisted arrest by pulling his arms away. The officers drive-stunned him in the side of the neck.[81]
>
> Officers pushed him to the ground, began handcuffing him, and announced, "stop resisting or you're going to get tased." It appears from the video, however, that the man was neither interfering nor resisting.[82]

And, apart from empirics, Black annotation and Black redaction in legal practice ought to challenge the law itself; to highlight its inconsistencies, its technologies of death, and its deadly foundations and underpinnings; to constrict the narratives that uphold oppression and loosen the stories that honor and help those on the margins survive.[83] The task for lawyers would be to implement such practices in those venues where we have particular access and privilege alongside communities that do not. However, these challenges to Black suffering will themselves be challenged; because they are inherently destabilizing to a world stabilized

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[80] CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 62 (2015), https://perma.cc/7ZN5-NZ38.

[81] *Id.* at 36.

[82] *Id.* at 28.

[83] *See, e.g.*, RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 37-46 (2001).

by anti-Blackness, these stories are not the stories the law is inclined to tell nor will always allow to be told.[84] However, for us to survive, they must be told—by any means necessary.

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The theoretical framework explored here has no reverence for the law, but this paper is not seeking to develop theories about anarchism or chaos, although those may be legitimate means or ends for some. I am interested in seeing the law for what it is and allowing that to guide our practice of law, for the sake of surviving it along with the other conditions of the wake of slavery. In other words, this paper's primary interest is in revolting against death, what such a task might require of lawyers, and how our arsenal of tactics and theories might be expanded for the sake of this insurgency. As has been explored above, the law is steeped in the death we resist, but I recognize without reservation that it is sometimes necessary to engage with the law, often on its own terms. This undoubtedly means that a deft navigation of the law is often helpful, and intermediate measures of harm reduction through the changing of harmful laws may be important. While I maintain that Black survival sometimes demands that the law be broken, I respect that some may be hesitant to embrace this notion as a practical matter. I affirm the need for practicality and strategic thinking; resistance comes at a cost, and different lawyers may occupy different roles in the cause of Black survival, just as there are different roles available within any movement. I do not think every lawyer should always or routinely break the law.

But, extending Sharpe's metaphor, if we understand the law as an important plank in the hold that contains Black people in the wake of slavery, what would it mean for us to consider prying that plank from its position in the ship? If liberation and survival are what we need and are fighting for, if life is at stake, would this not warrant a bit of tampering with the thing constraining and killing us? What might it become if we broke that plank? Firewood? A weapon? A lever to warp or tear away other planks?[85] What would it mean for architects or carpenters—those

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[84] *See generally* WILDERSON, *supra* note 44.

[85] *See, e.g.*, Jay Willis, *Minneapolis City Council Members Announce Intent to Disband the Police Department, Invest in Proven Community-Led Public Safety*, APPEAL (June 7, 2020), https://perma.cc/H49S-BQF4 (reporting that due to the success of protests for Black lives and against police violence, Minneapolis would disband its police force).

familiar with woodwork, trained in its construction and usage—to be the ones messing with the planks? And, if the planks must be tampered with or broken so that we can live, aren't the carpenters uniquely qualified and well-positioned to do it effectively?