2021

Presumed Punishable: Sentencing on the Streets and the Need to Protect Black Lives Through a Reinvigoration of the Presumption of Innocence

Jelani Jefferson Exum
St. John's University School of Law

Presumed Punishable: Sentencing on the Streets and the Need to Protect Black Lives Through a Reinvigoration of the Presumption of Innocence

JELANI JEFFERSON EXUM*

* Professor Jelani Jefferson Exum is the Philip J. McElroy Professor at the University of Detroit Mercy School of Law. She is a member of the Oakland County Chapter of Jack and Jill of America, Inc., and would like to thank the children in Group 5 of the North Oakland/Macomb Chapter of Jack and Jill of America, Inc. for sharing their insights on this topic. Prof. Jefferson Exum presented the cases of George Floyd and Breonna Taylor to the Group, which consisted of middle-schoolers, and they came up with alternative paths that could have avoided the deaths in both cases. In George Floyd's case, the children said that the store clerk did not have to call the police, and the police did not have to assume that Mr. Floyd had actually done what the store clerk alleged. In Breonna Taylor's case, the children said that the officers could have intercepted any suspicious mail sent to Ms. Taylor at the post office. They also said that, if the police had a warrant, they should have gone to Ms. Taylor's house during the daytime, in their police uniforms, and given her time to come to the door so they could explain to her the basis of the warrant. These alternative paths—all from the point of view of presuming that Mr. Floyd and Ms. Taylor were innocent since they have not been proven guilty in court—were clear to middle school children. It is a shame that such obvious solutions do not have any legal force.

INTRODUCTION

Following the police killing of George Floyd in the summer of 2020, there has been a renewed focus on protecting Black people in America from excessive police violence. While the images of George Floyd were shocking to the public, that level of extreme violence and disregard for life has been a common aspect of the lives of Black Americans throughout history. In America, Black people are "presumed punishable."[1] Due to the historical and persistent biases against Black people, Black people find themselves subject to false assumptions about their criminality and presumptions that they are deserving of punishment. This stands in stark contrast to the presumption of innocence that has been enshrined into our American understandings of fairness in the criminal justice system. Though scholars have posited a host of suggested policing reforms in the wake of the renewed Black Lives Matter movement,[2] this Article argues that none of those reforms will lead to sustained improvement in the

1. This Article is the scholarly companion to the TEDxToledo talk delivered by the author, *#PresumedPunishable: Sentencing on the Streets by Jelani Jefferson Exum*, YouTube (Sept. 22, 2020), https://www.youtube.com/watch?v=MOXsTCdhGQE.

2. "The #Black Lives Matter movement was founded in 2013 by Alicia Garza, Patrisse Cullors, and Opal Tometi in response to the murder of unarmed 17-year-old Black child, Trayvon Martin, who was walking in a relative's gated community in Florida." *See* Thomas J. Sugrue, *2020 Is Not 1968: To understand today's protests, you must look farther back*, Nat'l Geographic (June 11, 2020), https://www.nationalgeographic.com/history/2020/06/2020-not-1968/#close. *See also* Black Lives Matter, *About*, https://blacklivesmatter.com/about/.

lives of Black Americans if they are not accompanied by the acknowledgement of the daily biases faced by Black people and the employment of new understandings of basic constitutional protections to address the effects of those biases. Through this author's "presumed punishable" concept, this Article offers a reinvigoration of the presumption of innocence as a due process requirement as a possible vehicle for protecting Black lives.

The author's previous article, *The Death Penalty on the Streets: What the Eighth Amendment Can Teach About Regulating Police Use of Force*, makes the case for treating fatal police force as punishment.[3] Criminal punishment occurs when the government takes the life, liberty, and/or property of an individual as a response to objectionable behavior of violating an aspect of a state or federal criminal code. In the context of fatal police force, a law enforcement official (a government agent) has taken the life of an individual as a response to that person's perceived objectionable behavior toward the officer or others, such as threatening the life of the officer, other officers, or the public. Reconceptualizing police use of deadly force as a form of punishment recasts that force by police officers as the death penalty being administered on the streets, outside of the protections given in the criminal court system. That article specifically offers that infusing an Eighth Amendment "respect for human dignity" standard into the reasonableness analysis for the use of fatal force by police officers avoids the pitfalls of the traditional, Fourth Amendment reasonableness analysis. The instant Article builds on this idea by exploring the underlying obstacle faced by Black people in America—that they are presumed punishable by police officers and lay people alike. In this way, the force that police employ against Black people, whether fatal or not, acts as extrajudicial "sentencing on the street" that should be considered unconstitutional because it contravenes the presumption of innocence.

The presumption of innocence is said to be a bedrock of American due process understandings.[4] However, when Black people are sentenced on the street—punished for their perceived objectionable behavior—by police or other citizens, the presumption of innocence and all of its safeguards are frustrated. This Article examines the his-

3. *See generally* Jelani Jefferson Exum, *The Death Penalty on the Streets: What the Eighth Amendment Can Teach About Regulating Police Use of Force*, 80 MO. L. REV. 987 (2015).

4. *See In re* Winship, 397 U.S. 358, 363 (1970) (tying the presumption of innocence to due process).

torical foundations and later development of the presumption of innocence to argue that, in order to adequately protect Black people in America from violence at the hand of the government, the application of the presumption of innocence must be expanded and strengthened. Part I of the Article explains the concept of being "presumed punishable," through a discussion of the development of race-based policing and its current consequences. In Part I, the Article also posits that policing has been used as a tool to facilitate the presumption that Black people are punishable. The trauma of that presumption is explored in Part I, as well. Part II of the Article offers the presumption of innocence as a shield to protect Black lives from the consequences of being presumed punishable. In Part II, the Article explores the origins of the presumption of innocence and exposes the failure to give sufficient substance to that presumption in the United States. Part III proposes resurrecting the original object of the presumption of innocence—to treat people as innocent before a conviction, thus guarding them from punishment before an adjudication of guilt. As Part III details, in order to use the presumption of innocence to save Black lives, policing must be viewed as a means of inflicting punishment, and courts must see the presumption of innocence as a constitutional requirement guarding people from that punishment. In Part IV, the Article uses the cases of George Floyd and Breonna Taylor to suggest reforms that would incorporate a renewed and robust presumption of innocence.

I. PRESUMED PUNISHABLE

From the arrival of the first enslaved Africans to the English Colony of Virginia, Black people in America have been presumed punishable in both de facto and de jure contexts.[5] In the social context, a presumption acts as "the ground, reason, or evidence lending probability to a belief."[6] In the legal context, a presumption is "a legal inference as to the existence or truth of a fact not certainly known that is drawn from the known or proved existence of some other fact."[7] Both versions of this concept have operated to the detriment

5. For a scathing assessment of the pervasive impact of the beginning of slavery in the United States, *see The 1619 Project*, N.Y. TIMES MAG., https://www.nytimes.com/interactive/2019/08/14/magazine/1619-america-slavery.html (last visited Dec. 30, 2020).

6. *Presumption*, MERRIAM WEBSTER, https://www.merriam-webster.com/dictionary/presumption (last visited Dec. 30, 2020).

7. *Id.*

of Black people for the entirety of their presence in the United States. Seeds of racism that were planted during the slavery period blossomed into the "evidence" of Black people's criminality that was taken as "the existence of truth" as modern-day policing developed. In both law and social understanding, Blackness has come to be associated with criminality and criminal desert.

A. The Development of Race-Based Policing and the Presumption of the Need to Control Black People Through Force

During slavery, "the use of race as a 'free-floating proxy' for criminality" was necessary for social control and manipulation, and crucial in upholding "the de facto and de jure unequal social relationships arising out of slavery."[8] Policing was central to upholding this oppressive system. Slave patrols in the 1700s were the beginning of formal policing in the United States.[9] As Professor Brandon Hasbrouck explains, "[s]ince America's founding, this assumption of dangerousness subjected free [B]lack people to constant scrutiny and invasion of privacy by white authorities."[10] He elaborates:

> The principal tasks of slave patrol policing were to terrorize enslaved [B]lack [people]s to deter revolts, capture and return enslaved [B]lack [people] trying to escape, and discipline those who violated any plantation rules. Slave patrols had significant and unfettered power within their communities that derived from Slave Codes. Slave patrols would forcefully enter homes to look for criminal activity—such as harboring enslaved [B]lack [people] seeking freedom—or simply because they could.[11]

This focus on the subjugation of Black people through police power, and intertwining the police function with controlling Black people, fostered a view of Black people as requiring law enforcement intervention early on in U.S. history. This racist development of police authority occurred in the North as well. During the 1830s, police organizations in the Northern states were created to be the formal control mechanism for free Black people who were considered dangerous.[12] The consequences of the race-focused beginning of policing

8. William M. Carter, Jr., *A Thirteenth Amendment Framework for Combatting Racial Profiling*, 39 HARV. CIV. RTS. CIV. LIBERTIES L. REV. 17, 56–57 (2004).

9. Brandon Hasbrouck, *Abolishing Racist Policing with the Thirteenth Amendment*, 68 UCLA L. REV. DISC. 200, 206–208 (2020).

10. *Id.* at 206–08.

11. *Id.*

12. *Id.*

have led scholars to recognize modern-day racial profiling as a "badge and incident of slavery."[13]

The pervasiveness of the race-based policing that took root during slavery was evident at slavery's official end. The Reconstruction Era began with the passage of the Emancipation Proclamation in 1863[14] and the adoption of the Thirteenth Amendment to formally end slavery in the United States in 1865.[15] However, from the very beginning of this seemingly-progressive moment,[16] southern state legislatures passed Black Codes to maintain white supremacy and to continue controlling the labor and behavior of Black people.[17] Again, the police were used to enforce this "neo-enslavement."[18] The Black codes were carried out "by a police apparatus and judicial system in which [B]lacks enjoyed virtually no voice whatever. Whites staffed urban police forces as well as State militias, intended, as a Mississippi white put it in 1865, to 'keep good order and discipline amongst the negro population.'"[19]

---

13. Carter Jr., *supra* note 8, at 25.

14. Proclamation No. 95, Emancipation Proclamation, Jan. 1, 1863; Presidential Proclamations, 1791–1991; Record Group 11; General Records of the United States Government; National Archives.

15. U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.").

16. The Reconstruction Era can be called "seemingly progressive" because, though there were gains for Black people, sanctioned violence against Black people continued during this time. At the same time that Black men were elected to office at every level of government (including two U.S. Senators, twenty congressmen, and an estimated two thousand additional Black office holders at the state and local levels), *see* HENRY LOUIS GATES, JR., STONY THE ROAD: RECONSTRUCTION, WHITE SUPREMACY, AND THE RISE OF JIM CROW 8 (2019), the Ku Klux Klan, a racist domestic terror group, was gaining strength. *See* PBS, *Grant, Reconstruction and the KKK*, AMERICAN EXPERIENCE, https://www.pbs.org/wgbh/americanexperience/features/grant-kkk/ (accounting how the Ku Klux Klan gained political prominence during this time).

17. As succinctly explained by the Editors of Encyclopedia Britannica:

> The black codes enacted immediately after the American Civil War, though varying from state to state, were all intended to secure a steady supply of cheap [labor], and all continued to assume the inferiority of the freed slaves. There were vagrancy laws that declared a black person to be vagrant if unemployed and without permanent residence; a person so defined could be arrested, fined, and bound out for a term of [labor] if unable to pay the fine. Apprentice laws provided for the "hiring out" of orphans and other young dependents to whites, who often turned out to be their former owners. Some states limited the type of property African Americans could own, and in other states black people were excluded from certain businesses or from the skilled trades. Former slaves were forbidden to carry firearms or to testify in court, except in cases concerning other [B]lacks. Legal marriage between African Americans was provided for, but interracial marriage was prohibited.

Black Code, UNITED STATES HISTORY, available at https://www.britannica.com/topic/black-code.

18. GATES, JR., *supra* note 16, at 4.

19. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 203 (Henry Steele Commager & Richard B. Morris eds.) (1988).

This purported need to maintain good order and discipline amongst Black people—born during the slave era—persists into the present day. It is the cause of Black people being presumed punishable as they go about their everyday lives. Given our history, this is an unsurprising reality. While slavery lasted nearly 300 years, Reconstruction was merely 10 years and was followed by approximately 100 years of Jim Crow segregation in the United States. And, it was actually during Reconstruction that white people organized themselves into terror groups to systemically brutalize Black people.[20] The Equal Justice Initiative has reported that during Reconstruction, "at least 2,000 [B]lack women, men and children were victims of racial terror lynchings."[21] This means that the United States—and its people—had practiced deep-seated racism against African Americans for over 400 years. That racism persists in our American institutions to this day. This systemic racism[22] that runs over four centuries deep has fostered and cultivated the presumption that Black people must be controlled through force and violence—by police and lay persons alike.

During the Jim Crow period following Reconstruction—a time of renewed legalized race-based oppression and violence—the idea that Black people were presumed worthy of and in need of punishment was ever present. In 1928, Thorsten Sellin, "one of the nation's most respected white sociologists,"[23] recognized:

> We are prone to judge ourselves by our best traits and strangers by their worst. In the case of the Negro, stranger in our midst, all beliefs by him prejudicial to him aid in intensifying the feeling of racial antipathy engendered by his color and his social status. The colored criminal does not as a rule enjoy the racial anonymity which cloaks the offenses of individuals of the white race.[24]

---

20. EQUAL JUSTICE INITIATIVE, LYNCHING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR, (3d ed. 2017), https://eji.org/reports/lynching-in-america/.

21. EQUAL JUSTICE INITIATIVE, RECONSTRUCTION IN AMERICA: RACIAL VIOLENCE AFTER THE CIVIL WAR, 1865–1876 (2020) https://eji.org/report/reconstruction-in-america/journey-to-freedom/.

22. Systemic, structural, or institutional racism refers to the "systems and structures that have procedures or processes that disadvantages African Americans." N'dea Yancey-Bragg, *What is Systemic Racism? Here's What It Means and How You Can Help Dismantle It*, USA TODAY (June 15, 2020), https://www.usatoday.com/story/news/nation/2020/06/15/systemic-racism-what-does-mean/5343549002/. For an informative overview of how racism is embedded in American institutions, *see* RACEFORWARD, *What Is Systemic Racism?*, https://www.raceforward.org/videos/systemic-racism (last visited Apr. 13, 2021).

23. KHALIL GIBRAN MUHAMMAD, THE CONDEMNATION OF BLACKNESS RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA 2 (2010).

24. *Id.*

Sellin's words highlight that it is simply that the Black man is a Black man in America—"his color and his social status"—that leads to views that he is more likely a criminal than others. His mere existence warrants him being presumed punishable. Due to that reality, this time was fraught with state-sanctioned violence and terror against Black people. For the period between 1877 and 1950, there are over 4,400 documented lynchings of Black people in the United States.[25] The lynchings, police beatings, and other brutality that Black people faced during his time were, of course, based in racial hatred. This terrorizing was also founded on an attitude that Black people who dared step out of line needed to be taught a lesson. They needed to be punished. Therefore, Black people wore the anxiety of being presumed to have stepped out of line daily. In his article for The 1619 Project, famed activist-lawyer and Director of the Equal Justice Initiative, Bryan Stevenson, uses the following example of violence against Black people to highlight this point:

> Anything that challenged the racial hierarchy could be seen as a crime, punished either by the law or by the lynchings that stretched from Mississippi to Minnesota. In 1916, Anthony Crawford was lynched in South Carolina for being successful enough to refuse a low price for his cotton. In 1933, Elizabeth Lawrence was lynched near Birmingham for daring to chastise white children who were throwing rocks at her.[26]

The idea that these were punishable offenses and that even laypersons were empowered to make the decision to inflict the punishment is what Black people today continue to face.[27] As Bryan Stevenson further explained about the Jim Crow era:

> It's not just that this history fostered a view of [B]lack people as presumptively criminal. It also cultivated a tolerance for employing any level of brutality in response. In 1904, in Mississippi, a [B]lack man was accused of shooting a white landowner who had attacked him. A white mob captured him and the woman with him, cut off their ears and fingers, drilled corkscrews into their flesh and then

25. EQUAL JUSTICE INITIATIVE, RECONSTRUCTION IN AMERICA: RACIAL VIOLENCE AFTER THE CIVIL WAR, 1865–1876 (2020), https://eji.org/report/reconstruction-in-america/journey-to-freedom/.

26. Bryan Stevenson, *Slavery Gave America a Fear of Black People and a Taste For Violent Punishment. Both Still Define Our Criminal Justice System*, N.Y. TIMES, (Aug. 14, 2019), https://www.nytimes.com/interactive/2019/08/14/magazine/prisonindustrial-complex-slavery-racism.html.

27. Taja-Nia Y. Henderson & Jamila Jefferson-Jones, *#LivingWhileBlack: Blackness As Nuisance*, 69 AM. U. L. REV. 863 (2020) (explaining that blackness is seen as a property law nuisance in white spaces and criminal law is used to control that nuisance).

> burned them alive—while hundreds of white spectators enjoyed deviled eggs and lemonade.

These horrific examples show that that Black people were treated as though they were deserving of punishment in a way that emboldened whites to inflict, and even celebrate, that chastisement. We see the legacy of that audacity in the present day.

B. The Current Consequences of Being Presumed Punishable

We do not have to do much digging to find current day examples of Black people being presumed punishable in a manner that harkens back to slavery, Reconstruction, and Jim Crow. The examples are in our everyday news cycles. One such story is that of Ahmaud Arbery. On Sunday, February 23, 2020, Ahmaud Arbery, a Black man, was jogging near his home in a coastal South Georgia neighborhood when he was confronted by a white man and his son.[28] The man, Gregory McMichael, who was not a police officer, claimed he thought Mr. Arbery looked like a man suspected in several break-ins in the area.[29] McMichael called to his son, Travis McMichael, and the men grabbed a .357 Magnum handgun and a shotgun, and got into a pickup truck.[30] They tried to cut off Mr. Arbery with their truck as he ran away from them.[31] A third man, William Bryan, also joined the father and son in the pursuit.[32] According to a video taken by Bryan, when the men confronted Mr. Arbery, a struggle ensued, and then three shotgun blasts rang out.[33] Mr. Arbery staggers away and then drops to the ground, dead.[34] Mr. Arbery was unarmed, and there is no evidence that he was involved in burglarizing a home.[35] Months later, once video of the killing emerged, and during the time that the nation was already experiencing social unrest due to the police killing of George Floyd, Mr. Arbery's case was sent to district attorney George E. Barnhill.[36] Just as the men who accosted and ultimately killed Mr. Arbery presumed that he was punishable, Barnhill used the same presumption to lead to the conclusion that the trio had lawfully pursued "a

28. Richard Fausset, *What We Know About the Shooting Death of Ahmaud Arbery*, N.Y. TIMES (Nov. 13, 2020), https://www.nytimes.com/article/ahmaud-arbery-shooting-georgia.html.
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*

burglary suspect," and quoted a state law as saying, "[a] private person may arrest an offender if the offense is committed in his presence or within his immediate knowledge."[37] As it has played out for centuries—the presumption that punishment is deserved has deadly consequences for Black people.

There are a heartbreaking and infuriating number of cases in which the presumption that Black people are deserving of punishment leads to their death. Our current examples often harken back to the tragic stories that are cemented in Black history. Today we have the loss of 17-year-old Trayvon Martin[38] to remind us of yesterday's loss of 14-year-old Emmitt Till.[39] When police killed 12-year-old Tamir Rice[40] it led to flashbacks of police killing Leon Mosely in Detroit in

37. *Id.* Ultimately, the three men involved in the shooting were arrested.

38. African American teen, Trayvon Martin, was killed by George Zimmerman on February 26, 2012. Trayvon, who was 17 years old and dressed in a hooded sweatshirt, was walking in a gated community in which his father's fiancé lived, after having gone to a convenience store to buy a bag of Skittles and a bottle of juice. Zimmerman, a neighborhood watch volunteer, was patrolling the community and claimed that he thought Trayvon looked suspicious. Zimmerman followed and then confronted Trayvon and claimed to have fatally shot Trayvon out of self-defense during a subsequent physical altercation. *Florida Teen Trayvon Martin Is Shot and Killed*, HISTORY (Nov. 12, 2013), https://www.history.com/this-day-in-history/florida-teen-trayvon-martin-is-shot-and-killed.

39. On August 28, 1955, while visiting family in Mississippi, 14-year-old Emmett Till, a Black boy from Chicago, was heinously murdered for allegedly flirting with a white woman. The claim was that, four days earlier, Emmett had gone to a country store, bought some candy, and on the way out said, "Bye, baby" to Carolyn Bryant, the white woman behind the counter. Bryant also claimed that Emmett grabbed her and made other lewd advances, including whistling at her, as he left the store. Learning of the alleged incident, Roy Bryant, the store owner and the woman's husband, along with his half-brother, J.W, Milam, accosted Emmett from his home. The pair tortured Emmett and threw him into the Tallahatchie River with a heavy cotton gin fan tied to his neck with barbed wire. Three days later, when Emmett's body was recovered, it was grotesquely disfigured. To call attention to the brutality, Emmett's mother, Mamie Till Bradley, insisted on an open casket funeral. Decades later, Carolyn Bryant recanted her story, admitting that Emmett had never touched her and that she had lied in her court testimony against him. *See Emmett Till is Murdered,* HISTORY (Feb. 9, 2010), https://www.history.com/this-day-in-history/the-death-of-emmett-till; *see also*, Michael Ray, *Emmett Till: American Murder Victim*, BRITANNICA (Sept. 18, 2020), https://www.britannica.com/biography/Emmett-Till.

40. On November 22, 2014, 12-year-old African American boy, Tamir Rice, went to play at a park near his home in Cleveland, Ohio. When an older friend of his was going to leave that park, Tamir asked the friend if he could play with the friend's airsoft toy pistol until the friend came back. The friend complied. As Tamir played, a witness called into 911, and calmly, after exchanging pleasantries, told the dispatcher that there was a male "probably a juvenile" in the park pointing a pistol that was "probably fake" at people and scaring them. Within just two seconds of the officers' arrival at the scene, they shot Tamir dead. Sheila Dewan & Richard Oppel, Jr., *In Tamir Rice Case, Many Errors by Cleveland Police, Then a Fatal One*, N.Y. TIMES (Jan. 22, 2015), https://www.nytimes.com/2015/01/23/us/in-tamir-rice-shooting-in-cleveland-many-errors-by-police-then-a-fatal-one.html.

1948.[41] While we have the disturbing examples of everyday citizens taking matters into their own hands to exact punishment on Black people whom they have determined deserve punishment, sometimes these individuals call the police with the hopes that the police will execute the punishment for them. In just the past few years, news outlets have amassed lists of the mundane, non-threatening activities that Black people have been enjoying when someone—typically a white person—views that activity with suspicion and decides to call the police.[42] It only makes sense that the person who calls the police does so because she believes that the police will presume that the Black person is punishable and act accordingly. Current policing strategies and responses support this view.[43]

C. Police as the Tool of the Presumption

Just as policing developed with a raced-based objective, it is often used today as a tool of pervasive racial bias, and, likewise, racial bias has become a tool for policing. Even in the last few years, polls show that a majority of Americans have recognized that police are more

41. In 1948, Detroit police fatally shot 15-year-old Black boy, Leon Mosely, in the back after he led them on a high-speed chase in a stolen car. Bill McGraw, *DPD's troubled relationship with Black Detroiters spans decades*, DETROIT FREE PRESS (June 14, 2020), https://www.freep.com/indepth/news/local/michigan/detroit/2020/06/14/detroit-police-department-black-residents/5334470002/. Though police claimed that Leon was resisting arrest and trying to escape, witnesses told an investigative panel that the police beat up Mosely and then shot him as he staggered down the street. An autopsy confirmed a skull fracture and other injuries consistent with the witness accounts. B.J. WIDICK, DETROIT: CITY OF RACE AND CLASS VIOLENCE 123 (Wayne State U. Press, rev. ed. 1989).

42. In December 2018, CNN published a story entitled "Living While Black" and listed several of the "routine activities for which police were called on African-Americans" that year. The list includes: operating a lemonade store; golfing too slowly; waiting for a friend at Starbucks; barbecuing at a park; working out at a gym; campaigning door to door; moving into an apartment; mowing the wrong lawn; shopping for prom clothes; napping in a university common room; asking for directions; not waving while leaving an Airbnb; redeeming a coupon; selling bottled water on a sidewalk; eating lunch on a college campus; riding in a car with a white grandmother; babysitting two white children; wearing a backpack that brushed against a woman; working as a home inspector; working as a firefighter; helping a homeless man; delivering newspapers; swimming in a pool; shopping while pregnant; driving with leaves on a car; and trying to cash a paycheck. Brandon Griggs, *Living While Black*, CNN (Dec. 28, 2018), https://www.cnn.com/2018/12/20/us/living-while-black-police-calls-trnd/index.html.

43. Cedric Alexander, *Racially Biased 911 Calls are a Huge Problem. This isn't a Solution*, CNN (June 5, 2019), https://www.cnn.com/2019/06/05/opinions/racially-biased-911-calls-living-while-black-alexander/index.html. *See also* Maria Sacchetti, Shayna Jacobs & Abigail Hauslohner, *Public outrage, legislation follow calls to police about black people*, WASH. POST (May 27, 2020), https://www.washingtonpost.com/national/public-outrage-legislation-follow-white-womans-call-to-police-about-black-man-in-central-park/2020/05/27/94b219a6-a049-11ea-9590-1858a893bd59story.html.

likely to use force against a Black person.[44] But, even with this realization, when asked, "[h]ow serious is the problem of police violence against the public?," even in 2020, only 48 percent of Americans answered that the problem is extremely serious or very serious.[45] These responses are, of course, racially divided—with 85 percent of Black Americans seeing the severity of the problem of police violence, but only 39 percent of white Americans feeling the same way. How can a majority of Americans believe that police are more likely to use force against a Black person and still believe that there is not a serious problem of police violence against the public? This is a logical line of reasoning for someone who presumes that Black people are more likely than others to be deserving of that police force. To be clear, however, presuming that Black people are punishable is not the same as believing that it is always fair to punish them. In June 2020, 72 percent of Americans (including 70 percent of white Americans) admitted that white people are treated more fairly than Black people when dealing with the police.[46] Presuming that Black people are punishable is not about fairness, it is about control. These numbers make sense when viewed in light of the historic use of police to "keep good order and discipline amongst the [Black] population."[47]

In many of the news accounts of white people calling the police to the scene to deal with a Black person, it is done to control and discipline that Black person's behavior. We saw this in the May 2020 situation with Amy Cooper, a white woman, who threatened to call the police to control the behavior of Christian Cooper, a Black man who was in a public park carrying out his pastime of bird-watching.[48] According to interviews with both Coopers (who are not related), Christian Cooper admonished Amy Cooper for not having her dog on a leash per the park rules.[49] At some point during their exchange (which Mr. Cooper began to record on his cell phone), Amy Cooper

44. *Significant Shifts in Attitudes on Race and Policing*, AP-NORC, https://apnorc.org/projects/significant-shifts-in-attitudes-on-race-and-policing/ (last visited June 5, 2020) (reporting that in 2017, 52% of Americans polled said that police are more likely to use force against a black person. This number was up to 55% in 2019, and up to 61% in 2020).

45. *Id.*

46. *Id.*

47. FONER, *supra* note 19, at 203.

48. Amir Vera & Lara Ly, *White woman who called police on a black man bird-watching in Central Park has been fired*, CNN (May 26, 2020), https://www.cnn.com/2020/05/26/us/central-park-video-dog-video-african-american-trnd/index.html.

49. *Id.*

says that she will call the police.[50] She tells Mr. Cooper, "I'm going to tell them there's an African American man threatening my life."[51] The video shows Amy Cooper making a call on her cell phone and saying, "There's a man, African American, he has a bicycle helmet. He is recording me and threatening me and my dog."[52] Later she adds in a distraught tone, "I'm being threatened by a man in the Ramble. Please send the cops immediately!"[53] As a Black man, Mr. Cooper clearly understood what was going on. He explained, "I videotaped it because I thought it was important to document things. Unfortunately, we live in an era with things like Ahmaud Arbery, where Black men are seen as targets. This woman thought she could exploit that to her advantage, and I wasn't having it."[54] Mr. Cooper knew that Amy Cooper was trying to use the police as a tool to support her anti-Black bias. She knew that it was unfair to do so (and later issued an apology),[55] but she did it anyway because she understood that, if the police responded to her call, she was more likely to be seen as innocent than would Mr. Cooper.

In the same way that people use the police as a tool for their racial bias, the police have used racial bias as a tool in their law enforcement strategies. Professor William Carter, Jr. has explored the ways in which modern-day racial profiling[56] used by police is a "badge and incident of slavery."[57] He writes of the stigma of dangerousness and criminality that, incident to slavery's legacy, automatically attaches to Blackness. As he explains, the stain is perpetual, onerous, and cannot be overcome by "high personal achievement, . . . education, . . . wealth," or "personal appearance."[58] In his words, "racial profiling is a modern manifestation of the historical presumption, still lingering from slavery, that African Americans are congenital

50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.* (In her apology, Amy Cooper said, "I think I was just scared. When you're alone in the Ramble, you don't know what's happening. It's not excusable, it's not defensible.").
56. For a discussion of racial profiling by police and other individuals, and the dangerous consequences to Black people to which these faulty views of Black criminality contribute, *see* Jelani Jefferson Exum, *Sentencing Disparities and the Dangerous Perpetuation of Racial Bias*, 26 WASH. & LEE J. C. R. & SOC. JUST. 491, 494–98 (2020).
57. Carter, Jr., *supra* note 8, at 24.
58. *Id.* at 25–26.

criminals rightfully subject to constant suspicion because of their skin color."[59] He further writes:

> [T]he legally enforced stereotype of [B]lack criminality has a particularly injurious effect on African Americans, given their history of enduring legally enforced and officially sanctioned enslavement, apartheid and mistreatment. The image in the collective white mind of [B]lacks (particularly [B]lack men) as congenital criminals is perhaps the most deeply entrenched stereotype pervading the [B]lack-white relationship in America. The pervasiveness of this assumption reveals that it rests upon deeply rooted historical attitudes and is not simply the result of individual racial bias . . . . This stigma remains one that African Americans cannot escape, regardless of their individual circumstances.[60]

Studies on police practices bear out this truth that Black people cannot escape being presumed punishable by the police. When officers hold the pervasive stereotypes of Black people as criminals, it can be fatal.[61] These stereotypes result in a higher risk of the police perceiving Black people as dangerous during an interaction than is true for non-Black people.[62] The consequence of this biased policing is too often deadly for Black people. In 2019, police officers fatally shot and killed over one thousand people.[63] Unsurprisingly, Black people were the most at risk for this violence. Black people are killed by police officers at more than twice the rate of white people.[64] The

---

59. *Id.* at 56.

60. *Id.* at 24–25.

61. Zaid Jilani & Jeremy Adams, *How Challenging Stereotypes Can Save Blacks*, GREATER GOOD SCI. CTR. (June 8, 2020), https://greatergood.berkeley.edu/article/item/howchallengingstereotypescansaveblacklives.

62. *See* Aldina Mesic, Lydia Franklin, Alev Cansever, Fiona Potter, Anika Sharma, Anita Knopov & Michael Siegel, *The Relationship Between Structural Racism and Black-White Disparities in Fatal Police Shootings at the State Level*, 110 J. NAT'L MED. ASS'N 106, 108 (2018) (reporting the results of a study about the "relationship between state-level structural racism and Black-White disparities in police shootings of victims not known to be armed").

63. *See Fatal Force: 1,004 People Have Been Shot and Killed by Police in the Past Year*, WASH. POST, https://www.washingtonpost.com/graphics/investigations/police-shootings-database/ (last visited July 16, 2020).

64. *See generally The Counted: People Killed by Police in the US*, GUARDIAN, https://www.theguardian.com/us-news/ng-interactive/2015/jun/01/the-counted-police-killings-us-database (last visited Apr. 23, 2019) (noting the rate of death for young Black men was five times higher than white men of the same age, out of the 1,146 people killed by police in 2015); *Law Enforcement and Violence: The Divide Between Black and White Americans*, ASSOCIATED PRESS AND NORC, https://apnorc.org/projects/law-enforcement-and-violence-the-divide-between-black-and-white-americans/ (last visited Oct. 21, 2020); *see also* Ryan Gabrielson, Eric Sagara & Ryan Grochowski Jones, *Deadly Force, in Black and White: A ProPublica Analysis of Killings by Police Shows Outsize Risk for Young Black Males*, PROPUBLICA (Oct. 10, 2014, 11:07 AM), https://www.propublica.org/article/deadly-force-in-black-and-white; David Johnson, Trevor Tress, Nichole Burkel, Carley Taylor & Jospeh Cesario, *Officer Characteristics and Racial Dis-*

consequences of being presumed punishable by police are staggering. Over the course of their life, approximately 1 in every 1,000 Black men can expect to be killed by police.[65] Some might argue that this is so based on some police officers' faulty belief that Black people are more likely to be involved in criminal activity and, therefore, deadly force may be required against them at higher rates. In fact, across races, people overestimated Black participation in violent crime by over 10 percent.[66] When asked about burglaries, illegal drug sales, and juvenile crimes, whites overestimated the percentage of those crimes committed by African Americans by as much as 30 percent.[67] These erroneous estimates are, themselves, rooted in racial bias. The truth is that, while 83 percent of victims of fatal police force were reported to be armed, Black victims were more likely to be unarmed (14.8 percent) than white (9.4 percent) or Hispanic (5.8 percent) victims.[68] The race of the officer appears to also play a part in their view of the need to use force against Black people. A study examining more than two million 9-1-1 calls in two cities showed that that white officers dispatched to Black neighborhoods fired their guns five times as often as Black officers dispatched for similar calls to the same neighborhoods.[69] It is not the individual Black people who are the problem—at least not to a greater extent than a person of any other race. The problem is that Black people are living under the constant threat of being presumed punishable just because they are Black people in America.

D. The Trauma of Being Presumed Punishable

Racial profiling—both by police and the public at large—causes Black people deemed criminals to experience "fear, anxiety, humilia-

parities in Fatal Officer-Involved Shootings, 116 PROCEEDINGS OF THE NAT'L ACAD. SERV. 15877, 15877 (Aug. 6, 2019).

65. Frank Edwards, Hedwig Lee & Michael Esposito, *Risk of being killed by police use of force in the United States by age, race–ethnicity, and sex*, 116 PROCEEDINGS OF THE NAT'L ACAD. SERV. 16793, 16794 (Aug. 20, 2019).

66. *Race and Punishment: Racial Perceptions of Crime and Support for Punitive Policies*, THE SENTENCING PROJECT at 13 (2014) https://www.sentencingproject.org/publications/race-and-punishment-racial-perceptions-of-crime-and-support-for-punitive-policies/.

67. *Id.*

68. Sarah DeGue, Katherine A. Fowler & Cynthia Calkins, *Deaths Due to Use of Lethal Force by Law Enforcement: Findings From the National Violent Death Reporting System, 17 U.S. States, 2009–2012*, 51 AM J. PREV. MED. S173–S187 (Nov. 2016).

69. Mark Hoekstra & Carly Will Sloan, National Bureau of Economic Research Working Paper 26774 (2020) (cited in Lynne Peeples, *What the data say about police brutality and racial bias – and which reforms might work*, NATURE (June 19, 2020), available at: https://www.nature.com/articles/d41586-020-01846-z#ref-CR4.

tion, anger, resentment, and cynicism."[70] "Cultural trauma" describes "the traumatic stress and mental and psychological impact that [B]lack people suffer as a result of the relentless effects of systemic oppression, discrimination, and racism."[71] It is a phenomenon that "occurs when groups endure horrific events that forever change their consciousness and identity."[72] Cultural trauma collectively subjects members of a group to "an atrocious, disturbing event that permanently scars group consciousness, 'marking their memories forever and changing their future identity in fundamental and irrevocable ways.'"[73] The trauma of living while Black, of being presumed punishable in America, is the type of cultural trauma that "is transmitted collectively and inter-generationally over time."[74] This "chronic exposure to racism"[75] is what leads Black parents, generation after generation, to give "The Talk" to their children about how to behave when they are stopped by police or are threatened with having the police called to discipline them.[76] As one parent explained, "The Talk" is given because, "[w]e want them to come home. Everything comes out of that. We do it so that they won't be killed, so that they can survive."[77] Parents understand that they cannot control if their Black children will be presumed punishable. Therefore, it seems as though a

70. Carter, Jr., *supra* note 8, at 23.

71. For a further discussion of this concept, *see* Jalila Jefferson-Bullock & Jelani Jefferson Exum, *That's Enough Punishment: Situating Defunding the Police Within Anti-Racist Sentencing Reform*, 48 FORDHAM URB. L. J. (forthcoming Spring 2021); *see* Robert T. Carter, Veronica E. Johnson, Katheryn Roberson, Silva L. Mazzula, Katherine Kirkinis & Sinead Sant-Bark, *Race Based Traumatic Stress, Racial Identity Statuses, and Psychological Functioning: An Exploratory Investigation*, 48 PROF. PSYCHOL. RES. & PRAC. 30, 30 (2017); *see also* Thema Bryant-Davis, *The Case for Race-Based Traumatic Stress*, 35 COUNS. PSYCH. 135 (2007).

72. Angela Onwuachi-Willig, *The Trauma of the Routine Lessons on Cultural Trauma from the Emmett Till Verdict*, 34 SOC. THEORY 335, 335 (2016).

73. Jefferson-Bullock et al., *supra* note 71 (quoting Onwuachi-Willig, *supra* note 72, at 336).

74. *Id.* (citing Nicole Tuchinda, *The Imperative for Trauma-Responsive Special Education*, N.Y.U. L. REV. 766, 796 (2020)).

75. *Id.*

76. The terms "behave" and "discipline" are used intentionally here to stress that, for Black people, being presumed punishable is all about the police and the public using force and violence against you to control your behavior and to punish you for not behaving in a manner that they have deemed appropriate. For a deeper understanding of "The Talk" that Black parents have with their Black children, *see* HiHo Kids, *Black Parents Explain How to Deal with the Police — HiHo Kids*, YOUTUBE (June 9, 2020), https://www.youtube.com/watch?v=drqufuL6eD8&feature=emb_logo; *see also* German Lopez, *Black parents describe "The Talk" they give to their children about police*, VOX (Aug. 8, 2016, 11:40 AM), https://www.vox.com/2016/8/8/12401792/police-black-parents-the-talk; *see also* Rhea Mahbubani, *As police violence comes under more scrutiny, Black parents say they're still giving their kids 'The Talk' about dealing with cops*, INSIDER (June 27, 2020) (explaining that "'The Talk' can be traumatic for both children and parents").

77. Mahbubani, *supra* note 76.

parent's only choice is to help their children to navigate the presumption in the way that they and their parents before them have had to do for themselves. However, we live in a country that at least purports to embrace another concept—the presumption of innocence. Giving legal force to the presumption of innocence in spaces that will actually protect Black lives can be an avenue to actually protecting those lives.

II. THE PRESUMPTION OF INNOCENCE AND THE RIGHT TO LIVE AS INNOCENT

The presumption of innocence has been described as a piece of the very "foundation of the administration of our criminal law."[78] However, the truth is that it is a protection that has been dramatically reduced in its force in American jurisprudence. Despite that reality, both the foundations and the failures of the presumption of innocence in the United States are instructive and support the argument for reinvigoration. It is a concept that has promise in protecting the sanctity of life beyond the courtroom. That it is a human rights protection is evidenced by the United Nations incorporating the standard into its Declaration of Human Rights in 1948, and the European Convention for the Protection of Human Rights following suit in 1953.[79] The principle is also found in the United Nations International Covenant on Civil and Political Rights.[80] It is a value that is expressed in some form throughout legal systems across the world. A look at the origins of the presumption of innocence and its development (or, perhaps, its decline) reveals the principle's promise for protecting lives from police violence—especially Black lives.

A. The Origins of the Presumption of Innocence

In American jurisprudence, the presumption of innocence has been reduced to an evidentiary rule that simply relates to the proof beyond a reasonable doubt required in criminal trials.[81] However, its

78. Bell v. Wolfish, 441 U.S. 520, 533 (1979).

79. Kenneth Pennington, *Innocent Until Proven Guilty: The Origins of a Legal Maxim*, 63 JURIST: STUD. CHURCH L. & MINISTRY 106, 106 (2003).

80. *Id.*

81. Several scholars have cited to this problem. *See, e.g.*, Francois Quintard-Morenas, *The Presumption of Innocence in the French and Anglo-American Legal Traditions*, 58 AM J. COMPAR. L. 107, 141 (2010). "The transformation of the presumption of innocence into merely an evidentiary rule in common law jurisdictions is the result of a process that started in the nineteenth century and culminated in the United States with *Bell v. Wolfish*."; *see also* Pennington, *supra* note 79, at 107 (The presumption of innocence, "began life as a norm that articulated a cluster of rights protecting litigants. In American law, it has become a notion, an assumption,

foundation reveals that it was meant to be a "rule of proof"[82] *and* a "shield against premature punishment."[83] The presumption of innocence has ancient roots.[84] The Babylonian Code of Hammurabi, one of the oldest written codes of law, embraced this sentiment in writings as early as 1792 B.C. requiring that anyone accusing someone of a crime had to prove the accused's guilt.[85] Similarly, in a Roman constitution of A.D. 212, Emperor Antonin declared, "[h]e who wishes to bring an accusation must have the evidence"[86] While these iterations of the presumption of innocence may seem to focus on the strength of evidence, their purpose was to protect people from being punished without a conviction.[87] In 352 B.C., Greek Orator Demosthenes urged that no man can be considered a criminal, "until he has been convicted and found guilty" because it is only then that "conscience permits us to inflict punishment according to knowledge, but not before."[88] As Demosthenes explained, blocking the accused from the protection of the "intermediate process" between accusation and conviction offends a fundamental principle of justice.[89] It is this view of the presumption of innocence as an essential piece of justice—critical in protecting people from being subjected to punishment unduly—that has value in the context of sentencing on the street and protection of Black lives.

French canon lawyer Johannes Monachus introduced the modern form of the maxim "innocent until proven guilty" in his comment on a Pope Boniface VIII decretal issued at the end of the thirteenth century.[90] In it, Monachus was defending the accused's right to due pro-

---

with very little content."); James Bradley Thayer, *The Presumption of Innocence in Criminal Cases*, 6 YALE L.J. 185 (Mar. 1897), https://www.jstor.org/stable/pdf/780722.pdf.

82. Quintard-Morenas, *supra* note 81, at 107.

83. *Id.*

84. JOHN SASSOON, ANCIENT LAWS AND MODERN PROBLEMS: THE BALANCE BETWEEN JUSTICE AND A LEGAL SYSTEM 42 (2001) ("[T]he burden of proof rested in the third millennium BC where it would rest today—with the accuser.").

85. Allen H. Godbey, *The Place of the Code of Hammurabi*, 15 THE MONIST 199, 210 (1905) ("It is a fundamental principle of the code of Hammurabi that the presumption is always in favor of the innocence of the accused: the burden of proof is thrown upon the accuser . . . . Not merely is the burden of proof upon the accuser, but in all primitive society [sic] the entire burden of accusation or indictment falls upon him. In this respect the legal procedure of Babylonia seems to have been that of all early nations.").

86. Quintard-Morenas, *supra* note 81, at 111 (quoting Code Just. 2.1.4 (Antonin 212)).

87. *Id.* at 112 ("Until guilt is established by conclusive evidence, society has no right to treat the accused as a criminal.").

88. DEMOSTHENES, AGAINST MEIDIAS, ANDROTION, ARISTOCRATES, TIMOCRATES, ARISTOGEITON 229, 231–32, 235 (J.H. Vince trans., Harvard Univ. Press 1935).

89. *Id.* at 235.

90. Quintard-Morenas, *supra* note 81, at 114 n. 64; *see also* Pennington, *supra* note 79.

cess, by claiming that everyone is presumed innocent until proven guilty (*quilibet praesumitur innocens, nisi probetur nocens*).[91] This concept operated in a manner that demonstrated a respect for the right to live as an innocent person until your guilt had actually been proven in a legal tribunal. For instance, when executing arrest warrants, law enforcement officials were directed to select the time and place of arrest to minimize any embarrassment to the arrestee.[92] Therefore, officers could not arrest priests, judges, or schoolteachers while those individuals performed their job, nor could officers interrupt a wedding to apprehend the groom or bride.[93] This was not because the guilty deserved some measure of dignity, but rather because a person "can be charged with a crime and be innocent."[94] Though this view lost favor for a time in France,[95] the French view of regarding the presumption of innocence as being more than an evidentiary rule, thus giving it force beyond the courtroom, has reappeared. For this reason, in France, respect for the presumption of innocence is not even confined to criminal procedure. In Article 9 of the French Declaration of Rights of 1789, the French Civil Code currently recognizes the right not to be publicly described as guilty before a conviction.[96] Putting this history and present iteration together, this broad view of the presumption of innocence promotes the view that, until proven otherwise, a person should be able to live as an innocent person in their everyday lives. Such innocent living should not be disrupted by even the suspicion of criminal guilt. This is a far cry from the experience of Black Americans who experience being presumed punishable in their day-to-day lives. This failure of the American concept of the presumption of innocence can be seen in the departure from the roots of seeing the presumption of innocence as a shield against impulsive punishment.

---

91. *See* Quintard-Morenas, *supra* note 81, at 114 n. 65.

92. *See* ANTOINE BRUNEAU, OBSERVATIONS ET MAXIMES SUR LES MATI'ERES CRIMINELLES, 103, 105 (1715).

93. *Id.* at 105.

94. Claude-Joseph de Ferriere, DICTIONNAIRE DE DROIT ET DE PRATIQUE, 26 (1771).

95. *See* Quintard-Morenas, *supra* note 81, at 133–41.

96. CODE CIVIL [C. CIV.] [CIVIL CODE] art. 9-1 (Fr.) (Georges Rouhette & Anne Rouhette, trans.) ("Everyone has the right to the respect of the presumption of innocence. Where, before any sentence, a person is publicly shown as being guilty of facts under inquiries or preliminary investigation, the court, even by interim order and without prejudice to compensation for the injury suffered, may prescribe any measures, such as the insertion of a rectification or the publication of a communique, in order to put an end to the infringement of the presumption of innocence, at the expense of the individual or legal entity liable for that infringement.").

B. The American Limitation to the Presumption of Innocence

In the 1979 case, *Bell v. Wolfish*, Justice Rehnquist declared that the presumption of innocence "has no application" for a defendant "before his trial has even begun."[97] However, the American view of the presumption of innocence was not always so restrictive. For instance, the Rhode Island Constitution of 1842 contains a provision prohibiting any unnecessary "act of severity against the accused."[98] This protection was meant to be broad and was explicitly based on the foundation that "[e]very man being presumed innocent, until he is pronounced guilty by the law[.]"[99] This language, conveying an early common law principle, was already found in the Rhode Island Bill of Rights of 1798 and was identical to language found in the French Declaration of Rights of 1789.[100] Similar importance of the doctrine was acknowledged in 1894, when the doctrine first formally appears in the United States Supreme Court decision *Coffin v. United States*.[101] In that case, a lower court refused to instruct the jury on the presumption of innocence.[102] Writing for the Court, Justice White stated, "[t]he principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law."[103] In explaining the ancient roots of the principle, Justice Whited described the principle as "unquestioned."[104] Though the Court tied the presumption of innocence to the burden of proof beyond a reasonable doubt in the case, the Court rightly found that the error in the jury charge was fundamental.[105] From that point forward, however, the presumption of innocence in United States courts has

97. Bell v. Wolfish, 441 U.S. 520, 533 (1979).
98. *See* R.I. CONST. art. I, § 14.
99. *Id.*
100. Public Laws of the State of Rhode-Island and Providence Plantations, as Revised by a Committee, and Finally Enacted by the Honourable General Assembly, at Their Session in January, 1798, 79–81 (1798) ("An Act declaratory of certain Rights of the People of this State . . . Sec. 10. Every man being presumed to be innocent, until he has been pronounced guilty by the law, all acts of severity that are not necessary to secure an accused person ought to be repressed.").
101. Coffin v. United States, 156 U.S. 432, 453 (1895).
102. *Id.* at 453.
103. *Id.*
104. *Id.* at 454.
105. *Id.* at 461 ("The error contained in the charge, which said, substantially, that the burden of proof had shifted, under the circumstances of the case, and that therefore, it was incumbent on the accused to show the lawfulness of their acts, was not merely verbal, but was fundamental, especially when considered in connection with the failure to state the presumption of innocence.").

diminished only in substance, and now seems no more than a form recitation for court theatrics. The weakening of the presumption of innocence was clear by the 1970s.

The decline of a robust presumption of innocence, in the context of bail and pretrial detention, began in the 1960s. The Bail Reform Act of 1966[106] (the "Act") was the first major federal bail reform since the Judiciary Act of 1789, which established the federal judiciary system.[107] The 1966 reforms were based on the view that unnecessarily detaining defendants who were unable to post bail violated the presumption of innocence by punishing them before being found guilty.[108] Though the Act included a presumption in favor of release in noncapital cases, arguments about its application highlighted the emerging view that the presumption of innocence was nothing more than a companion to a rule of evidence. When President Nixon attempted (though ultimately failed) to limit the presumption in favor of release in noncapital cases with a measure that would allow judges to use "danger to the community" as a factor in bail determination,[109] the Department of Justice supported the effort by arguing that the presumption of innocence was solely a rule of evidence inapplicable to pretrial proceedings.[110] These sentiments were eventually adopted by the Supreme Court in *Bell v. Wolfish*, formally relegating the presumption of innocence to a "pleasant fiction."[111]

---

106. Bail Reform Act of 1966, Pub. L. No. 89–465, 80 Stat. 214 (repealed 1984).

107. *Id.* at § 3146(a)(1)–(5); *see also* Evie Lotze, John Clark, D. Alan Henry & Jolanta Juszkiewicz, *The Pretrial Services Reference Book: History, Challenges, Programming*, PRETRIAL JUST. INST. (Jan. 22, 2017), https://university.pretrial.org/glossary/bail-reform-act-of-1966 ("The 1996 Act contained the following provisions: (1) a presumption in favor of releasing non-capital defendants on their own recognizance; (2) conditional pretrial release with conditions imposed to reduce the risk of failure to appear; (3) restrictions on money bail bonds, which the court could impose only if non financial release options were not enough to assure a defendant's appearance; (4) a deposit money bail bond option, allowing defendants to post a 10% deposit of the money bail bond amount with the court in lieu of the full monetary amount or a surety bond; and (5) review of bail bonds for defendants detained for 24 hours or more.").

108. *See* S. REP. NO. 89–750, at 1 (1965) ("The Congress finds that—(1) Present Federal bail practices are repugnant to the spirit of the Constitution and dilute the basic tenets that a person is presumed innocent until proven guilty by a court of law and that justice should be equal and accessible to all."). The Act followed the line of thinking presented by Chief Justice Vinson in Stack v. Boyle, 342 U.S. 1, 4 (1951) ("This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction . . . . Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.")

109. Christopher Lydon, *Congress Gets Nixon Bill for Preventive Detention*, N.Y. TIMES (July 12, 1969), nytimes.com/1970/09/24/archives/congress-rushes-nixons-crime-bills.html.

110. John N. Mitchell, *Bail Reform and the Constitutionality of Pretrial Detention*, 55 VA. L. REV. 99, 101 (1969).

111. 441 U.S. 520, 533 (1979); *see also* ARTHUR TRAIN, COURTS AND CRIMINALS 14 (1921).

In *Bell*, pretrial detainees challenged the constitutionality of numerous conditions of confinement and practices in a federal detention facility in New York City.[112] The District Court enjoined several of the challenged regulations and practices, including double-bunking of inmates.[113] The District Court's decision was based on its view that, because pretrial detainees are "presumed to be innocent and held only to ensure their presence at trial, 'any deprivation or restriction of . . . rights beyond those which are necessary for confinement alone, must be justified by a compelling necessity.'"[114] The United States Court of Appeals for the Second Circuit affirmed that portion of the lower court's decision.[115] The Supreme Court granted *certiorari* in the case and in a Memorandum to the Conference circulated prior to the issuance of the *Bell* opinion, Justice Stevens framed the question at issue as "whether a practice [of pretrial detention] invades the basic dignity of an individual who has not yet been convicted of any crime."[116] This concern, though true to the origins of the presumption, apparently did not convince a majority of the Justices. Instead, writing for the majority, Justice Rehnquist stated:

> The presumption of innocence is a doctrine that allocates the burden of proof in criminal trials; it also may serve as an admonishment to the jury to judge an accused's guilt or innocence solely on the evidence adduced at trial and not on the basis of suspicions that may arise from the fact of his arrest, indictment, or custody, or from other matters not introduced as proof at trial.[117]

In characterizing the presumption of innocence as a mere doctrine of evidence, the Supreme Court limited its application to the trial context. Although the Court acknowledged the historic importance of the principle, it concluded that the presumption "has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun."[118] And, even within the trial context, the presumption has limited force. Just one week after the *Bell* decision, the Supreme Court decided *Kentucky v. Whorton*, in which the Court explained that "the failure to give a requested in-

112. *Bell*, 441 U.S. at 523.
113. *Id.* at 530.
114. *Id.* at 528 (quoting United States Ex Rel. Wolfish v. Levi, 439 F. Supp. 114, 124 (S.D.N.Y. 1977)).
115. Wolfish v. Levi, 573 F.2d 118, 124 (2d Cir. 1978).
116. Memorandum to the Conference (Mar. 7, 1979) (on file with the Library of Congress, Manuscript Division, Papers of Thurgood Marshall, Box 232).
117. *Bell*, 441 U.S. at 533.
118. *Id.*

struction on the presumption of innocence does not in and of itself violate the Constitution."[119] Since then, we have seen the consequences of the diminished presumption of innocence in the United States, from the loosening of the requirement to segregate pretrial detainees from convicted inmates in federal facilities[120] to Justice Scalia's suggestion during oral argument that there may be deterrent value in treating arrestees harshly.[121] In the United States, the presumption of innocence has become an "unreflective cliché."[122] As Justice Marshall said in his remarks at a judicial conference following the *Bell* decision, "the Supreme Court decided the presumption didn't exist at all."[123] Now is the perfect time for a rebirth of the presumption and a return to its foundation and rightful prominence within due process protections.

III. RESURRECTING THE PRESUMPTION OF INNOCENCE TO SAVE BLACK LIVES

Although police violence against Black people is no new topic, the protests that spread across the world beginning in the summer of 2020 seemed to have a different activist energy than any recent years. The transformative feel of this moment has even been referred to as the "New Civil Rights Movement."[124] Though this time shares some

119. 441 U.S. 786, 788–89 (1979) (holding that the instruction need not "be given in every criminal case").

120. *Compare* 28 C.F.R. § 551.104 (1994) ("To the extent practicable, pretrial inmates will be housed separately from convicted inmates.") *with* its wording prior to the 1994 revision 28 C.F.R. § 551.104 (1980) ("Unless a threat is posed to institution security or good order, staff shall house pre-trial inmates separately from convicted inmates.").

121. Transcript of Oral Argument at 22, Atwater v. City of Lago Vista, 532 U.S. 318 (2001) (No. 99-1408). Referring to a newspaper account of a girl taken into police custody for eating French fries on the subway, Justice Scalia said, "What about deterrence? Don't you think people are going to be pretty unlikely to eat french fries on the subway in Washington." Still referring to the deterrent principle, Justice Scalia turned to the facts of the case at hand, in which a motorist was arrested for not having her child wear a seatbelt, and said, "And maybe in Lago Vista, not to belt up their kids?" Counsel replied, "Yes, but the problem—" Justice Scalia interrupted with, "Well is that worth nothing?" Counsel answered, "No. But that is confusing punishment with enforcement. Deterrence is a justification for punishment. And police officers should be enforcing laws and not punishing." *Id.*

122. CARLETON KEMP ALLEN, LEGAL DUTIES AND OTHER ESSAYS IN JURISPRUDENCE 293 (1931).

123. Tom Goldstein, *In Rare Attack, Justice Marshall Says Court Erred*, N.Y. TIMES (May 28, 1979), https://www.nytimes.com/1979/05/28/archives/in-rare-attack-justice-marshall-says-court-erred-in-rare-attack.html.

124. *See* Abdallah Fayyad, *Welcome to the New Civil Rights Era*, BOS. GLOBE (July 10, 2020, 4:00 AM), https://www.bostonglobe.com/2020/07/10/opinion/welcome-new-civil-rights-era; *see also The 2020 United States Civil Rights Movement*, NAT'L TRIAL LAW TOP 100 (July 31, 2020), https://thenationaltriallawyers.org/2020/07/the-2020-united-states-civil-rights-movement; *see also* Valerie Strauss, *This is My Generation's Civil Rights Movement*, WASH. POST (June 6, 2020, 3:00

of the energy and promise of the Civil Rights Movement of the 1950s and 1960s, it is a movement unique to 2020.[125] We have built upon the past movement that focused on ending racial segregation to now push for the realization that even so-called legal and social equality is inadequate because entire systems—from education to healthcare to finance to criminal justice—are built upon racist foundations. Today's movement insists that if you believe that Black lives matter, you must be antiracist to address the systemic dangers to Black lives. Professor Ibram X. Kendi explained this now famous term in this way: "[a]n antiracist idea is any idea that suggests the racial groups are equals in all their apparent differences."[126] However, this moment is not just calling for people to have antiracist ideas. Instead, the protests of 2020 led to pledges by individuals and institutions to be antiracist in action.[127] As Professor Kendi explains further, "[a]ntiracism is a powerful collection of antiracist policies that lead to racial equity and are substantiated by antiracist ideas."[128] This means challenging the status quo with an eye toward repairing the danger caused by racism and protecting ourselves from the reinstitution of policies that will lead to those same damaging results. Many of the currently proposed police reforms miss this mark.[129]

In response to the protests that erupted across the globe, and the international calls for police reforms or police defunding, lawmakers and policymakers in the United States have advanced proposals for reforms to current policing approaches.[130] There have been bans of chokeholds, prohibitions on no-knock warrants, reallocation of funds, strengthened body camera requirements, updated transparency proto-

AM), https://www.washingtonpost.com/education/2020/06/06/this-is-my-generations-civil-rights-movement.

125. *See* Sugrue, *supra* note 2 ("The conflicts of 2020 aren't just a repeat of past troubles; they're a new development in the American fight for racial equality.").

126. IBRAM X. KENDI, HOW TO BE AN ANTIRACIST 20 (2019).

127. For a list of large businesses making such pledges, *see* Nivedita Balu & Aishwarya Venugopal, *Factbox: Corporations Pledge $1.7 Billion to Address Racism, Injustice*, REUTERS (June 9, 2020, 9:48 PM), https://www.reuters.com/article/us-minneapolis-police-pledges-factbox/factbox-corporations-pledge-1-7-billion-to-address-racism-injustice-idUSKBN23H078; *see also Law Deans Anti-Racism Clearinghouse Project*, ASS'N OF AM. L. SCH., https://www.aals.org/antiracist-clearinghouse/ (last visited Oct. 21, 2020), for an example of what educational institutions are doing.

128. KENDI, *supra* note 126, at 20.

129. *See* Lynne Peeples, *What the Data Say about Police Brutality and Racial Bias – and Which Reforms Might Work*, NATURE (June 19, 2020), https://www.nature.com/articles/d41586-020-01846-z#ref-CR4, for a discussion of the limits of proposed police reforms.

130. *See* Orion Rummier, *The Major Police Reforms Enacted Since George Floyd's Death*, AXIOS (Oct. 1, 2020), https://www.axios.com/police-reform-george-floyd-protest-2150b2dd-a6dc-4a0c-a1fb-62c2e999a03a.html, for a list of such proposals.

cols, among many other efforts.[131] However, few of these approaches significantly alter the institution of policing by instituting measures that specifically focus on ameliorating the racist tactics and outcomes that have plagued policing in America since its creation. Banning chokeholds is not enough if racial profiling still persists. Prohibitions on no-knock warrants are meaningless if the knock and announce rule for warrant execution can be easily disregarded without remedy in Black communities.[132] "To be antiracist is a radical choice in the face of history, requiring a radical reorientation of our consciousness."[133] One such "radical choice" is for courts to apply the presumption of innocence in a manner that will protect Black lives. This will require lawmakers and courts to radially reorient their consciousness in order to view the use of force by police as punishment, and to embrace the presumption of innocence as a viable legal shield against that punishment.[134]

A. Policing Can Be Punishment

Police force against individuals that goes beyond the minimal level needed to effectuate a legal arrest has all the trappings of punishment, and courts should treat it as such. The Supreme Court, of course, has failed to expand its view of punishment to embrace the real lived experiences of society. Under current Supreme Court jurisprudence, for one to challenge a police officer's use of force as excessive, a plaintiff must bring their claim under the Fourth Amendment protection against unreasonable seizures.[135] According to the Court, the Eighth Amendment protection against cruel and unusual punishment applies, "only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions."[136] Scholars, however, have begun to advocate for rec-

131. *Id.*

132. *See infra* Part IV.B.

133. KENDI, *supra* note 126, at 23.

134. A similar argument is made in the author's article, *Reconstruction Sentencing: Reimagining Drug Sentencing in the Aftermath of the War on Drugs*, AM. CRIM. L. REV. (forthcoming April 2021). That article focuses on restoring the damaging consequences of the War on Drugs on the Black community, but its thesis regarding constitutional re-invigoration has application beyond drug sentencing.

135. *See, e.g.*, Graham v. Connor, 490 U.S. 386, 395 (1989); *see also* Exum, *supra* note 3, at 989–91.

136. *Graham*, 490 U.S. at 398.

ognition of the actual nature of policing.[137] The true consequence of police force—individuals being penalized or executed for their perceived objectionable response to a police encounter—demonstrates that police use of force is more akin to punishment than seizure.[138] In some instances, laypersons, like Amy Cooper, act as judges: they determine that a person deserves punishment and call the police, counting on officers to inflict the punishment that the faux judge has ordered. This sort of sentencing on the streets can have deadly results when police, acting on a presumption that the Black person indeed deserves punishment, respond with deadly force. This fatal result is the death penalty on the streets—"when police officers kill individuals as punishment for that person's perceived objectionable behavior."[139] Whether street sentencing is capital or not, it operates outside of the criminal justice system's procedural safeguards. It operates without the presumption of innocence as a shield against unwarranted sanctions.

B. The Presumption of Innocence as a Shield Against Punishment

The first step in protecting Black lives through a reinvigoration of the presumption of innocence is to return to the origins of the presumption as a safeguard against punishment before an adjudication of guilt. To achieve this end, the Supreme Court need only correct the missteps it took in *Bell v. Wolfish*, where it held that the presumption of innocence is inapplicable to the conditions of pretrial detention.[140] In breaking down the legal issues in the case, the *Bell* Court said:

> [W]hat *is* at issue when an aspect of pretrial detention that is not alleged to violate any express guarantee of the Constitution is challenged, is the detainee's right to be free from punishment, and his understandable desire to be as comfortable as possible during his confinement, both of which may conceivably coalesce at some point.[141]

137. *See generally* Exum, *supra* note 3, 989–91, 998 for examples of these arguments; *see also* Mitchell Crusto, *Black Lives Matter: Banning Police Lynchings*, 48 HASTINGS CONST. L. Q. 3, 11–12 (2020).

138. *See* Jefferson-Bullock et al., *supra* note 71, for a full discussion of the punishment nature of policing.

139. *See* Exum, *supra* note 3, at 992, for further explanation of the concept of deadly police force being the death penalty on the streets; *see* TEDxToeldo, *The Death Penalty on the Street by Jelani Jefferson Exum*, YOUTUBE (Oct. 10, 2014), https://www.youtube.com/watch?v=sq7eAEjJm6U.

140. 441 U.S. 520, 520–21 (1979).

141. *Id.* at 534 (internal citations omitted).

At this point, the Court is on the right track by focusing on the issue of punishment. The Court continued:

> In evaluating the constitutionality of conditions or restrictions of pretrial detention that implicate only the protection against deprivation of liberty without due process of law, we think that the proper inquiry is whether those conditions amount to punishment of the detainee. For under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law.[142]

Though the Court did not explicitly make the connection with those words, the Court invoked the original purpose of the presumption of innocence. It is the presumption of innocence that gives substance to the due process protection against being punished prior to the adjudication of guilt. As explained by the history of the origins of the presumption, it was not simply to accompany a rule of evidence at trial, but to ensure that a person was not labeled or treated as a criminal prior to adjudication.[143] The reason for this was not to save the person from some embarrassment, but rather to ensure that the individual, at this point innocent, could not yet suffer punishment. However, prior to making the above statement, the Court had already thrown away the presumption of innocence, saying that it simply had no place in the pretrial analysis because it was only a rule of evidence.[144] Had the Court remained open to the view that the presumption stood as a guard that must be procedurally overcome by a conviction before punishment can be imposed, then the rest of the Court's analysis would be one that can apply to any instances of punishment—whether pre or post-conviction. The Court, however, gives short shrift to the presumption, and unnecessarily pulls it out of the pretrial due process analysis.

As indicated in *Bell*, the Court's analysis clearly embraced the possibility that government actions that occur pretrial may amount to punishment.[145] The problem in *Bell* was that the Court did not find the particular conditions of confinement complained about significant

142. *Id.* at 535 (internal citations omitted).

143. *See generally* Quintard-Morenas, *supra* note 81, at 141.

144. *Bell*, 441 U.S. at 533 ("The presumption of innocence is a doctrine that allocates the burden of proof in criminal trials; it also may serve as an admonishment to the jury to judge an accused's guilt or innocence solely on the evidence adduced at trial and not on the basis of suspicions that may arise from the fact of his arrest, indictment, or custody, or from other matters not introduced as proof at trial.").

145. *Id.* at 537 ("Not every disability imposed during pretrial detention amounts to 'punishment' in the constitutional sense, however.").

enough to constitute punishment. In coming to this conclusion, the Court employed a line of reasoning that can be used to breathe new life into the presumption of innocence in order to apply it to the context of policing. The Court said, "This Court has recognized a distinction between punitive measures that may not constitutionally be imposed prior to a determination of guilt and regulatory restraints that may."[146] The Court then offered a test from a previous case, *Kennedy v. Mendoza-Martinez*,[147] to draw the line between regulatory restraints and the sort of punitive measures that it would consider punishment:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment-retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions.[148]

The Court acknowledged that the above *Mendoza-Martinez* factors provided "useful guideposts" in ascertaining whether certain pretrial conditions amount to punishment "in the constitutional sense of that word."[149] Today's courts could do the same to determine that the excessive use of force by police officers constitutes punishment as well.

1. Police Force as Restraint with the Historical Purpose to Punish

The *Mendoza-Martinez* analysis begins with a determination of whether the sanction involves "an affirmative disability or restraint."[150] The Supreme Court clearly considers force by officers to be a seizure; therefore, it satisfies being a restraint.[151] Next, the factors lead courts to determine whether the restraint has "historically been regarded as a punishment."[152] Though courts may not have his-

146. *Id.*
147. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168–69 (1963).
148. *Bell*, 441 U.S. at 537–38 (quoting Mendoza-Martinez, 372 U.S. at 168–169).
149. *Id.* at 538.
150. *Id.* at 537.
151. For Fourth Amendment purposes, a seizure by police occurs when "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." United States v. Mendenhall, 446 U.S. 544, 544 (1980).
152. *Bell*, 441 U.S. at 537.

torically considered the use of force by police to be punishment, the development of policing in the United States demonstrates that the public and the police certainly have understood the punitive nature of policing. As discussed in Part I of this Article, the very genesis of policing Black people in the United States was based on the desire of white people in power to reprimand enslaved Black people who threatened the social order. Officers in slave patrols were not in the business of investigating crime, executing warrants based on probable cause, and then handing suspects over to prosecutors for formal charges, a trial, and then sentencing upon conviction. Officers in slave patrols were the enforcers of the punishment themselves. Historian Gary Potter has explained that slave patrols served three main functions:

> 1) to chase down, apprehend, and return to their owners, runaway slaves;
>
> 2) to provide a form of organized terror to deter slave revolts; and,
>
> 3) to maintain a form of discipline for slave-workers who were subject to summary justice, outside the law.[153]

It is key that the slave patrollers' role was to "discipline" enslaved people "outside the law." In other words, slave patrol officers imposed punishment outside of the court system. However, at the time, it was very much seen as lawful for them to do so. In fact, patrollers were "legally compelled" to carry out these duties,[154] which largely consisted of "watching, catching, [and] beating" enslaved Black people.[155] Police continued to be extrajudicial punishers of Black people after the end of slavery as Black Codes and Jim Crow practices came into effect, with the same key strategies—watching, catching, and beating. Lynching became the punishment of choice during this time and police and other government officials were complicit in the mob terror.[156] The 1919 book, "The Truth About Lynching and the Negro

153. Gary Potter, *The History of Policing in the United States*, EKU SCH. OF JUST. STUD., https://plsonline.eku.edu/sites/plsonline.eku.edu/files/the-history-of-policing-in-us.pdf.

154. Chelsea Hansen, *Slave Patrols: An Early Form of American Policing*, NAT'L LAW ENF'T MUSEUM (July 10, 2019), https://lawenforcementmuseum.org/2019/07/10/slave-patrols-an-early-form-of-american-policing/#_ednref1.

155. SALLY E. HADDEN, SLAVE PATROLS: LAW AND VIOLENCE IN VIRGINIA AND THE CAROLINAS 4 (2001).

156. Equal Justice Initiative, *supra* note 21, at 44 ("And finally, the indifference and even complicity of local legal systems left few authorities to whom attacks could be reported, even if people were brave enough to do so."); *see also* Khalil Gibran Muhammad, *The History of Lynching and the Present of Policing*, BUNK HIST. (May 17, 2018), https://www.bunkhistory.org/resources/2530 ("For nearly three quarters of a century, thousands of black people, including over 100 black women, were lynched in the presence of or with the complicity of law enforce-

in the South," asserted that "the lynching of [B]lack men prevents their becoming over-dangerous to the white South."[157] The book author believed that Black men needed to be "punished by periodic lynching—preferably by burning."[158] When lynch mobs acted, Black people quickly learned that, "[t]he laws discriminated against them, the courts upheld a double standard of justice, and the police acted as the enforcers."[159] Lynching was often a community affair. Public spectacle lynchings were pre-planned torturous murders that drew large crowds—sometimes numbering in the thousands.[160] They have been described as "carnival-like events, with vendors selling food, printers producing postcards featuring photographs of the lynching and corpse, and the victim's body parts collected as souvenirs."[161] This could not be done without police assistance, either through active participation in the gruesome community festival, or through a passive failure to intervene to protect Black victims. The documented case of John Hartfield, a Black man who was lynched and burned in Mississippi in 1919, highlights this community-police cooperation.[162] In advance of the attack, the Jacksonville newspaper ran a story with the headline, "JOHN HARTFIELD WILL BE LYNCHED BY ELLISVILLE MOB AT 5 O'CLOCK THIS AFTERNOON."[163] Mr. Hartfield had been accused of assaulting a young white woman and officers were assigned to guard him.[164] The newspaper article explained that thousands were headed to attend the "event" and, therefore, "officers have agreed to turn him over to the people of the city at 4 o'clock this afternoon when it is expected he will be burned."[165] Regardless of whether courts have acknowledged reality, society has historically un-

---

ment. Not only could blacks not testify in prosecutions against whites, local officials often refused to indict, lying in the official record that the victim died "at the hands of parties unknown.").

157. Mary White Ovington, *REVIEW: The Truth About Lynching and the Negro in the South by Winfield Collins*, 41 THE SURVEY 843, (March 8, 1919).

158. *Id.*

159. LEON F. LITWACK, BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY 283–84 (1980).

160. MANFRED BERG, POPULAR JUSTICE: A HISTORY OF LYNCHING IN AMERICA 91 (2011).

161. Equal Justice Initiative, *supra* note 20, at 33 (citing David Garland, *Penal Excess and Surplus Meaning: Public Torture Lynchings in Twentieth-Century America*, 39 L. & SOC. REV. 793 (2005)).

162. *John Hartfield Will Be Lynched 1919*, RECS. OF RTS., http://recordsofrights.org/records/342/john-hartfield-will-be-lynched (last visited Dec. 18, 2020).

163. *Id.*

164. *Id.*

165. *Id.*

derstood that police action has been an integral part of the extrajudicial punishing of Black people in this country.

2. Policing and the Purposes of Punishment

The *Mendoza-Mendez* factors look to whether a restraint "comes into play only on a finding of scienter" and "whether its operation will promote the traditional aims of punishment-retribution and deterrence."[166] When a police officer uses excessive force, operating on the presumption that the Black victim is punishable, that officer acts as though he or she has made a finding of scienter, which is related to retribution as a traditional aim of punishment. Scienter is the "intent or knowledge of wrongdoing."[167] It is the basis of moral blameworthiness, which gives the retributivist basis for punishment.[168] Retribution comes in two forms: deontological and empirical. Deontological retribution is informed by philosophical views on just desert and moral blameworthiness,[169] and empirical retribution focuses on the community's view of blameworthiness and proportionality.[170] The empirical form of retribution is the most relevant in the context of the unfair use of police force against Black people. Empirical retribution looks to the community's intuitions of justice.[171] In assessing police violence, the officer's intuitions of justice—in place of that of the community—is most instructive. When police kill individuals, the officers often give reasons justifying their actions that fall short of saying, "this level of force was absolutely necessary to effectuate an arrest." Instead, officers focus on everything that was wrong about how the Black vic-

166. Bell v. Wolfish, 441 U.S. 520, 537–38 (1979).

167. *Scienter*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/scienter#:~:text=intent%20or%20knowledge%20of%20wrongdoing,wex%20definitions (last visited Dec. 19, 2020).

168. Deontological retribution focuses "on the blameworthiness of the offender, as drawn from the arguments and analyses of moral philosophy." Paul H. Robinson, *Competing Conceptions of Modern Desert: Vengeful, Deontological, and Empirical*, 67 CAMBRIDGE L.J. 145, 148 (2008).

169. *Id.* This deontological approach to retribution comes from the work of Immanuel Kant. For another traditional account of retribution, *see* G.W.F. HEGEL, HEGEL'S PHILOSOPHY OF RIGHT 93–94 (S.W. Dyde trans., 1896). For a modern retributivist view, *see* Dan Markel, *Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanctions Debate*, 54 VAND. L. REV. 2157, 2170–79 (2001). *See generally* IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE: PART I OF THE METAPHYSICS OF MORALS 100–02 (John Ladd trans., 2nd ed. 1999).

170. Robinson, *supra* note 168, at 149; *see* Josh Bowers & Paul H. Robinson, *Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility*, 47 WAKE FOREST L. REV. 211, 217 (2012) (explaining that "the crime-control benefits from distributing punishment according to people's shared intuitions of justice").

171. Robinson, *supra* note 168, at 149.

tim behaved, whether they were running away from officers,[172] walking toward officers,[173] reaching for identification,[174] or even lawfully defending their home.[175] The focus is on the victim's actions and not the officer's choices.[176] For instance, in the case of Michael Brown, who was killed by Officer Wilson in Ferguson, MO in 2014, the Officer's testimony before a grand jury served to dehumanize Michael and to indicate that justice required killing him. Officer Wilson's account portrayed Michael as a fuming, untamable beast.[177] He said that Michael looked like a "demon."[178] Officer Wilson testified before the grand jury that, as he fired a flurry of shots at Michael, the young man "looked like he was almost bulking up to run through the shots, like it was making him mad that I'm shooting at him."[179] In Officer Wilson's version of events, the menacing behavior displayed by Michael Brown was deserving of retribution. And so, that's what Officer Wilson did. He exacted retribution. As Officer Wilson ex-

172. On June 12, 2020 in Atlanta, Rayshard Brooks, a 27-year-old Black male, died after being shot twice in the back as he ran away from two police officers. His recorded crime was driving while intoxicated, though police were called because he was asleep in a parked car in a Wendy's parking lot. After being awakened by the police and subsequently failing a field sobriety test, Mr. Brooks wrestled away a police taser and then attempted to run from police. Rather than letting him run or attempting to apprehend Mr. Brooks with nonfatal force, police officers fatally shot him. *See* Helena Oliviero & Christian Boone, *Who was Rayshard Brooks?*, ATLANTA J. CONST. (June 23, 2020), https://www.ajc.com/lifestyles/who-was-rayshard-brooks/lWjd3oZvR5D9QZywptiGkP/.

173. On October 27, 2020, in Philadelphia, Pennsylvania, police officers fatally shot Walter Wallace, Jr., a 26-year-old Black man, as he walked toward them, armed only with a knife. Mr. Wallace was in the midst of a mental health crisis. He was several feet away from officers when they fired approximately a dozen shots at him. *See* Azi Paybarah & Johnny Diaz, *Protests in Philadelphia after Police Fatally Shoot Black Man*, N.Y. TIMES, https://www.nytimes.com/2020/10/27/us/philadelphia-police-shooting-walter-wallace-jr.html (last updated Oct. 29, 2020); *see also* Miranda Bryant, *Walter Wallace Jr killing: Footage Shows 'Obvious Mental Health Crisis', Lawyer Says*, GUARDIAN (Oct. 30, 2020, 3:58 PM), https://www.theguardian.com/us-news/2020/oct/30/philadelphia-man-walter-wallace-police-shooting.

174. On July 6, 2016, in a suburb of St. Paul, Minnesota, police shot and killed Philando Castile, a 32-year-old Black man, during a traffic stop. Mr. Castile was reaching for his identification when police fatally shot him in front of his girlfriend and her 4-year old daughter who were passengers in the car. *See* ASSOCIATED PRESS, *Minn. Man Fatally Shot By Police While Inside a Car With A Woman And Child*, NPR (July 7, 2016, 1:58 AM), https://www.npr.org/2016/07/07/485049343/minn-man-shot-by-police-while-inside-a-car-with-a-woman-and-child; *see* Mitch Smith, *Minnesota Officer Acquitted In Killing of Philando Castile*, N.Y TIMES (June 16, 2017), https://www.nytimes.com/2017/06/16/us/police-shooting-trial-philando-castile.html.

175. *See* discussion of Breonna Taylor's case *infra* Part IV.B of this Article.

176. For a discussion of the problems with viewing police conduct only from the police officer's point of view, see Jelani Jefferson Exum, *Nearsighted and Colorblind: The Perspective Problem of Police Deadly Force Cases*, 65 CLVSLR 491 (2017).

177. Grand Jury Transcript, vol. V at 212:18–22, State of Missouri v. Darren Wilson (Sept. 16, 2014), http://www.documentcloud.org/documents/1371222-wilson-testimony.html.

178. *Id.* at 225:2–3.

179. *Id.* at 228:19–21.

plained it, "I remember looking at my sites and firing, all I see is his head and that's what I shot."[180] There was no discussion by Officer Wilson about his other non-fatal options in dealing with this unarmed individual who only caught the officer's eye because Michael and his friend were walking down the middle of the street and a few drivers had to make extra efforts to get around the duo.[181] Of course, shooting and killing Michael also had the effect of permanently deterring Michael's perceived dangerous behavior.

Deterrence is a utilitarian theory that is focused on reducing the overall cost of crime. Deterrence takes two forms—specific and general. The goal of specific deterrence is to "disincline individual offenders from repeating the same or other" undesirable actions.[182] General deterrence seeks to dissuade others in society from engaging in similar conduct.[183] Police violence against individuals arguably serves both functions. In the case of the death penalty on the street, fatal police force completely incapacitates a person, which also satisfies the goal of specific deterrence. But even a non-fatal beating by police officers also has a deterrent effect on both the individual victim, but also that victim's community. This is why "The Talk" described in Part I has persisted for generations. Black parents, aunts, uncles, and other mentors have seen the dangerous interactions between police and Black people and seek to alter their own behavior and that of the Black children they foster in order to avoid the potentially deadly consequences of those contacts. An essential part of "The Talk" is to advise young Black people that "[t]he police have more power than you do. They have guns. They have legal authority to kill you."[184] Black children are told by their loved ones to "remain calm. Don't make any sudden movements. Don't argue. [And] don't run" in an encoun-

180. *Id.* at 229:16–18.

181. In his grand jury testimony, Officer Wilson explained what caught his attention about Michael Brown:

> I see them walking down the middle of the street. And first thing that struck me was they're walking in the middle of the street. I had already seen a couple cars trying to pass, but they couldn't have traffic normal because they were in the middle, so one had to stop to let the car go around and then another car would come. *Id.* at 207:9–15.

182. ARTHUR W. CAMPBELL, LAW OF SENTENCING § 2:2 (2d ed. 1991).

183. *Id.*

184. Dustin Dwyer, *Teaching Black Kids About The Police: They Have The Legal Authority To Kill You*, WUOMFM BBC WORLD SERV. (Oct. 8, 2014), https://stateofopportunity.michiganradio.org/post/teaching-black-kids-about-police-they-have-legal-authority-kill-you (quoting Stephen Drew, a civil rights attorney in Grand Rapids, Michigan who was giving a presentation to parents and children on how to interact with the police as part of a local NAACP chapter event).

ter with the police.[185] A classic line in the script is a reminder that these are not a reflection of actual rights—the Constitution gives a set of more protections—but "[t]hese are just survival tips."[186] Given that police violence is about control, the deterrence goal has been satisfied by the repeated exposure to police brutality, stories about police brutality, and fear of police brutality that Black people suffer, which ultimately changes the behavior of many Black Americans when they are in the presence of law enforcement. In these ways, policing certainly promotes the traditional aims of punishment.

It should not go unsaid, however, that though policing can serve both retributivist and deterrence goals, these goals often operate in a racially-biased fashion in the policing context. Studies "have demonstrated that stereotypes linking [Black people] with aggression cause people to judge [their] ambiguous behavior as more aggressive than identical behavior by white [people]."[187] This is true of laypersons, but also of law enforcement officers. Studies have shown that officers "hold stereotypes linking [Black people] with violence."[188] This, of course, is the heart of Black people being presumed punishable and why, as explained in Part I, Black people face a higher risk than non-Black people of having the police perceive them as dangerous during an encounter.[189] This means that even when an officer feels that retribution justifies the amount of force used against a Black person or that the force was justified by its ultimate deterrence goals, that force ought to be examined through an antiracist lens to determine its racist foundation. If evidence is showing that police act differently in their decision to use force when the subject is Black than when the subject is not Black, then the principles of antiracism are violated. In *Bell*, the Court said that, in applying the *Mendoza-Mendez* factors, it had to "decide whether the disability [or restraint] is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose." The only antiracist answer is that police action that disproportionately affects one race more than another can never be legitimate. Statistics clearly show that police use force more

185. *Id.*
186. *Id.*
187. JACK GLASER, SUSPECT RACE: CAUSES AND CONSEQUENCE OF RACIAL PROFILING 43 (2015).
188. *Id.*
189. Mesic et al, *supra* note 62, at 108.

regularly against Black people than people of other races.[190] As the *Bell* Court said itself, if a restraint "is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon" the individual.[191] In the case of racially-biased police decisions, concluding that police are unconstitutionally using force for the purpose of punishment is the only antiracist conclusion, and it requires an antiracist response.

IV. USING THE PRESUMPTION OF INNOCENCE AS A SHIELD TO PROTECT BLACK LIVES

The presumption of innocence can be used as a shield to protect Black lives once courts have recognized that: (1) the presumption of innocence is a shield to protect people from punishment before an adjudication of guilt; (2) therefore the presumption of innocence must apply pretrial; and (3) policing can operate as punishment. Of course, lawmakers can take these steps in the absence of court action. However, if courts will rightfully situate the presumption within due process, that will give sustained constitutional force to the source of protection. If courts would hold that it is a violation of due process to subject someone to police punishment before they have been proven guilty in a court of law—thus opening officers, municipalities, and states to possible lawsuits—then legislatures and policymakers would be prompted to institute measures to prevent extrajudicial punishment from occurring.[192] The following subsections offer some approaches that are responsive to a constitutional requirement to honor the presumption of innocence. Revisiting the cases of George Floyd and Breonna Taylor demonstrate that a renewed presumption of innocence is an antiracist solution to the dangers that Black people face by being presumed punishable by society.

190. *See generally* Stefan Newton, *The Excessive Use of Force Against Blacks in the United States of America*, 22 INTL. J. OF HUMAN RTS. 1067 (2018); Ronald G. Fryer, Jr., *An Empirical Analysis of Racial Differences in Police Use of Force,* (manuscript), https://law.yale.edu/sites/default/files/area/workshop/leo/leo16_fryer.pdf; Richard A. Oppel, Jr. & Lazaro Gamio, *Minneapolis Police Use Force Against Black People at 7 Times the Rate of Whites,* N.Y. TIMES (June 3, 2020), https://www.nytimes.com/interactive/2020/06/03/us/minneapolis-police-use-of-force.html; Aaron Mendelson, *Police Use Force On Black Angelenos At Dramatically Higher Rates, Data Shows,* LAIST (July 7, 2020), https://laist.com/2020/07/07/police-use-of-force-on-blacks-in-la-very-high.php.

191. Bell v. Wolfish, 441 U.S. 520, 539 (1979).

192. For this model to be completely effective, barriers to liability, such as qualified immunity, would need to be removed. Though a full discussion of these barriers is outside of the scope of this Article, *see* Crusto, *supra* note 137, at 35–53.

A. Affording a Presumption of Innocence to George Floyd by Unbundling the Police

It was the callous and cavalier killing of George Floyd that set off protests across the country and also garnered international attention.[193] A widely viewed witness cellphone video showed that, on May 25, 2020, in Minneapolis, Minnesota, Officer Derek Chauvin restrained Mr. Floyd by pressing his knee into Mr. Floyd's neck for approximately eight minutes and forty-six seconds.[194] Mr. Floyd died, handcuffed with his face on the concrete street, under the pressure of the officer's knee.[195] Mr. Floyd repeatedly cried, "I can't breathe."[196] Three other officers stood watch and did not intervene as the life drained out of Mr. Floyd.[197] Officer Chauvin continued to kneel on Mr. Floyd's neck even after Mr. Floyd lay lifeless on the ground.[198] All of this began because a convenience store clerk called 9-1-1 to report that Mr. Floyd had purchased cigarettes with a counterfeit $20 bill.[199] Had Mr. Floyd been afforded a meaningful presumption of innocence, he could be alive today.

From the start, Mr. Floyd was presumed punishable. Even if the $20 bill had indeed been a counterfeit, the convenience store employee could have refused the purchase, rather than calling on the police to inflict punishment. By involving law enforcement, the clerk was using the presumption that Black people are punishable in the same manner that it has been used throughout history—to summon the force of the police to punish out-of-line Black people when it is unnecessary to do so. However, the presumption of innocence is a legal one, and so while the store clerk may not have been under any constitutional duty to presume that Mr. Floyd was innocent or to withhold punishment until Mr. Floyd had been adjudicated guilty, law enforcement certainly should be under such a duty.

193. Oliver Holmes, *George Floyd killing sparks protests across US: at a glance guide*, GUARDIAN (May 30, 2020, 6:58 PM), https://www. guardian.com/us-news/2020/may/30/george-floyd-protests-latest-at-a-glance-white-house; *see also*, Adela Suliman, *George Floyd's Death Sparks Protests Across Europe,* NBC NEWS (June 7, 2020, 11:49 AM), https://www.nbcnews.com/news/us-news/live-blog/2020-06-06-george-floyd-protests-n1226451/ncrd1226626#blogHeader.

194. Evan Hill, Ainara Tiefenthäler, Christiaan Triebert, Drew Jordan, Haley Willis & Robin Stein, *8 Minutes and 46 Seconds: How George Floyd Was Killed in Police Custody*, N.Y. TIMES (May 31, 2020), https://www.nytimes.com/2020/05/31/us/georgefloyd-investigation.html.

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

When the officers approached the convenience store scene, they acted as though they, too, already presumed that Mr. Floyd was deserving of punishment. In the numerous video clips that have been pieced together to show the events leading up to Mr. Floyd's death, it never appears that officers question the store clerk or Mr. Floyd to ascertain whether he had indeed attempted to use a counterfeit $20 bill. Instead, footage from Officer Thomas Lane's body camera shows the officer approaching Mr. Floyd with his service weapon drawn and pointed to Mr. Floyd's face as Mr. Floyd sat in the driver's seat of a car.[200] If the police actions against Mr. Floyd were viewed as punishment, then the presumption of innocence could be given force in this situation and would have required a different approach to Mr. Floyd's situation.

A layer of protection that could have made a difference in George Floyd's case is a required "unbundling of the [p]olice," which is a concept that recognizes police are called to deal with a host of activities that do not involve a response to violent crime.[201] In order to respect a presumption of innocence and to use it as a guard against pre-conviction punishment, it is necessary to disentangle police response to violence, police crime investigation, and non-police social services in order to adequately resource appropriate responses to calls for state intervention. Unbundling proposes "redirecting some [police] duties, as well as some of their funding, by hiring more of other kinds of workers to help with the homeless or the mentally ill, drug overdoses, minor traffic problems, and similar disturbances."[202] Across the country, reports show that a large majority of 9-1-1 calls to which police respond do not involve violent situations that would arguably require police intervention.[203] For instance, in New Haven, Connecticut, data from the last three years showed that 95 percent of

200. *What We Know About The Death Of George Floyd In Minneapolis*, N.Y. TIMES (Dec. 9, 2020), https://www.nytimes.com/article/george-floyd.html.

201. *See* Derek Thompson, *Unbundle the Police*, ATLANTIC (June 11, 2020), https://www.theatlantic.com/ideas/archive/2020/06/unbundle-police/612913/.

202. Jeff Asher & Ben Horwitz, *How Do The Police Actually Spend Their Time*, N.Y. TIMES (June 19, 2020), https://www.nytimes.com/2020/06/19/upshot/unrest-police-time-violent-crime.html.

203. *Id.* ("A handful of cities post data online showing how their police departments spend their time. The share devoted to handling violent crime is very small, about 4 percent.").

9-1-1 calls to which police responded did not involve allegations of violent crime.[204] The same is true for many major U.S. cities.[205]

Mr. Floyd's situation should never have been treated as an emergency, requiring officers to arrive to the scene quickly. Emergency dispatchers should operate under lawfully required instructions to redirect non-emergency calls to other service providers or to give callers instructions on other appropriate modes of dealing with their issue, such as filing a police report. Though not perfect, there are some examples to look to as models of this approach. In Austin, Texas, 9-1-1 operators redirect callers to mental health services where appropriate—an area of the city's budget that lawmakers recently increased by millions of dollars.[206] Reformers have praised the CAHOOTS (Crisis Assistance Helping Out On The Streets) program in Eugene, Oregon, which dispatched mental-health counselors for certain distress calls.[207] The untangle approach recognizes that police are not trained, nor are they necessary, for many situations in which their assistance is sought.[208] As Professor Kalfani Ture, a former police officer, has warned, involving the police in situations for which they are not trained or necessary is dangerous because "police officers are trained as warriors."[209] Professor Ture explained that when he was an officer, he and his colleagues in Atlanta would spend a significant amount of time learning about "defensive tactics, firearms training, and how to forcefully gain compliance from a suspect."[210] According to Professor Ture, de-escalation training was mostly clouded by the view that "a suspect inherently presents a violent threat to the officers and their surroundings."[211] In cases like that of Mr. Floyd, untangling that starts at the point of dispatch may lead to no services being called to respond at all. In that scenario, Mr. Floyd lives another day, and the convenience store management develops other strategies to deal with the risk of counterfeit money. Had the presumption of innocence

204. Thomas Breen, *95.6% of Cops' Calls Don't Involve Violence*, NEW HAVEN INDEP. (June 19, 2020), https://www.newhavenindependent.org/index.php/archives/entry/police_dispatch_stats/.

205. Asher & Horowitz, *supra* note 202.

206. Andrea Fox, *Austin budget adds millions for mental health response in 911 services*, Govl (Sept. 13, 2019), https://www.govl.com/public-safety/articles/austin-budget-adds-millions-for-mental-health-response-in-911-services-DqqgMkTaZMxXi538/.

207. *See* WHITE BIRD CLINIC, https://whitebirdclinic.org/cahoots/ (last visited Dec. 28, 2020).

208. Thompson, *supra* note 201 ("Two questions that could guide the reform movement are 'What is it that police actually do?' and 'Why do we need armed police to do it?'").

209. Breen, *supra* note 204.

210. *Id.*

211. *Id.*

been given its appropriate place in constitutional jurisprudence, then the very fact that police responded with force to a call about a suspicious $20 bill would be sufficient basis for a claim of a constitutional violation.

B. Affording a Presumption of Innocence to Breonna Taylor: Making Warrants Truly Protective

The heartbreaking and infuriating fate that Breonna Taylor suffered while innocently in her home highlights the true purpose of the presumption of innocence. In popularizing the presumption of innocence, French jurists from the thirteenth century[212] to the French revolution[213] would regularly invoke the Roman law maxim "it is better that a guilty person escape than one innocent suffer."[214] The presumption of innocence *should* protect the person who will eventually be adjudicated guilty from being punished before conviction. But the presumption of innocence is *meant* to protect the innocent from ever being punished by slowing down the machinery of justice and inserting a deliberative process that, though flawed, at least holds the state to a high level of proof before treating someone as guilty. The presumption of innocence could have saved Breonna Taylor.

On March 13, 2020, police killed Breonna Taylor, a 26-year-old Black woman, in her home in Louisville, Kentucky.[215] Ms. Taylor, an emergency room technician, was asleep in her bed when she and her boyfriend, Kenneth Walker, were stirred by a loud knocking at her

212. LOUIS NICOLAS RAPETTI, P. CHABAILLE, HENRI KLIMRATH, LI LIVRES DE JOSTICE ET DE PLET 277 (Paris, F. Didot, 1850) (cited in Jean-Marie Carbasse, Histoire du droit penal et de la justice criminelle 168 (2000)).

213. *See, e.g.*, CLAUDE LE BRUN DE LA ROCHETTE, LE PROCÈS CRIMINEL, DIVISÉ EN DEUX LIVRES: LE PREMIER CONTENANT LES CRIMES: LE SECOND LA FORME DE PROCÉDER AUX MATIÈRES CRIMINELLES 73 (Lyon, 1610) (stating, well before Blackstone, that it is better that ten guilty persons escape than one innocent suffer); 1 de Ferriere, *supra* note 94, at 33.

214. DIG. 48.19.5 (Ulpian, De Officio Proconsulis 7).

215. *See* Arian Campos-Flores & Sabrina Siddiqui, *Police Killing of Breonna Taylor Fuels Calls to End No-Knock Warrants*, WALL ST. J. (May 24, 2020, 11:00 AM), https://www.wsj.com/articles/police-killing-of-breonna-taylor-fuels-calls-to-end-no-knock-warrants-11590332400. Black women, too, are victims of varying forms of police brutality, including fatal shootings, rape, and maiming, though their stories often go unpublicized. *See* Mary-Elizabeth Murphy, *Black Women Are the Victims of Police Violence, Too*, WASH. POST (July 24, 2020, 6:00 AM), https://www.washingtonpost.com/outlook/2020/07/24/police-violence-happens-against-women-too/. *See generally* KIMBERLÉ WILLIAMS CRENSHAW, ANDREA J. RITCHIE, RACHEL ANSPACH, RACHEL GILMER & LUKE HARRIS, SAY HER NAME: RESISTING POLICE BRUTALITY AGAINST BLACK WOMEN (African American Policy Forum et al. eds., 2015), https://static1.squarespace.com/static/53f20d90e4b0b80451158d8c/t/5edc95fba357687217b08fb8/1591514635487/SHNReportJuly2015.pdf.

apartment door at 12:40 AM.[216] According to Mr. Walker, when he and Ms. Taylor were startled awake, they called out to ask who was there but only received more loud banging in response.[217] Frightened that an assailant was trying to break in, Mr. Walker picked up his legally registered handgun, and he and Ms. Taylor began walking slowly toward the door.[218] Just as the couple emerged from the bedroom, into the hallway, plainclothes officers burst into the apartment, bashing the door from its hinges with a battering ram.[219] Terrified and unable to see who was there in the dark, Mr. Walker fired a warning shot toward the floor.[220] His shot struck one of the officers, Sergeant Jonathan Mattingly, in the thigh.[221] The four officers on the scene returned fire immediately thereafter.[222] At one point, one of the officers, Detective Brett Hankison, left the building and blindly shot ten rounds into the apartment from the outside, through a window with drawn blinds.[223] Officers called an ambulance to the scene to render aid to Sergeant Mattingly, but Breonna Taylor lay coughing and struggling to breathe on the floor of her home for nearly five minutes before separate emergency aid was sent to her location.[224] Ms. Taylor's medical assistance came only after her boyfriend, still unaware that it was the police who were in the apartment, called 9-1-1 and cried, "I don't know what's happening. Someone kicked in the door and shot my girlfriend."[225] Aid did not arrive for Ms. Taylor for more than 20 minutes after the officers' bullets struck her.[226] Ms. Taylor

216. Tessa Duvall, *Fact Check 2.0: Debunking 9 Widely Shared Rumors in the Breonna Taylor Police Shooting*, LOUISVILLE COURIER J. (June 16, 2020, 7:03 AM), https://www.courier-journal.com/story/news/crime/2020/06/16/breonna-taylor-fact-check-7-rumors-wrong/5326938002/.

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. Richard A. Oppel, Jr., Derrick Bryson Taylor & Nicholas Bogel-Burroughs, *What to Know About Breonna Taylor's Case and Death*, N.Y. TIMES (Oct. 30, 2020), https://www.nytimes.com/article/breonna-taylor-police.html.

225. For a thorough account of the situation, refer to the two-part New York Times podcast. *The Daily*: *The Killing of Breonna Taylor, Part 1*, N.Y. TIMES (Sept. 9, 2020), https://www.nytimes.com/2020/09/09/podcasts/the-daily/breonna-taylor.html?auth=login-google1tap&login=google1tap; *The Daily*: *The Killing of Breonna Taylor, Part 2*, N.Y. TIMES (Sept. 10, 2020), https://www.nytimes.com/2020/09/10/podcasts/the-daily/Breonna-Taylor.html [hereinafter *New York Times Podcast*].

226. Oppel, Jr. et al., *supra* note 224.

was already deceased by that time.[227] No drugs were ever found in her apartment.[228]

Though the officers involved, and their supporters, have attempted to cast this situation as an unfortunate incident in which officers were justified in their use of force,[229] this case actually highlights how presuming Black people to be punishable is embedded into the very institutional process of a police investigation. This is especially true for drug investigations, which operate within the systemic racism that birthed and maintains the War on Drugs.[230] The first place that this unjust presumption is evident is in the warrant procurement. The Louisville Metro Police Department ("LMPD") claims they believed a former boyfriend of Ms. Taylor used her apartment to receive packages of illegal drugs.[231] Ms. Taylor was no longer in a relationship with that man, but officers were able to procure a warrant to search her apartment, which she shared with her sister and niece (who, thankfully, were not at home that night).[232] In accordance with the Fourth Amendment, before a magistrate issues a warrant, that judicial officer must find that there is probable cause, or a fair probability, to believe that the evidence sought will be found in the place to be searched.[233] Seemingly objective standards, such as probable cause, are vehicles for racial bias. There is evidence that Black Americans are overrepresented as targets of drug warrants.[234] In Ms. Taylor's

227. *Id.*

228. *New York Times Podcast*, *supra* note 225.

229. Kentucky Attorney General Daniel Cameron said that the jurors were told that the two officers, whose shots likely killed Ms. Taylor, were justified in their actions. *Transcript: Grand Juror in Breonna Taylor Case Calls or Release of Proceeding Records, Transcripts Press Conference*, REV (Sept. 29, 2020), https://www.rev.com/blog/transcripts/transcript-grand-juror-in-breonna-taylor-case-calls-for-release-of-proceeding-records-transcripts-press-conference. It is widely understood that prosecutors can secure indictments from grand jurors when they desire to do so. Therefore, if Mr. Cameron wanted the grand jury to indict the other officers, he almost certainly could have presented the facts and secured an indictment. *See* Dylan Stableford, *Extremely Rare for Grand Jury Not to Return Indictment, Statistics Show*, YAHOO NEWS (Nov. 25, 2014), https://news.yahoo.com/ferguson-federal-grand-jury-indictment-statistics-history-134942645.html; *see also* Debra Cassins Weiss, *Grand Juries Almost Always Indict, Federal Stats Show; Is There a Shooting Exception for Cops?*, ABA J. (Nov. 26, 2014, 6:58 AM), https://www.abajournal.com/news/article/grand_juries_almost_always_indict_federal_stats_show_is_there_a_cop_shootin.

230. For this author's thorough discussion of the War on Drugs and its effects, *see generally* Jelani Jefferson Exum, *From Warfare to Welfare: Reconceptualizing Drug Sentencing During the Opioid Crisis*, 67 U. KAN. L. REV. 941 (2019); *see also* Exum, *supra* note 135.

231. Oppel, Jr. et al., *supra* note 224.

232. *New York Times Podcast*, *supra* note 225.

233. Illinois v. Gates, 462 U.S. 213, 214 (1983).

234. *See* Laurence Benner, *Racial Disparities in Narcotics Search Warrants*, 6 J. OF GENDER, RACE AND JUST. 183 (2002), http://faculty.cwsl.edu/benner/aaRacialDisparityinNarcoticsSearchWarrants.pdf (providing a study of search warrants in San Diego, California); *see also*

case, there have been many questions surrounding why a search warrant was approved when the suspected boyfriend was already apprehended.[235] This is all made even more curious given the fact that the U.S. postal inspector in Louisville said that officers never used the post office to confirm that suspicious packages were delivered to Breonna Taylor's home, though the police officers listed that verification as a basis for probable cause in their warrant application.[236] Further, the postal inspector reported that a separate agency asked months before for the post office to look into whether suspicious mail went to Ms. Taylor's home, and the post office concluded that there had been none.[237] If Breonna Taylor were not presumed punishable by the police applying for the warrant and the magistrate issuing the warrant, there would have been more scrutiny of the warrant application. A magistrate who wanted to protect the presumed innocence of the target of a search would ask for sworn statements of witnesses relied upon in the warrant affidavit (such as the U.S. postal inspector). This is not to conclude that the particular magistrate in Breonna Taylor's case did not scrutinize the warrant application.[238] That level of scrutiny cannot be known without further facts.[239] Instead, the point here is that the probable cause standard does not require the scrutiny level necessary to protect the presumption of innocence. This is a statement about the web of systemic racism in which Breonna Taylor be-

Samantha Michaels, *Breonna Taylor is One of a Shocking Number of Black People to See Armed Police Barge Into Their Homes*, MOTHER JONES (May 20, 2020), https://www.motherjones.com/crime-justice/2020/05/breonna-taylor-is-one-of-a-shocking-number-of-black-people-to-see-armed-police-barge-into-their-homes/.

235. Oppel, Jr. et al., *supra* note 224.

236. Jason Riley, Marcus Green & Travis Ragsdale, *Louisville postal inspector: No 'packages of interest' at slain EMT Breonna Taylor's home*, WDRB.COM (May 16, 2020), https://www.wdrb.com/in-depth/louisville-postal-inspector-no-packages-of-interest-at-slain-emt-breonna-taylor-s-home/article_f25bbc06-96e4-11ea-9371-97b341bd2866.html (last updated Sept. 29, 2020).

237. Darcy Costello, *Breonna Taylor attorneys: LMPD supplied 'false information' on 'no-knock' warrant*, COURIER J. (May 16, 2020, 11:36 AM), https://www.courier-journal.com/story/news/local/2020/05/16/breonna-taylor-attorneys-say-police-supplied-false-information/5205334002/.

238. For an argument defending the way magistrates consider warrant applications, *see* Charles L. Cunningham, *Judge in Breonna Taylor case didn't rubber-stamp search warrants*, COURIER J. (July 1, 2020, 10:51 AM), https://www.courier-journal.com/story/opinion/2020/07/01/breonna-taylor-police-shooting-judges-dont-rubber-stamp-warrants/3285195001/ (Even in his defense of magistrates, the author acknowledges that "generally meet the low threshold of 'probable cause.'").

239. It is important to note, however, that an investigator with the Louisville police department's Public Integrity Unit found that the wording in the search warrant affidavit was misleading. Jason Riley, *Breonna Taylor warrant was 'misleading,' Louisville police investigators find*, WDRB.COM (Oct. 7, 2020), https://www.wdrb.com/in-depth/breonna-taylor-warrant-was-misleading-louisville-police-investigators-find/article_5066abb4-08ee-11eb-983a-6f7458a23340.html.

came entangled. A view toward the presumption of innocence in the warrant process does not usually happen because magistrates are typically not thinking about policing as punishment. However, if the use of police force—anticipated in drug raids—were viewed as extrajudicial punishment against which the presumption of innocence stands guard, then even the probable cause assessment would become a more substantive and protective one.

How Breonna Taylor's situation reveals the systemic racism of Black people being presumed punishable is even more evident upon examination of the warrant in her case. Due to the militarization of the police as a War on Drugs tactic, being a more likely target of drug warrants also means that Black people are more likely to be subject to military-like force during the execution of drug warrants.[240] Federal programs send surplus military equipment to state and local police agencies that are often used by those departments for their Special Weapons and Tactics ("SWAT") teams.[241] An ACLU report revealed that, from 2011–2012, SWAT teams were deployed for their intended hostage, barricade, or active shooter situations in only seven percent of cases.[242] However, seventy-nine percent of the cases in which SWAT teams were used were to search someone's home, typically for low-level drug investigations.[243] The report also concluded that SWAT teams were more likely to be used in searches and raids targeting Black Americans and Latinos than targeting white Americans.[244] Further, in those instances, the SWAT tactics often involved "excessive violence, knocking down doors with battering rams, throwing flash-bang grenades and sometimes injuring the people inside, shooting their dogs or destroying property."[245] In the aggressive raid of Breonna Taylor's home, LMPD initially procured a no-knock warrant to enter the home, but those orders were changed prior to the raid to require the officers to knock and announce their presence when they executed the warrant.[246] Officers claim that they knocked and announced their presence several times before forcibly opening the door

240. *See* Michaels, *supra* note 234; *see also* Lindsey Cook, *Use of SWAT Teams Affects Minorities More*, U.S. NEWS (Aug. 19, 2014), https://www.usnews.com/news/blogs/data-mine/2014/08/19/use-of-swat-teams-affects-minorities-more.

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

246. Oppel, Jr. et al., *supra* note 224.

when they received no response.[247] However, Ms. Taylor's boyfriend, Kenneth Walker, and several others who lived in the apartment building said the police never announced themselves.[248] Again, a robust presumption of innocence calls for a different approach.

If police violence were considered punishment, requiring the presumption of innocence to be used as a protection against that punishment, then the rules regarding a reasonable warrant execution would be more substantial. The Fourth Amendment's "general touchstone of reasonableness . . . governs the method of execution of [a] warrant."[249] However, most of the reasonableness requirements for warrant execution are dealt with by statute and rule, rather than through court decisions on constitutional requirements.[250] The Supreme Court has upheld a requirement that officers knock and announce their presence when executing a search warrant,[251] but there is no exclusionary remedy if that rule is violated.[252] Further, the Court has offered many instances when an officer can forgo the knock and announce rule.[253] Therefore, many jurisdictions allow for the issuance of no-knock warrants when police allege that they are necessary.[254] As with all of American policing, this plays out in a racially disproportionate manner. In Louisville, where Breonna Taylor lived, police used no-knock warrants more frequently against Black residents.[255] And, even if officers do knock and announce, the Supreme Court has said that there is no constitutional violation if officers forcibly enter a home after waiting only a mere 15–20 seconds after knocking and announcing

247. *Id.*

248. *New York Times Podcast*, *supra* note 226.

249. United States v. Ramirez, 523 U.S. 65, 71 (1998).

250. For instance, Rule 41(e), Federal Rules of Criminal Procedure, provides, inter alia, that the warrant shall command its execution in the daytime, unless the magistrate "for reasonable cause shown" directs in the warrant that it be served at some other time. *See* Jones v. United States, 357 U.S. 493, 498–500 (1958); Gooding v. United States, 416 U.S. 430 (1974). A separate statutory rule applies to narcotics cases. 21 U.S.C. § 879(a).

251. Wilson v. Arkansas, 514 U.S. 927 (1995).

252. Hudson v. Michigan, 547 U.S. 586 (2006).

253. Richards v. Wisconsin, 520 U.S. 385, 394 (1997) (the knock and announce rule can be disregarded when police have "a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime.").

254. *See* CONGRESSIONAL RESEARCH SERVICE, *"No-Knock" Warrants and Other Law Enforcement Identification Considerations* (June 23, 2020), https://crsreports.congress.gov/product/pdf/LSB/LSB10499.

255. Matt Mencarini, Darcy Costello & Tessa Duvall, *Louisville police's 'no-knock' warrants most often targeted Black residents, analysis shows*, USA TODAY (Dec. 1, 2020), https://www.usatoday.com/story/news/2020/12/01/louisville-police-no-knock-warrants-mostly-targeted-black-residents/6456241002/.

themselves as law enforcement officials.[256] None of this is very protective of a person innocently sheltered within what should be the safety of their home.

This lack of protection is even more apparent when the flimsy knock and announce rule is combined with an even flimsier preference for a daytime warrant execution. Protesters and advocates have questioned why officers would choose to raid Briana Taylor's home in the middle of the night, though they apparently thought that Ms. Taylor lived alone at her apartment and did not suspect her of violent crime.[257] Again, the answer here is a systemic presumption that Black people are punishable. There is a requirement for the daytime execution of warrants, and some jurisdictions have codified that rule. The Supreme Court has declined to decide that daytime warrants are required under the Fourth Amendment or to clarify any circumstances under which nighttime warrant execution is unconstitutional.[258] This lack of substantive protection against the unreasonable execution of warrants allows racially-biased outcomes in warrant execution. For a person presumed to be innocent, or at least a person given the dignity of that presumption, a warrant is executed in the daytime to avoid startling that person (thus giving officers an excuse to use fatal force in the event that the person uses a firearm to protect their home), and that gives the person the opportunity to cooperate—as an innocent person is likely to do. It is only when officers presume that a person will be combatant or dangerous does it make sense to barge into their home under cover of night. Officers had no individualized reason to suspect that Breonna Taylor, a person with no violent criminal history, would resist complying with a lawfully executed search warrant. In other words, there was no reason for officers to execute a warrant the way that they did in Breonna Taylor's case unless they presumed that she was punishable. Considering that Black people are systemically presumed punishable, there is an increased risk that Black people will be facing the same tragic end as Breanna Taylor.

Infusing a presumption of innocence in the constitutional requirements for the reasonable execution of warrants could temper the risk to Black lives. Rather than leaving the assessment of warrant execu-

256. United States v. Banks, 540 U.S. 31 (2003).

257. *Id.*; *see also* Oppel, Jr. et al., *supra* note 224.

258. For a full discussion of this issue, *see* Mallory K. Bland, *Nighttime Execution of Warrants: An Analysis Under Wilson v. Arkansas and Virginia v. Moore*, SSRN (Jan. 24, 2017), https://ssrn.com/abstract=2905358 or http://dx.doi.org/10.2139/ssrn.2905358.

tion reasonableness to a court after the fact, the common law principles of daytime execution and a meaningful knock and announce procedure must be required. When combined with a robust probable cause standard—one that looks at a warrant application with the presumption that the person being searched actually stands innocent before the law—the warrant process can be revamped to accomplish antiracist aims.

CONCLUSION

The nation has been taking note of the pervasiveness of police violence against Black Americans and the toll that such violence has taken on the Black community.[259] Additionally, increasing attention has been given to the suspicions to which Black Americans are subjected daily by police and laypersons alike.[260] The truth is, Black Americans live their lives being presumed punishable. Not only do they live under the fear and trauma of this presumption, but they also live and die according to its consequences. Being presumed punishable means that a Black person is often subjected to sentencing—even the death penalty—on the streets. Courts should consider this extrajudicial enforcement of sanction to be considered unconstitutional, but it takes a renewed understanding and application of the presumption of innocence to land on that conclusion. An antiracist objective can provide the momentum for moving toward that outcome.

Antiracism calls for us to look at our systems—including constitutional jurisprudence—to uncover ways in which our institutions perpetuate racially disparate outcomes. As this Article, and countless studies and reports, have shown, policing in America has racially disparate outcomes. Eradicating racism from policing will require a dismantling and rebuilding, or defunding and unbundling, of the institution with an antiracist lens every step of the way. No reform,

259. For an example of how this issue is not being discussed in the mainstream news, *see* David A. Harris, *Why police violence against Black people persists—and what can be done about it*, FORTUNE (June 30, 2020), https://fortune.com/2020/06/30/police-violence-brutality-black-racism/. ("Race runs through the American psyche in deep ways, all rooted to slavery, white supremacy, and Jim Crow. Decades ago, research established that the dominant American stereotypes of Black people cast them as criminal, dangerous, and violent."); *see also* Oliver Laughland, *US police have a history of violence against black people. Will it ever stop?*, GUARDIAN (June 4, 2020), https://www.theguardian.com/us-news/2020/jun/04/american-police-violence-against-black-people.

260. P.R. Lockhart, *Living While Black and the criminalization of blackness*, VOX (Aug. 1, 2018), https://www.vox.com/explainers/2018/8/1/17616528/racial-profiling-police-911-living-while-black.

however, can be truly effective in making a meaningful difference in the lives of Black people unless they start with a recognition that Black people are presumed punishable in our society. It is that presumption and its potential consequences that call for a renewed and reinvigorated presumption of innocence to defend Black lives from that premature punishment.

The presumption of innocence must be thought of as more than a mere rule of evidence. Instead, it is vital to ensuring due process before punishment. Without a robust presumption of innocence—one that applies outside of the courtroom, where sentencing on the street takes place—there is no constitutional weight to an insistence that Black Americans not be punished by the police. An expansive view of the presumption of innocence is necessary to advance antiracist policing reforms that recognize that Black people have the right to live as innocent people unless and until they are proven guilty in court.[261] Of course, applying the presumption of innocence to the use of force by police requires courts to see that force as punishment. As this Article discussed, there are numerous reasons to see police violence in that light. Just as courts should resurrect the presumption of innocence in its original image as a protection against premature punishment, courts should also acknowledge the present-day legacy of the historic race-based foundations of policing. This is what it means to be antiracist. Antiracism requires understanding that "[e]very policy in every institution in every community, in every nation is producing or sustaining either racial inequity or equity between racial groups."[262] Policing in America sustains racial inequity and has done so since its inception. It does so by punishing people and punishing Black people the most harshly. Certainly, there are other arguably legitimate policing functions, such as criminal investigation and intervention in an immediate violent situation. But those possibly legitimate functions of the police do not eliminate the consequences of the excessive force that has historically been used to deter objectionable behavior by

261. Of course, guilty pleas are another manner of securing a conviction. While that precise topic is outside of the scope of this Article, it is worth noting that the plea process also carries with it a presumption that Black people are punishable. Various studies have shown that racial bias plays a role in the plea process. Therefore, it is another area that is in need of antiracist reform. *See* Jenn Rolnick Borchetta and Alice Fontier, *When Race Tips the Scales In Plea Bargaining*, MARSHALL PROJECT (Oct. 23, 2017), https://www.themarshallproject.org/2017/10/23/when-race-tips-the-scales-in-plea-bargaining; *see also* Carlos Berdejó, *Criminalizing Race: Racial Disparities in Plea-Bargaining*, 59 B.C.L. REV. 1187 (2018), https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=3659&context=bclr.

262. KENDI, *supra* note 126, at 18.

Black Americans and express society's retributive aims against the Black community. This is punishment. And when policing as punishment is coupled with a presumption that Black people should be punished, the presumption of innocence as a meaningful constitutional protection carries much promise. Those who agree that Black Lives Matter ought to look for ways to embed a presumption that those Black lives are innocent into our calls and proposals for reform.