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Maya R. Foster April 9, 2019

Blackness on Trial: The Presumption of Non-Innocence in the United States of America

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Abstract

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By Maya R. Foster

America's judicial system is predicated on the notion that every individual is equal and entitled to the rights stated in the Constitution, one of those rights being the right to be considered innocent until proven guilty as agreed under the burden of proof in criminal law. Black Americans appear to be second-class citizens, who exist outside this realm of equality and justice, however, and this status suggests the need for a very important critique of the judicial system as fair and just. Not only are the laws not applicable to Black people, but there is a historical association between Blackness and guilt, or non-innocence. I hypothesize that in America there exists a presumption of non-innocence for Black people that renders them inherently guilty. This thesis investigates the ways in which Blackness has and continues to be criminalized in the U.S. justice system within the legal system and in society. I examine the cultural concepts that shape views of blackness, the body, the presumption of innocence, gender, flesh, and citizenship rights to position the presumption of non-innocence as the antithesis of innocence and Blackness as the antithesis of whiteness in America. While some scholars argue that it is America's anti-black judicial system that creates the guilt for Black people, I contend that is a combination of both the judicial system and the criminalization of Blackness itself that contribute to the presumption of non-innocence for Black persons.

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Introduction

In 1896, following the U.S. Supreme Court ruling, in *Plessy v. Ferguson,* that segregation did not violate the equal protection clause of the Fourteenth Amendment, Justice Henry Brown of Michigan, who voted alongside the majority in an 8-to-1 decision made clear his opinions in this quote:

> The object of the Fourteenth Amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or commingling of the two races upon terms unsatisfactory to either (Brown v. Board of Education, 163 U.S. 537 1896)

Brown's stance in the *Plessy* decision speaks volumes on the racial attitudes of the time. Not only is there an admittance that the Fourteenth Amendment was proposed as theory and *not* as practice, but there is also the declarative point about the "nature of things". What is natural cannot be fixed or amended. What is natural is also biological and inherent to our understanding of each other and society. For Brown, whose opinion presumably represented the majority of white racial attitudes in the nineteenth century, the racial distinctions were natural and therefore, permanent. So, what then was the purpose of the ratification of the Civil War amendments, specifically the Fourteenth Amendment? Or the 1954 ruling in *Brown v. Board of Education* to overturn *Plessy* when Black[1] children remain in separate schools, with separate opportunities?

[1] I capitalize Black because, in following the American grammar structure, proper names *should* be capitalized and although Black or Blackness are not limited to just one's identity, when referring to the people I will use a capital "B" to affirm the importance of thinking of Black as an ontological position. Inspired by Red, White and Black from Wilderson: I capitalize the words Red, White, Black, Slave, Savage, and Human in order to assert their importance as ontological positions and to stress the value of theorizing power politically rather than culturally (23). Inspired by the work of Saidiya Hartman, Michelle Wright, Eric Ritskes, and Toni Morrison, I use the terms Black body and

There is a clear disconnect between the ratifications of laws and upholding laws particularly concerning the lives of Black people. Well into the present there are a number of examples that echo Justice Brown's nineteenth-century sentiments. In the case of the presumption of innocence, which I later identify as a principle and *not* a law, there is a greater discrepancy between the principle, as it is defined, and the principle, as it is applied in the courtroom and society. When legal principles, such as the presumption of innocence, depend upon the perceived innocence of the accused, can Black people, who are perceived as non-innocent, be considered innocent? The aim of the assumption of innocence is to ensure that the necessary steps of due process are taken in the court of law. Within this legal concept, the burden of proof falls on the state and the prosecution to develop strong evidentiary claims to prove the defendant's guilt. The reverse however, being presumed guilty until proven innocent, shifts the burden of proof from the state to the defendant. While this may not seem significant, when the defendant is Black the burden becomes one almost too heavy to carry. It is through this thesis that I offer a cultural analysis to these legal questions.

This exclusion from the ability to be considered innocent plagues the lives of Black people whose version of due process results in their death or a predetermined verdict of guilty. According to Section 1 of the Fourteenth Amendment, Black people are citizens of America and within their right to be presumed innocent until proven guilty beyond a reasonable doubt. History has shown us, from the Scottsboro Boys to Trayvon Martin, that Black people exist outside of the legal presumption of innocence. I am choosing to use the phrase the presumption of non-innocence instead of the presumption of guilt because there is a significance in the use of the

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flesh interchangeably to represent the different levels of Black vulnerability and the reduction of Black people to their bodies or their flesh.

word “non” to express the negation or absence of something. Guilt, or guiltiness, connotes the involvement of a crime. Guilt requires an action to create the classification of an individual as guilty; however, I argue that an action is not required for Blackness to be considered guilty. This is why I have defined Blackness as non-innocent. Non-innocence is an existence, whereas guilt is hyperbolic and suggests that the Black body has the ability to undo its guiltiness or be considered innocent. Non-innocence is also a facet of Black death where biological death does not necessarily constitute death but where the mere existence of Blackness is sufficient evidence for death. It is my intention to show that the cultural perception of non-innocence of Black people extends far beyond the action of committing a crime.

To develop my argument that in America there exists a presumption of non-innocence for Black people that renders them inherently guilty, I examine two well-known legal cases, *State v. Zimmerman* (2013) and *Brown v. State* (2014). In both cases, the race of the defendant and of the deceased played a key role in each trial. Though race is not considered measurable or a sufficient counterargument in court, I argue that publicized incidents of police brutality and state violence have a significant impact on the general population’s opinions about racial discrimination in America and therefore contribute to the non-innocence of the Black person in question.

Black defendants are placed on trial both inside the courtroom and outside through media outlets. In the case of *State v. Zimmerman*, the defendant is George Zimmerman, I will argue that the focus on the trial was not on whether not Zimmerman was guilty of murder, but whether Trayvon Martin, the deceased young Black man, deserved to die. In the case of *State v. Brown*, I argue that the defendant, Cyntoia Brown, is denied access to the presumption of innocence as a result of the intersection between her gender and race. Brown is not given the considerations detailed in the presumption of innocence and suffers the consequences with a harsh sentence.

Analyzing the impact of Blackness and gender in the cases of Trayvon Martin and Cyntoia Brown reveals that the presumption of non-innocence is fulfilled against Black persons regardless of the intersectionalities of their identities.

Another connection between these cases is that both Martin and Brown were approximately the same age when each of their incidents occurred, Martin 17 years old and Brown 16 years old. Though my thesis focuses on the intersection of race and gender with the presumption of non-innocence it is important to note the ways in which age contributes to the non-innocence of Blackness as well. Oftentimes a correlation is made between adolescence and innocence, however in Robin Bernstein's book, *Racial Innocence: Performing American Childhood from Slavery to Civil Rights*, she details the racialization of childhood and explains how innocence itself, through the cultural productions of childhood, is "raced white" (4). In her chapter titled, "Tender Angels, Insensate Pickanninnies", Bernstein highlights the positioning of white children as angels and Black children as "unfeeling, noninnocent" children (33). This discrepancy between the ways white children were portrayed in comparison to Black children supports my claim of the presumption of non-innocence for Black bodies. However, now it is clear that the age of the Black body does not aid in the presumption of innocence, but instead furthers the notion of non-innocence that has its origins in childhood formation.

Chapter One: Framing Blackness as Non-Innocent is divided into two parts. The first section takes a historical look at slavery as the foundation for the positioning of the Black body as non-innocent. Through analyzing historical slave practices against Black men and women I will show that while the institutions of violence against Black bodies may have changed, the method of reducing Blackness to just the vulnerable exposed flesh remain unchanged. This lens is to highlight America's notion of Black bodies as expendable. Historically, Black bodies could

be killed, discarded, and replaced without second thought. Now, the legal system serves as the institution to establish justice in society, however, the views of Black bodies as disposable has not changed. The second section, titled, Law & Social Order: The presumption of non-innocence in America focuses on the history of the presumption of innocence to show concept's inherent anti-Blackness. Historically, citizenship laws and amendments were not made with the goal to actualize the humanity of Black people, but with the intention to control and restrict Blacks to the confinements of a second-class non-citizens whose access to rights are denied. It is my intention to convey that the foundation of Blackness as non-innocent in American society is rooted in laws from the seventeenth, eighteenth and nineteenth centuries. Chapter Two: The Story of Trayvon Martin discusses 17-year-old Trayvon Martin who was shot and killed February 26, 2012 in Sanford Florida. Through exploring Martin's case, I analyze the various ways in which his guilt was placed on trial both inside and outside of the courtroom—even in his death. Though the case was brought forth to determine the innocence or guilt of defendant, Zimmerman, I probe the significance of Trayvon Martin's presumed criminality as evidence of the non-innocence for Black men. Martin's case points directly to historical slave practices, specifically the power dynamics between white men and Black men. This case highlights the expendability of the Black body, and the connections between the value of the Black body during slavery to the present. Chapter Three: From Celia to Cyntoia is the second case I examine regarding the presumption of non-innocence but with a focus on both Blackness and gender. The case of Cyntoia Brown who, when my research first began, was serving a life sentence for a murder she committed when she was 16 years old is a significant one because it deals with issues of age, gender, and Blackness. In this case, however, Brown's gender further complicates this presumption through the concept of double deviance that creates an additional obstacle for her to

overcome[2]. Similarly, to Trayvon, Cyntoia's case is not unique nor is it new. To connect modern legal practices with jurisprudence during slavery, I compare Cyntoia's case to Celia the slave to show how the presumption of non-innocence has taken a particular shape for Black women since the beginning of the seventeenth century. In the Conclusion, I offer three considerations to the problem of the presumption of non-innocence for Black persons in America. Further, I question whether we can ever escape the social, political, and psychological association American society makes between the lack of innocence and Black people.

For the purpose of this thesis, I have centered my research and evidence in the southeastern region of the United States from slavery to the present. I begin my research with American racial slavery because this time period is necessary to the formation of racial ideologies and racial distinction between master and slave, and white and Black. In Alden T. Vaughan's article, "The Origins Debate: Slavery and Racism in Seventeenth- Century Virginia", Vaughan emphasizes the connection between Anglo-American racism and the system of slavery that existed during this time period. He writes, "It may be more useful to see Anglo-American racism as a necessary precondition for a system of slavery based on ancestry and pigmentation" (353). The relationship between slavery and racism is foundational to my research because it explains the formation of racial associations around Blackness, as well as the position Black bodies are placed in on account of their skin color. As I argue throughout this thesis, Blackness is inherently non-innocent, and American racial and chattel slavery provides the origins to this claim.

[2] Valerie G. Hardcastle's article, "The Impact of Neuroscience Data in Criminal Cases". Hardcastle references Heidensohn's concept of "double devian[ce]" that speaks to the view that women who are held to higher standards than their male counterparts are punished harsher for their crimes due to their deviation from basic social norms and the expectations of womanhood.

My research is focused in the southern region of the United States of America because there is significant evidence of anti-Blackness through social life and law in South during the seventeenth century. It is my intention to interrogate the legacy of Southern influence on anti-Blackness as a result of slavery and the slave codes and how its remained consistent across time. Although historical, and contemporary, notions of anti-Blackness are not unique to the South[3], and there is a manner in which the anti-Blackness experienced throughout the South, during slavery, has transformed and prevailed into the twenty-first century. Between the time of slavery to the present day, there have been a series of cultural markers that maintain this notion of Blackness as non-innocent. In sociologist, Loic Wacquant's article, "From Slavery to Mass Incarceration: *Rethinking the 'race question' in the US"*, he details the specific 'peculiar institutions' that have defined and controlled Black bodies in the United States of America since slavery. For Wacquant, the important markers are Slavery (1619-1865), Jim Crow (South, 1865-1965), and the creation of the Ghetto which corresponds to the urbanization of African-Americans from the Great Migration (1914-30 to the 1960s). In addition to Wacquant's markers, I would add the ratification of the 13th, 14th, and 15th amendments[4] as contributors to the anti-Blackness present in American law and society. These time periods, and the laws established, highlight the historical tools used to sustain Blackness as non-innocent into the contemporary period. Although I conduct a comparative analysis between seventeenth century and twenty-first

[3] In the tragic deaths of Eric Garner (New York) and Renisha McBride (Michigan).

[4] U.S. Constitution. Amendment. XIII: "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." Amendment XIV: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law." Amendment XV: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

century to show the continuation of anti-Blackness, cultural markers confirm the notion that even if the methods used to sustain anti-Blackness have changed the goals remain the same.

Researching the presumption of innocence is necessary because it calls into question the legal concepts of equality and justice in America's criminal justice system, but that is not where the issue ends. Where does this presumption originate, and how is it non-existent for Black bodies? If the presumption of innocence does not exist for Black people, then how fair or just can standing trial with a jury of one's peers be?[5] If the presumption, for Black people, is non-innocence then is not a guilty verdict inevitable? Why is death an acceptable alternative punishment for a crime committed by Black bodies? These are a few of the questions I will address throughout my thesis with the aim of shedding light on the foundations upon which the discrepancy between the law and its application to Black people rests.

[5] Article III, Section 2 of the Federal Constitution which states, "The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed" and the Sixth Amendment which states, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense"

Chapter One: Framing Blackness as Non-Innocent

A Brief History of the Presumption of Innocence

As an institution, slavery laid the foundation for the Blackness to be linked to criminality or non-innocence because from its inception, the attempt to even attain the most basic right of freedom was considered to be the highest of crimes. Slave codes and laws, such as the Fugitive Slave Act and state specific laws like the Act X of Black Law of Virginia[6], criminalize normal person-to-person interactions to further emphasis the distance between the slave and humanity. These slave codes not only show us the positioning of Black bodies as equal to animals, but they highlight the origins of how the simple existence of the Black body became a punishable crime. These codes from the seventeenth through the nineteenth centuries laid the foundation for Blackness as inherently non-innocent because at every moment an individual of group of slaves could be whipped just for existing.

In 1853, William Goodell noted that the slave "becomes 'a person' whenever he is to be *punished!*... He is under the *control* of law, though *unprotected by* the law, and can only know law as an enemy, and not as a friend."[7] Goodell's observation finds its foundation in the case of *State v. Manor* (1834), where South Carolina's Judge John Belton O'Neall concluded that the slave existed outside of common law and its protection (State v. Manor 1834). During the nineteenth and early twentieth centuries, whenever a slave was accused of committing a crime,

[6] Act X, 1680; Guild, BLACK LAWS OF VIRGINIA 45(1888): [w]hereas the frequent meetings of considerable numbers of Negro slaves under pretense of feasts and burials is judged of dangerous consequence [be it] enacted that no Negro or slave may …go from his owner's planation without a certificate and then only on necessary occasions; the punishment twenty lashes on the bare back, well laid on. Two years later with Act III of 1682, the law was harshened to restrict socializing between slaves to a maximum of four hours unless approved by the slave's master.
[7] William Goodell, The American Slave Code in Theory and Practice. 1853. P. 309

more often than not, the slave would never live to stand trial inside of the courtroom[8]. Slaves who were able to avoid being captured and lynched, were ultimately unsuccessful due to their inability to testify during trial. In *A Treatise on the Law of Evidence* (1842), Simon Greenleaf claimed:

> One of the main provisions of the law, for the purity and truth of oral evidence, is, that it be delivered under the *sanction of an oath*. Men in general are sensible of the motives and restraints of religion, and acknowledge their accountability to that Being, from whom no secrets are hid.

On the surface, this aspect of jurisprudence appears sensible because it rests on the expectation that the witness, or the individual testifying, will tell the truth. However, Greenleaf specifies that only "Men" are sensible beings therefore excluding the slave from sensibility or the ability to testify under oath in court. These sentiments, expressed by Greenleaf, existed as early as the eighteenth century with men like Landon Carter who in 1777 shouted, "Do not bring your negroe to contradict me! A negroe and a passionate woman are equal as to truth or falsehood; for neither thinks of what they say"[9] or Cobb who, in the eighteenth century, states "the negro, as a general rule, is mendacious, is a fact too well established to require the production of proof, either from history, travels or craniology."[10] The beliefs of Carter and Cobb would govern the society long after the testimonies of slaves were permitted in court.

All free Negroes and mulattoes who lawfully resided in the state because of written emancipation were required to register and be numbered in the Orphan's Court[11]. If the free

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[8] Thomas D. Morris, "Slaves and the Rules of Evidence in Criminal Trials". P. 1210
[9] The Diary of Colonel Landon Carter of Sabine Hall, 1752-1778. Earlier in 1766, Carter stated, in short: "A negroe can't be honest."
[10] Thomas R. R. Cobb, An Inquiry into the Law of Negro Slavery in the United States of America
[11] Mississippi Code. 1798 to 1848, Ch. 37, art. 2, § 1.

Negro or mulatto should be unable to procure or produce a certificate of freedom, he or she was subject to being sold at public auction[12]. The purchase by the slave of "any article of articles whatever", without written permission of the master, subjected the slave to thirty-nine lashes[13]. Slaves were unable to own hogs, sheep, cattle or horse, nor pick cotton for their own use[14]. The slave was considered "personal property"[15] and as property the slave may be *used*, at their owner's will, for their own profit or pleasure (Goodell 77). In South Carolina and Georgia, a group of seven or more slaves, without the presence of a white person, allowed for each slave to receive twenty lashes (Goodell 228-9). In Delaware, the requirement was six (Goodell 229). The slave codes ramp up in severity once the subject matter shifts to slave attempts to run away. In South Carolina, "a slave endeavoring to entice another slave to run away, if provisions, be prepared, for the purpose of aiding such running away, shall be punished with DEATH" (Goodell 232). Many southern states had their own version of this law which was more commonly referred to as Fugitive slave laws.

From this, and many more laws, the actions of slaves became increasingly criminalized to the point where the mere existence of the Black body, or collection of Black bodies, would be grounds for legal action. These codes were never intended to protect the slave, or the Black body, but to make clear the relationship between the slave and live cattle[16]. Though significant on its own, slavery's influence extended far beyond the law. Social, philosophical, and psychological discourses were also complicit with the notion that Blackness was inherently non-

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[12] Ibid § 85.
[13] Ibid § 9.
[14] Ibid § 41- 42
[15] Ibid § 45.
[16] William Goodell, The American Slave Code in Theory and Practice (1853): "The most that can be claimed for the Slave Code, on this point, is, that by placing slaves upon a level with other live cattle, it entitles them to the same kind and degree of protection. Beyond this the Slave Code, so far as we know, never attempts or pretends to protect them. It knows them only as mere animals". P. 78

innocent by dehumanizing the enslaved body and framing Blackness as non-innocent. To the European observer, Blacks were inherently criminal (Duru 1322). Duru references John Pinkerton's observation of "Negros on the Gold Coast" from his 1814 collection of *Voyages and Travels:* In All Parts of the World. In a letter response Pinkerton writes,

> It would be surprising if upon a scrutiny into their Lives we should find any of them whose perverse Nature would not break out sometimes; for they indeed seem to be born and bred Villains: All sorts of Baseness having got such sure-footing in them, that 'tis impossible to lye concealed.

Here, this reference to the "nature" of Black folk relates back to the sentiments of Justice Henry Brown in *Plessy* and furthers the notion that Blackness is intrinsically linked to what is non-innocent. At the core of positioning Blackness as non-innocent is, as Frantz Fanon points out, in *Black Skin, White Masks*, Blackness being made the antithesis to whiteness. As the antithesis, Blackness or Black is rendered inferior, subhuman, or without humanity altogether. The Black person is not a person, but a manifestation of the inferiority that their Blackness suggests. Whether the inferiority is experienced through feelings, according to Fanon, or through the gap between the law and its extension to Black people, the result is that Black people remain outside of these rights and privileges. of society because their Blackness deems this treatment acceptable. The treatment becomes acceptable because positioning the Black body as non-human gives the oppressor the ability to assign attributes associated with non-innocence. Framing the Black body as non-innocent is a necessary tool in upholding liberalism and democracy in the United States as a method developed by whiteness seeking to maintain its own privilege. This foundation, rooted in slavery, continues to reinforce the structure of American society because of

how intrinsic slavery is to American society[17]. The link between the structure of American society and slavery also upholds the social order which reminds white people of what they are not. In his article "Wanderings of the Slave: Black Life and Social Death," theorist R.L. summarizes this relationship of power between whiteness and Blackness when he writes:

> To be white was to not be a slave. To be a slave was to define and guarantee white livelihood. The slave was set outside the delimited boundaries of humanity, which by definition was white, and effectively posited as the negative foundation of the bourgeois subject. Where the enslaved was, the white subject came into being (2013).

R.L. positions the slave as the antithesis to whiteness, not Blackness or a Black person, but the slave. This positioning is significant because it sheds light on the synonymy that America creates between "Black" and "slave". The slave who represents the captured body without rights, without being, and without innocence. Blackness as an extension of the slave exists "outside the delimited boundaries of humanity". If innocence, and the right to be presumed innocent, rests on the recognition of one's humanity exists, then Blackness, which is without humanity, is unable to be considered innocent. So then, once again the question of the purpose of the Civil War amendments is raised again. Why ratify the Fourteenth Amendment when the master-slave relationship between whiteness and Blackness is *necessary* for the American system to thrive? There is an apparent flaw in the United States' ideals and the presumption of non-innocence imposed upon the Black body sustains it. It is this positioning of the Black body as non-innocent that answers Hartman's question of, "… suppose that the recognition of humanity held out the promise not of liberating the flesh or redeeming one's suffering but rather of intensifying it? (5)" from *Scenes of Subjection*. Considering the Black body as always non-innocent and therefore

[17] Faces at the Bottom of the Well, Derrick Bell (10)

always excluded from the rights and privileges of the law is an intensity that makes freedom for Black people so bitter. The ratification of the Fourteenth Amendment was not meant to actualize the citizenship rights for Black folk but to transition Black folk from visible slavery to the invisible and mystified atmosphere of racial equality. In this atmosphere, the "agency" is returned to the Black body who is now responsible for his, her, or their own fate.

What was once obvious through overt racism in the form of chattel slavery and Jim Crow laws has transformed into covert racism and racial attitudes deeply embedded into American culture and society. The absence of clear racial prejudice and discrimination does not equate to the disappearance of these attitudes but instead gives rise to a new structure of social and legal practices where these racial attitudes and prejudices can hide in plain sight. As Angela Davis observes in her article *Prosecution and Race: The Power and Privilege of Discretion*, "When state actors openly expressed their racist views, it was easy to identify and label the invidious nature of their actions. But today, with some notable exceptions, most racist behavior is not openly expressed (Davis 1998). In the same way that racial attitudes of some individuals have shifted from overt to covert, the law has shifted from explicit racism to subtleties sprinkled throughout the law to uphold America's historical relationship with the racial hierarchy. Saidiya Hartman in her book *Scenes of Subjection: Terror, Slavery, and Self-Making in Nineteenth-Century*, identifies this as a reorganization of the plantation system that placed Black people in positions that are little better than those during slavery. The positioning of Blackness as non-innocent is a necessary tool in keeping the new plantation system alive. The laws that govern our society do not protect Black people, but rather ensure that society's survival is predicated on the continued exploitation of Black bodies.

It is the case that both Trayvon Martin and Cyntoia Brown were regarded as non-innocent on account of their mere existence. As will be seen in chapter three and four, both of their stories show parallels between slave codes and modern social practices: one reveals the perils of Blackness when it exists in excess, the other, the inability for the Black female slave body to give consent. Both fell into the trap of America's expectation for Blackness to be recognized as human only when it becomes necessary to punish the individual for a serious crime.

Law & Social Order: The Presumption of Innocence in America

The presumption of innocence is necessary to evaluate within the United States seeing that this country has modeled its legal system after these historical laws and principles. However, it is the unique interpretations of these laws, and how they have been altered and applied, that calls for an in-depth look at the history of its use in the United States.

At its core, the presumption of innocence refers to a burden of proof assigned to the prosecution, or the accusing party, to "establish the prisoner's guilt beyond a reasonable doubt"[18]. While the notion of considering an individual innocent until they are proven guilty appears to be simple in nature, it is the simplicity, vagueness, and ideal nature of the principle that has contributed to the presumption of *non*-innocence for Black folk.

The origin of the presumption of innocence is founded in two Latin principles: *Actori Incumbit Probati* and *Non Statim qui Accusatur Reus est* (Quintard-Morenas 110-112). Actori Incumbit Probatio is the principle that the it is the responsibility the accuser to prove the guilt of the accused (Quintard-Morenas 110). The core of this principle however, dates back to the Babylonian *Code of Hammurabi* [19](1782-1750 B.C.), one of the foundational inspirations in law

[18] Harvard Law Review, vol. 9, no. 2, 1895

[19] 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

and society. Under Hammurabi's code, a false accusation of a capital offense led to the accuser being put to death[20]. The same burden of proof is true in Roman law under Emperor Antonin of A.D. 212 who stated, "He who wishes to bring an accusation much have the evidence."[21] In criminal cases, the burden of proof intensified and the evidence necessary to convict an individual needed to be even more compelling, because it was a matter of life and death for the accused (Quintard-Morenas 111). In the event that the evidence was inconclusive or insufficient "the benefit of the doubt was given to the defendant (*in dubio pro reo)*."[22] Non Statim qui Accusatur Reus est refers to the treatment of accused in a criminal trial. Translated the principle states that "Until guilt is established by conclusive evidence, society has no right to treat the accused as a criminal (Quintard-Morenas 112). This principle reinforces the notion that an accusation *does not* equate to a conviction, and, therefore, the accused should be treated in a manner most consistent with their status at the time of trial proceedings (Quintard-Morenas 112). In 352 B.C. Demosthenes in agreement with the Non Statim qui Accusatur Reus est principle, stated, "for no man comes under that designation until he has been convicted and found guilty."[23] Examples of this maxim existed in Egyptian law[24], Roman law[25], and Frankish law at the end of

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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.").

[20] Robert Francis Harper, The Code of Hammurabi, King of Babylon 11, §1 (1904)

[21] Code Just 2.1. (Antonin 212)

[22] Francois Quintard-Morenas. "The Presumption of Innocence in the French and Anglo-American Legal Traditions" (111) quoted from Gaius, Ad edictum provinciale (5)

[23] Demosthenes, Against Meidias, Androtion, Aristocrates, Timocrates, Aristogeiton, (231)

[24] Decree of King Ptolemy VIII dated Apr. 28, 118 B.C.: A decree issued by King Ptolemy VIII of Egypt in 118 B.C. prohibited government officials from arresting and imprisoning anyone "for a private debt or offence or owing to a private quarrel" and directed them to bring suspects "before the magistrates appointed in each Nome (one of the thirty-six territorial divisions of ancient Egypt)" to be dealt with "in accordance with the decrees and regulations."

[25] Code Theodose. 9.1.19: A constitution of the Emperors Honorius and Theodose of A.D. 423 reminded consuls, praetors, senators, and tribunes of the people that defendants charged with a capital crime should not immediately be considered guilty merely because they had been accused, so that an innocent would not unjustly suffer (*non statim reus, qui accusari potuit, aestimetur, ne subjectam innocentiam faciamus*)

the eighth century[26]. With these two principles as the foundation of the presumption of innocence one must question how the maxim of innocent until proven guilty got lost in translation.

During the nineteenth century, legal interpretations of the presumption of innocence deviated from the standard notions of the principle. What was once a procedural concept regarding the treatment of the accused to ensure correct jurisprudence was followed was then reduced to "another way of expressing the traditional rule putting the burden of proving guilt beyond a reasonable doubt on the prosecution" (Quintard-Morenas 142). The U.S. Supreme Court deemed the doctrine an "instrument of proof" that is separate from the "reasonable doubt standard[27]. The shift in the judicial understanding of this principle was a reflection of the concern that the original method behind the presumption of innocence, as a principle that extends outside of the courtroom "undermine[s] the fight against crime" (Quintard-Morenas 143). This shift was significant because it lessened the severity of the presumption of innocence from a *necessary* standard that had to be adequately fulfilled, in order to determine and individual's guilt, to a *sufficient* amount of evidence, that is satisfactory to the jury, that the accused is in fact guilty.

The Anglo-American interpretation of the presumption of innocence as a rule of proof contributes the continued depiction of the accused as guilty both inside and outside of the courtroom, before a trial even begins. The consequences of this interpretation are far worse than the expectation that the presumption of innocence "undermines the fight against crime" unless that fight includes public opinion and shame. If the public assumes the accused guilty that makes

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[26] Capitularia regum Francorum 1079 (Paris, 1780): a *regula juris* throughout the Middle Ages to illustrate the idea that a defendant should not be considered guilty before conviction: it is not the accusation, but the conviction that makes the criminal (*non statim qui accusatur reus est, sed qui convincitur criminosus*)

[27] Coffin v. United States, 156 U.S. 432, 459 (1895): (Reasonable doubt "is the result of the proof, not the proof itself.)

the burden of proof for the prosecution, or the accuser, that much easier. Francois Quintard-Morenas counters the Anglo-American interpretation by bringing attention to a key issue:

> Denying that the presumption of innocence has any application before trial ultimately legitimizes the unnecessary indignities inflicted upon a growing number of persons accused of crime. A revitalization of this cardinal principle of Anglo- American jurisprudence is much needed at a time when the words "accused", and "convict" are becoming increasingly synonymous (Quintard-Morenas 149).

According to a series of studies conducted by Yale University, reports from the ACLU, and other criminal analyses, the "growing number of persons accused of crime" is disproportionally Black persons (Balko 2018). The purpose of the innocent until proven guilty maxim is not only to maintain the burden of proof within the responsibility of the prosecution, but also to prevent "the infliction of punishment prior to conviction" (Quintard-Morenas 149). I would extend the synonymy Quintard-Morenas' describes between "accused" and "convict" to include Black" and "Blackness." Not only is Blackness considered guilty within a courtroom filled with judge and jury, but also outside of the courtroom in the hands of public opinion. There is a trial of court and a trial of society that occur simultaneously both gathering evidence to determine the guilt of the accused. For Black people, whose bodies are inherently non-innocent, the trial is not to determine guilt but rather is a race to gather as much evidence as possible to confirm the guilt they already assumed. In the case of *Campbell v. McGruder,* it was ruled that, "[I]f the presumption of innocence is to be respected by judge and jury in the courtroom, it must be treated as an article of faith by all society outside the courtroom as well" (Campbell v. McGruder). In the case of Blackness, however, the presumption of innocence is not treated as an

article of faith, but a burden of proof, and, as a result, society sees no obligation in upholding the maxim either.

Chapter Two: The Story of Trayvon Martin

A Brief Overview of the Series of Events

On February 26, 2012, a seventeen-year-old African-American teenager, Trayvon Martin, left his father's girlfriend's residence at The Retreat at Twin Lakes, a gated community in Sanford, Florida, with the intention of going to a 7-Eleven convenience store to purchase a can of iced tea and a bag of skittles (Yancy and Jones 14). As he was walking, he noticed a man, who he presumed to be white, following him (Yancy and Jones 14). At 7:09 PM, George Zimmerman, who was later confirmed to be white from his voter registration card, (Yancy and Jones 14) called 911 dispatchers to report that there was a man, "just walking around looking about [looking like] he's no good or on drugs or something" ("Zimmerman 911 Call Transcript – Trayvon Martin"). The dispatcher then asked Zimmerman if he was following Martin, and Zimmerman answered, "Yeah" ("Zimmerman 911 Call Transcript – Trayvon Martin"). The dispatcher informed Zimmerman that pursuit of Martin was not necessary, to which he responded with an "Okay" (Yancy and Jones 14). In a period of eight minutes from the 911 call, George Zimmerman had shot Trayvon Martin, "in the chest at close range with a Kel-Tec 9 mm PF-9" (Yancy and Jones 14). After the incident, Martin's body was taken to the Volusia County Medical Examiner's office and classified as a John Doe because he was allegedly without any form of *identification* (Yancy and Jones 15). A few hours after Trayvon's death, small traces of marijuana were found in his body from the results of an autopsy conducted immediately after he was confirmed deceased (Yancy and Jones 15). In police custody, Zimmerman claimed the right of self-defense as stated under the Florida "Stand Your Ground Law", and was later released before any form of drug, alcohol or background checks and procedures were conducted (Yancy

and Jones 15). The lead homicide investigator, Chris Serino, filed an affidavit recommending that Zimmerman be charged with manslaughter, but both the State's Attorney's office and Police Chief hesitated to proceed due to a lack of evidence to disprove Zimmerman's claim of self-defense (Yancy and Jones 15). On April 11, 2012, in the Circuit Court of the Eighteenth Judicial Circuit in and for the Seminole county, Florida, in the case of the *State of Florida v. George Zimmerman*, the Honorable Judge Debra Nelson presiding and state attorney, Angela B. Corey, charged Zimmerman with one count of Second-Degree Murder[28]. After over a year of pre-trial hearings, discovery, jury selection, and witness testimonies, on Saturday, July 13, 2013, the six-person all-female and majority white jury[29] issued a verdict of not guilty on count one of Second-Degree Murder and the lesser charge of manslaughter.

Southern Legal Influence: From Virginia Slave Codes to Florida Stand Your Ground Laws

The outcome of the trial of *State v. Zimmerman* is one all too common to Black livelihood. There is something quite intentional about the way history continues to, not only repeat itself, but morph into new forms while maintaining the original foundation. The events that led to Trayvon's murder began well before 2012 with the 1857 *Dred Scott v. Sanford* Supreme court ruling that African-American's, freed or enslaved, were *not* American citizens and the rights of American citizens would not be extended to them. Under this ruling Blacks "had no rights which the white man was bound to respect" (Dance 148); however, even before *Dred Scott* there were the Virginia Slave Codes of 1705, and the 1770 slave codes of Georgia and South Carolina which stated,

[28] "Seminole County Criminal Information – Issue Capias" (PDF). Angela B. Corey, State Attorney. Retrieved April 11, 2012.
[29] All but one of the jurors were white women. One juror was identified as Black with Latinx heritage.

(A) If any slave resist his master, or owner, or other person, by his or her order correcting such slave, and shall happen to be killed in such correction, it shall not be accounted felony; but the master, owner, and every such other person so giving correction shall be free and acquit of all punishment and accusation for the same, as if such incident had never happened (An Act Concerning Servants and Slaves 1705).

(B) If any slave shall be out of the house, or off the plantation, of his master, and shall refuse to submit to an examination by *any white person,* such white person may apprehend and *moderately correct* him; and if he shall assault or strike such white person he may be *lawfully killed*[30].

Code thirty-four of the Virginia Slave Codes and the Georgia and South Carolina Penal Codes illustrate just a few of the foundational laws that have intentionally framed the existence of Black bodies within the category non-innocent and at disposable. In her article, "Can Trayvon Get a Witness? African American Folklore Elucidates the Trayvon Martin Case", scholar Daryl Cumber Dance emphasizes the relationship between whiteness, Blackness, and the law, when she writes, "…early laws in most states decriminalize[ed] almost anything a white person did to a black person and criminaliz[ed] *anything* a Black did to a white" (Dance 148). Dance's use of folklore to explain these relationships based on race is a significant method because folklores, like the law, possess the ability to the shape the way we view ourselves, each other, and the society in which we live. Of the "anything" that could be criminalized for Black people, walking without identification, as observed in Trayvon's case, constituted a crime that required action from white authority. As stated in Code thirty-four from the Virginia Slave law, the power to uphold the power hierarchy between whites and Blacks is guaranteed to the master, owner, or

[30] 2 Brevard's Digest, 21. Prince's Digest, 447. Sect. 5 of Act of 1770, and page 348, No. 43; title, Penal Laws

other person. The similarities between George Zimmerman's actions and the Virginia Slave Codes that calls for an in-depth look at the Stand Your Ground Law.

The Fugitive Slave codes were statutes passed by Congress to ensure the capture and return of runaway slaves by any means necessary. The Stand Your Ground laws, specifically in Florida, were established as legal measure for the "use or threatened use of force in defense of a person" ("Florida Statutes Title XLVI. Crimes § 776.012"). Inspired by the Castle Doctrine[31], the Stand Your Ground Law refers to the following:

> (1) A person is justified in using or threatening to use force, except deadly force, against another when and to the extent that the person reasonably believes that such conduct is necessary to defend himself or herself or another against the other's imminent use of unlawful force. A person who uses or threatens to use force in accordance with this subsection does not have a duty to retreat before using or threatening to use such force ("Florida Statutes Title XLVI. Crimes § 776.012").
>
> (2) A person is justified in using or threatening to use deadly force if he or she reasonably believes that using or threatening to use such force is necessary to prevent imminent death or great bodily harm to himself or herself or another or to prevent the imminent commission of a forcible felony. A person who uses or threatens to use deadly force in accordance with this subsection does not have a duty to retreat and has the right to stand his or her ground if the person using or threatening to use the deadly force is not

[31] Christine Catalfamo. "Stand Your Ground: Florida's Castle Doctrine for the Twenty-First Century," Rutgers Journal of Law and Public Policy vol. 4, no. 3 (Fall 2007): pp. 505, "During the thirteenth century, homicide committed in self-defense was not justifiable. A man convicted of homicide who raised evidence of self-defense could receive a pardon from the king, but he could not be acquitted. However, homicide was considered justifiable, and thus worthy of acquittal, if it was done in execution of the law-for example, to prevent a robbery. Eventually, the pardon became a mere formality, with the Chancellor signing the king's name, and by 1534, there is evidence that self-defense became an affirmative defense, both by statute and by common law."

> engaged in a criminal activity and is in a place where he or she has a right to be ("Florida Statutes Title XLVI. Crimes § 776.012").

At first glance the similarities between the Stand Your Ground Law and Code thirty-four of the Virginia slave code may not be apparent, but once "a person", in the Stand Your Ground maxim is replaced with "master", "owner", or "other person", meaning other *white* person, then the two principles appear to be similar. Through the "stand your ground" defense, the justification in controlling and killing Black bodies, without punishment, is restored to the social order which places whiteness as the supreme authority with the power to use threatening force or deadly force whenever the threat is Blackness.

To present the disparities in outcomes based on the race of the individual citing the law, on February 17, 2013, the Tampa Bay times updated an article[32] about the Florida "stand your ground" law, after reviewing approximately 200 cases where "stand your ground" was used as a defense. Of those who have used "stand your ground", seventy percent have successfully avoided prosecution (Martin 2012). Defendants acquittal in claiming the "stand your ground" law increases if the victim is Black (Martin 2012). The last statistic raises the question of whether the "stand your ground" law is *truly* a precaution for incidents citing self-defense or "legal camouflage for an open season of killing African-Americans" (Yancy and Jones 41). Although the previous question probes the intent and impact of the "stand your ground" law, the focal point is usually centered around the race of the victim or defendant in the case. This is where the presumption of non-innocence both inside and outside of the courtroom appears. The focus of the *Zimmerman* trial was not centered on the fact that George Zimmerman shot and killed Trayvon Martin, but media and news outlets instead focused on whether or not Trayvon

[32] Article originally published June 1, 2012

deserved to die. In the process of determining innocence, or the lack thereof, Trayvon was framed guilty and what followed, from the moment Zimmerman released the first bullet into his body, was a combination of historical legal precedence that has been set about the lives of Black folk in the form of slave codes, coupled with the stereotypical notions of Blackness that signify guilt or in this case, non-innocence. It is through the lens of Blackness as inherently non-innocent and existing outside of the presumption of innocence that we should unpack the death and trial of Trayvon Martin.

Once George Zimmerman called 911, he began his work as an agent of the State policing the existence of Blackness at any moment. Though Zimmerman made a number of comments to the 911 dispatcher that indicated his biases and entitlement, as a man perceived to be white, it was his complete disregard for the dispatcher's instruction that it was not necessary to pursue Martin, that makes clear his acting as an agent of the State. Some scholars classify Zimmerman's interaction with the dispatcher as a misinterpretation of conversation, that unlike disregarding a direct police order, "does not yield any consequences" (Yancy and Jones 5). While some may argue that Zimmerman pursued Martin because he misinterpreted the dispatcher's remarks, a misinterpretation fails to account for why Zimmerman decided, and possessed the right, to disregard the dispatcher's comment. Once again, because of the precedent that Code thirty-four of the Virginia Slave codes[33],and codes similar, sets in establishing and sustaining the hierarchy between the master and slave dynamic, Zimmerman felt it was his *right* to pursue Martin. Zimmerman's decision to pursue Martin stems from both his perception of Martin as existing

[33] *See* Virginia Slave Code XXXIV in "An Act Concerning Servants and Slaves", https://www.encyclopediavirginia.org/_An_act_concerning_Servants_and_Slaves_1705

where he did not belong, in excess[34], along with an implicit privilege of feeling he would not be punished.

Though the "stand your ground" law is understandable in theory, in praxis, as confirmed by the research conducted by Susan Taylor Martin, the legal defense disproportionally impacts Black life. There has been a shift from overt anti-Black laws against slaves to modern laws that at first glance appear to be just, but when applied, fall within the guidelines of the racial hierarchy that favors whiteness and destroys Blackness. Daryl Dance highlights the intentional misuse and misapplication of the law through African-American folklore traditions. As previously stated, folklores, similarly to the law, frame how we understand the world in which we live, but folklores also serve as a reflection of society as it exists. To support her claim about the manipulation of the law when it involves Black bodies, Dance cites a tale from author Philip Sterling's book *Laughing on the Outside: The Intelligent White Reader's Guide to Negro Tales and Humor,* to illustrate the method through which the interpretations occur. Dance quotes:

> A White driver in Alabama hit three Negro pedestrians so hard that one was knocked two hundred feet down the road, one landed in the back seat of the convertible with him, and another was stumbling drunkenly behind the car. The driver tells the highway patrolman that it wasn't his fault: it was so dark he couldn't see them, but he worries that he may have some problems explaining the accident in court. The trooper comforts him, "You don't have a thing to worry about. **You** don't have to go to court. I'm gon' charge this man in the back seat of your car with illegal entry. He don't have no business there. That guy that can't even stand up straight is obviously drunk; I'm gon' charge him with public

[34] The word "excess" is used here to further explain what happens when Blackness takes up physical space. Taken from Eric Ritskes article, "The Fleshy Excess of Black Life: Mike Brown, Eric Garner and Tamir Rice" who writes, "Blackness as excess is, as Alex Weheliye explains, a fleshy excess. It spills over and protrudes; it cannot be contained. It is always escaping. It is always already too much."

> intoxication. And that other guy way down the road, I'm gon' charge him with leaving the scene of a crime (Sterling 81-82).

From an accident caused by a white driver, three Black people will be charged with illegal entry, public intoxication and leaving the scene of crime. Dance cites this folklore as an example of its significance in modern culture and legal institutions, but specifically in the case of Trayvon Martin. George Zimmerman was the acting individual in this case who shot Trayvon Martin, yet because his claim was self-defense, the criminality of Trayvon Martin was immediately brought into question and he began trial, not George Zimmerman.

When news of his death first broke, Martin began as a "frightened young slightly-built boy (5'10", 158 pounds) walking from the store armed only with Skittles and a can of Arizona tea" (Dance 150), however, once his story circulated the media, Trayvon was morphed into the "fictional, dangerous, demonic, big Black brute, gangbanger, dope addict who charged out of bushes that weren't there" (Dance 150). These perceptions of Trayvon were later solidified by the Volusia County Medical Examiner's office, where an autopsy was issued, and traces of marijuana were discovered though the cause of death, murder, was determined rather quickly. The decision to test Trayvon's body for drugs, reinforces the "gangbanger" and "dope addict" tropes and confirms that his lifeless Black body is still placed under scrutiny on the assumption that he *must* have been a criminal. That there *must* have been a reason Zimmerman was compelled to kill him. This logic was used not only in the media, but in the minds of the jurors, specifically Juror B37 who is quoted from her interview with Anderson Cooper as saying, "Trayvon played a huge role in his [own] death" (Dance 151). The unarmed, young Black boy, walking in his father's girlfriend's neighborhood contributed to his own death, according to Juror B37 because "anybody would think anybody walking down the road, stopping and turning and

looking – if that's exactly what happened -- is suspicious[35].” Although, as her quote suggests, Juror B37 is not absolutely certain about the evidence, seeing that she uses the word “if”, nevertheless she excuses and understands Zimmerman’s actions because she agrees that a suspicious looking person warrants confrontation. Though she does not specify, when she says “anybody”, one might assume that she is referring to a Black person. Because he was perceived to be white, Zimmerman, did not cause her to be suspicious, but an unarmed teen who was shot and killed warrants her distrust and consideration on how this young man’s appearance may have made the defendant, Zimmerman, feel. This is one of the innumerable examples of how Blackness is framed and regarded as non-innocent resulting in the notion that Black bodies are undeserving of equal protection under the law or consideration from public opinion.

George Zimmerman’s acquittal sent society into a whirlwind of opinions about the jury’s verdict. In the Black community, however, the trial and acquittal prompted the beginnings of a particular movement, now infamously known as the Black Lives Matter Movement (#BLM)[36]. Though the Black Lives Matter movement originated from the death and trial of a young Black man, the organizations primary focus is centered on state-sanctioned violence experienced by Black people with particular attention paid to Black women and Black trans-women. Black women are routinely targets of violence from the state and due to their double-oppression from both their race and gender. In the *Zimmerman* trial, Trayvon was not the only Black body called into question on the basis of guilt or innocence. Trayvon’s friend, Rachel Jeantel, was constantly under attack as a result of her physical appearance and speech. Zimmerman’s defense lawyer, Don West, ruthlessly cross-examined Jeantel for two days calling into the question the validity of

[35] Anderson Cooper. CNN. 2013

[36] https://blacklivesmatter.com/about/herstory/: In 2013, three radical Black organizers—Alicia Garza, Patrisse Cullors, and Opal Tometi—created a Black-centered political will and movement building project called #BlackLivesMatter. It was in response to the acquittal of Trayvon Martin’s murderer, George Zimmerman.

her story and consistently repeating or clarifying Jeantel's words to portray her as illiterate and non-credible (Dance 151). Outside of the courtroom West's daughters attacked Jeantel in an Instagram post[37] and various media and social networking outlets labeled Jeantel as "inarticulate, ignorant, uneducated, stupid, unattractive, rude, hostile, and untruthful" (Dance 151). Though Jeantel was not on trial, her race, gender, and perceived social status became tools to undermine her and disregard her experience as a young Black woman who recently lost a friend to state violence. Jeantel's story only temporarily gained media attention after her testimony, but like many Black women, her experienced pain was soon forgotten.

Trayvon's story served as a catalyst to a resurgence of discussions around racial violence, police-brutality, the law. Movements were brought about as a result of his death because people saw their sons, brothers, fathers, and Black male friends in Trayvon. When Black racial victimhood is observed through gender, there is a level of privilege to designated to Black men. This privilege is centered around the detailed discourse and statistical data that exists about the Black man's experience to the point where Black male victimhood becomes the 'quintessential example' of racism and Black women become secondary and oftentimes forgotten (Carbado 337). Black women experience an additional negation of their humanity as a result of their gender that further positions them outside of the law or the ability to be considered innocent. Black women, like Cyntoia Brown, are vulnerable to state-violence and equal treatment under the law on account of their blackness *and* their womanness. Their humanity is doubly negated, and their experiences silenced, positioning them as particularly vulnerable to being framed as non-innocent.

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[37] Whitaker, Morgan. "Rachel Jeantel: Don West 'Disrespected Me'." *MSNBC*, NBCUniversal News Group, 2 Oct. 2013, www.msnbc.com/politicsnation/rachel-jeantel-don-west-disrespected-me. Following Rachel Jeantel's testimony, Molly West (Don West's daughter) posted a photo on Instagram with the caption, "We beat stupidity celebration" with the hashtag "#dadkilledit"

Chapter Three: From Celia to Cyntoia

Within the US, there exists a racial and social hierarchy that depends on the existence of Blackness but refuses to acknowledge it. Gender is part of this racial and social hierarchy through presumptions that consider the term "women" to mean white women. When gender is coupled with Blackness, Black women are even further removed from the racial and social hierarchy and rendered invisible. This invisibility leads to an additional layer of violence associated with women that, in an inherently anti-Black society, renders their experiences unimaginable. In this, the Black female body becomes a site of violence and subjection constantly fighting against exclusion from both their race and gender. This exclusion only further amplifies their positioning within the law as non-innocent.

Framing Gender and the Black Female Flesh

Understanding gender as it relates to the Black female body requires an in depth look at the history of slavery and the formation of gender as an additional racial and social hierarchal structure created to define what constitutes whiteness. Black female slaves were not considered, nor or qualified, to be women according to the European standard because they were not considered human and therefore restricted from participating in the "ongoing social construction and contestation of gender" (Broeck 7). So, in this position of "non-humanness", the Black female body is reduced to its most vulnerable state of being—the flesh. It is in the state of the flesh that both Hortense Spillers[38] and Toni Morrison[39] view as the focal point of the violence, abuse, and vulnerable state in which the Black female body rests. In Southern law, the

[38] From "Mama's Baby, Papa's Maybe: An American Grammar Book" (2003)
[39] From *Beloved*. (1987)

equivalence to the reduction of the Black female body as flesh is apparent through the codes that listed the Black female body as an owned "thing". George Yancy and Janine Jones explain this reduction of the Black female body to an inanimate object when they write,

> This reification—reduction of humans to the status of things—had drastic and horrendous implications for African American women. As owned "things" African American women had no recourse against the most degrading forms of physical violence to their bodies (rape) as well as the cruel violation of their progeny that is selling away their children to other slaveholders or even selling mothers away from the children (Yancy and Jones 43).

In addition to the negation of personhood, the Black female body also exists outside of the realms and privileges associated with gender construction that favors white womanness. Spillers questions if gender, and the system of self-definition that follows, possesses the "epistemological function to further add to Black people's abjected position in the modern world, since they cannot access gendered subjectivity" (Broeck 5). The Black female body cannot access gendered subjectivity because gender, as a category, did not extend to "things" or "property[40]". Black women have consistently fought for recognition on account of their gender and their Blackness but have been routinely denied. In this space of the unprotected and ungendered flesh, the Black woman becomes the primary target of repeated sexual and physical violence, which fosters perceptions of the Black female body non-innocent.

History of the Law Regarding Sexual Violence in the South

> The crime of rape does not exist in this State between African slaves. Our laws recognize no marital rights as between slaves; their sexual intercourse is left to be regulated by their

[40] As I will discuss later in this chapter, slaves were considered property *not* human beings and therefore social structures predicated on the humanness of the individual were not extended to slaves.

> owners. The regulations of law, as to the white race, on the subject of sexual intercourse, do not and cannot, for obvious reasons, apply to slaves; their intercourse is promiscuous, and the violation of a female slave by a male slave would be a mere assault and battery (George v. State, 37 Miss. 316 1859).

In 1861, Justice William Littleton Harris of the Mississippi high court asserted that "the common law is not applicable to the status of the slave" (George v. State, 37 Miss. 316 1859). Furthermore, Harris clarified that there is no statute that considers attempted or completed rape to a female slave a crime[41]. In regard to rape, the 1861 Georgia code considered rape to be, "the carnal knowledge of a female, whether slave or free, forcibly and against her will[42]". Though this definition references slaves, in practice, all crimes citing rape were not treated equally. The necessity to make a distinction between a "slave" and a "free person" implies a dual system of justice. A white man found guilty of rape against a white woman was sentenced to labor imprisonment for up to twenty years, while a Black man convicted of the same crime was subject to death[43]. The punishment for the rape of a slave or free person of color, however, was a "fine and imprisonment at the discretion of the court[44]". The leniency towards the rape of Black slave bodies only furthered the vulnerability of the Black female flesh and solidified their exclusion from rights under the law.

As property or "things", in the eyes of the law and social order of the South, the Black female slave was particularly vulnerable to sexual violence, in particular rape on the plantation.

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[41] Bardaglio, Peter W. "Rape and the Law in the Old South: 'Calculated to Excite Indignation in Every Heart.'" *The Journal of Southern History*, vol. 60, no. 4, 1994, pp. 749–772. *JSTOR*, www.jstor.org/stable/2211066. Pp. 759
[42] 5 Ga., Code (Clarke, Cobb, and Irwin, 1861)
[43] Ga., Code (Clarke, Cobb, and Irwin, 1861)
[44] Ga., Code (Clarke, Cobb, and Irwin, 1861)

In order for the act of sexual assault to be recognized in the law or society, a recognition of humanity on the part of victim, was required. The classification of the Black female slave did not allow for the concept of humanity nor the concept of consent to exist. Bodies deemed property cannot consent given the fact that "the very notion of subjectivity is predicated upon the negation of will" (Hartman 111). The very existence of the Black female body is that which exists outside of the recognition of humanity under the law or in society, and as a result the law neither accounted for nor held slave masters accountable for the rape of female slaves[45]. In 1807, the Louisiana legislature declared, "Slaves should always be reputed and considered real estate; shall be subject to mortgage, according to the rules prescribed by the law they shall be seized and sold as real estate" (Yancy and Jones 2014). As real estate, the sexual violation of a Black female body was viewed as a violation of property not of a human being. In Missouri, a white man's rape of a Black female slave was considered trespassing not rape and given that the slave was the property of the slave owner, it was deemed illogical for an owner to trespass on his own property (McLaurin 93). All the instances combine to show that the rape of Black female slaves was not punishable nor recognizable by the law and as a result the Black female body was the cite of exploitative and sexual control.

The control over the Black female slave was a necessary tool in maintaining the libidinal economy of slavery. In this economy, slave owners were able to maintain their social control over the slave community because the offspring from these sexual encounters produced new labor and more profit (Bardaglio, "Rape and the Law in the Old South" 757). Although the master-slave relationship led to the continuous sexual exploitation of Black female slaves, the

[45] Adele Logan Alexander, Ambiguous Lives: Free Women of Color in Rural Georgia, 1789-1879 (Fayetteville, Ark., 1991), 65. Although it was not considered rape for a master to engage in this sort of sexual behavior with one of his slaves, it violated laws against fornication, miscegenation, and, if he was married, adultery. These laws could have been enforced but were not, which further underscores the double standards of southern slave society.

rationalization for these occurrences were rooted in the notion held by Southern whites that "Black women were naturally promiscuous and sought to copulate with white men" (Bardaglio, "Rape and the Law in the Old South" 757). This power dynamic and the reduction of the Black woman to flesh, set the foundation for the presumption of non-innocence for the non-human Black female body, which exists outside of the protection or consideration of the law

To illustrate how the presumption of non-innocence is associated with the Black female body, I will discuss the cases of Celia the slave and Cyntoia Brown. Each case involves a Black woman's body as the victim of repeated sexual violence, yet as the law, jury, and public are concerned, both Celia and Cyntoia were criminals. It is through the legal precedent that the case of Celia the slave sets, along with the negation and exclusion of the Black female body from the law, that we begin to understand the plight of Cyntoia Brown.

The Story of Celia

In 1850, Robert Newsom, a well-known southern slave owner, purchased a fourteen-year-old slave girl by the name of Celia. The reason for Celia's purchase was driven by Newsom's desire to replace his wife who had be dead for roughly a year, a reason made abundantly clear on the ride home, Celia's purpose for purchase was made abundantly clear when Newsom raped her and established the master-slave dynamic that would govern their relationship for approximately five years (McLaurin 18). Celia was positioned on the Newsom plantation solely for Newsom's sexual enjoyment and exploitation and was repeatedly raped by him at his convenience. This would continue until Celia, who was pregnant at the time[46], would receive an ultimatum from her lover George, who was also enslaved, to end her sexual

[46] The father of the child was unknown.

exploitation from Newsom (McLaurin 26). Alone, subjected, and intentionally removed from familial or social interactions, she was determined to develop a plan to stop Newsom's assaults once and for all. On June 23, 1855, "Celia obtained a large stick, which she placed in the corner of her cabin upon her return. Should Newsom come to her cabin that night, as he said he would, Celia was prepared to resort to a physical attack to repel his advances[47]". As expected, Newsom arrived at Celia's cabin that night and demanded that she have sex with him, so Celia prepared to carry out her self-defense (McLaurin 30). In testimony, it was stated that Celia was fearful that Newsom would harm her so she "raised the club with both hands and once again brought it crashing down on Newsom's skull. With the second blow, the old man fell, dead, to the floor[48]". Celia proceeded to dispose of Newsom's body in the fireplace and when the flames consumed his flesh, she picked out the bones and crushed them, carried out the ashes before daylight, and then went to bed[49]. On October 9, 1855, Celia's trial commenced with the charge of murder in the first degree as the alleged crime.

In the state of Missouri, the only legal argument available to slaves in southern courts was self-defense, but it was extremely difficult to prove because self-defense relied on the humanity of the defendant[50]. Despite this, Celia's defense team cited self-defense and relied heavily on the jury's perception of Celia as both a human being and a woman. First degree murder was justifiable if the individual accused was resisting a person attempting to commit a felony[51]. Because the law did not extend to slaves nor did it consider the rape of the Black

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[47] Testimony of Jefferson Jones, Celia File 4496
[48] McLaurin, Melton A.. Celia, a Slave, University of Georgia Press, 1991. pp. 30. Testimony of William Powell, Jefferson Jones, and Thomas Shoatman, Celia File 4496
[49] Testimony of William Powell, Jefferson Jones, and Thomas Shoatman, Celia File 4496
[50] McLaurin, Melton A.. Celia, a Slave, University of Georgia Press, 1991. pp. 90. *Revised Statues of the State of Missouri, 1845,* art. 2, sec. 22, 573
[51] *Missouri Statutes, 1845,* art.2 sec.4, 180

female body to be a punishable crime, Celia's action was not considered self-defense in the eyes of the law. [52]

In denying the Black female body access to protection under the law regarding rape, southern law successfully protected the institution of slavery. Granting Black female slaves, the right to resist sexual exploitation from their masters would restore a level of humanity to their vulnerable body which would disrupt the social order and racial hierarchy and allow the Black female body to control slave production. For these reasons, Judge William Hall, presiding over Celia's case, refused to deliver the defense's jury instructions because they called for the jury to regard Celia as a human being (McLaurin 102). The defense's instructions posed a great threat to the institution and efficacy of slavery, as well as the relationship between white and Black women in the eyes of the law. In an effort to allow for her case to be heard by the Supreme Court, Celia successfully escaped prison. However, she was captured and sentenced to death on December 21, 1855, at 2:30 pm (King 52).

Celia's case brings forth the relationship between race, gender, and the law in the Old South as it relates to the intentional inclusion and exclusion of humanity regarding the Black body. To explain Newsom's continuous rape of Celia, many southerners held the belief that Black women were inherently sexual and desired to be intimate with their captors[53]. However, when discussing Celia's action of self-defense against Newsom, her humanity is suddenly restored for the purposes of finding her guilty of murder. Abolitionist, William Goodell supports this claim when he states,

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[52] Eugene Genovese clearly put it: "Rape meant, by definition, rape of white women, for no such crime as rape of a black woman existed at law." P. 93 Eugene P. Genovese, *Roll, Jordan Roll: The World the Slaves Made* (New York: Pantheon, 1972), 33

[53] Catherine Clinton, *The Plantation Mistress* (New York: Pantheon, 1982), Genovese, *Within the Plantation Household*, 325-26

> [The] slave, who is but 'a chattel' on all *other* occasions, with not one solitary attribute to personality accorded to him, becomes "a *person"* whenever he is to be *punished!* He is the only being in the universe to whom is denied all self-direction and free agency, but who is, nevertheless, held responsible for his conduct, and amenable to law.... He is under the *control* of law though *unprotected* by the law (King 41).

Celia was chattel, property, and Newsom's sex slave *every* day, yet she became a person during her trial only to the point where it would be sufficient to convict her of murder. The Black female body is both under the control of and unprotected by the law and rendered inherently non-innocent as a result of her assumed licentious nature. There is no humanity, no ability to consent or refuse, nor ability to defend oneself because once the Black female body was deemed "property" the concept of self or ability to utilize self-defense is null and void. The legal concept of self-defense requires an acknowledgement of humanity and when that is denied how can the Black body *ever* claim self-defense? This question is further pushed in the case of Cyntoia Brown, who just like Celia, was excluded from the right to be presumed innocent because she existed outside of the law as non-human, and therefore vulnerable to the arbitrary designation of inherent non-innocence by the dominant group.

The Story of Cyntoia Brown

Through violence and manipulation, a drug dealer named Garion McGlothen, also known as "Kutthroat, maintained control over sixteen-years-old, Cyntoia Brown's body for his own sexual satisfaction and monetary gain for three weeks[54]. Cyntoia recounts her experiences with Kutthroat as involving continuous physical and sexual violence through choking her, threatening

[54] Me Facing Life: Cyntoia's Story (2011)

her with guns, beating her, and raping her. When asked why she did not run away or separate herself from Kutthroat, Cyntoia responded with, "You're not listening to me, I made him money, he wasn't just going to let me go. He knows where I live. He knows where my mom lives[55]". The continuous violence to her body, the threat of violence to her family, and her monetary value to her captor, kept Cyntoia victim to Kutthroat's abuse and exploitation.

On August 6, 2004, Kutthroat informed Cyntoia that she needed to "make him some money[56]", so she set out to West Nashville with no money or car to fulfill Kutthroat's demand[57]. In route, she was approached by a man, later identified as Johnny Michael Allen, who was seeking some "action", more specifically "someone to make love to him with desire"[58]. In an effort to carry out Kutthroat's command, Cyntoia suggested that they go to a hotel, but Allen chose to return to his house[59]. Upon arrival, Allen proceeded to show his guns to Cyntoia and detail his life story to suggest his power and importance over her. As Allen spoke, Cyntoia grew increasingly nervous because she recognized how insignificant she was in that moment. She knew that Allen could kill her and no none would know or care where she was. The following moment, he grabbed her legs and began to reach under his bed[60]. Cyntoia perceived this action as a reach for a gun and in an alleged state of panic she grabbed her gun and shot him in the back[61]. Afterwards, she took two of his guns, money from his wallet, and left the scene in Allen's truck (Hardcastle et al. 291–315). Three months after the incident, on November 4, 2004, Cyntoia

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[55] Ibid.
[56] Ibid. *Cyntoia Brown Testimony*
[57] Ibid.
[58] Ibid. *Cyntoia Brown Testimony.*
[59] Ibid. *Cyntoia Brown Testimony.*
[60] Ibid.
[61] Ibid.

arrived at a transfer hearing to determine whether she should be tried in juvenile or adult court[62]. Ultimately, the decision was made to try her as an adult.

More than two years after her arrest, on August 21, 2006, Cyntoia, charged with murder in the first degree, felony murder, and aggravated robbery, began trial. Jeff Burks, the Assistant District Attorney assigned to her case, questioned her ability to claim self-defense citing that she had a gun in her purse, which suggests a premeditated action, and could not have experienced fear of him because she felt comfortable enough to go to his house and lay with him[63]. Burks also rejected the claim of self-defense because Cyntoia took items after she killed him, and the deceased, Johnny Allen, is unable to explain his side in court. The defense argued Cyntoia's difficult childhood and traumatic experiences to create an argument that would explain Cyntoia's actions outside of premeditated murder. Celia's case casts a shadow on perceptions of Cyntoia and illustrates the ways in which the Black female body is still perceived as inherently sexual. Though there have been historical, societal, and legal changes between the cases of Celia and Cyntoia, it is significant that the perceptions of a Black female enslaved body can be paralleled to the perceptions of a young Black woman subjected to the control of a modern pimp. In both cases of sexual exploitation, their victimhood is not recognized, and they are instead positioned as criminals.

Approximately a decade after her trial, Cyntoia's sentencing re-entered a new era of social media after famous musician Rihanna posted Cyntoia's picture with a caption[64] that detailed the trial evidence and harsh sentencing. The post was later reposted by a number of

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[62] Me Facing Life: Cyntoia's Story (2011)
[63] Burks' Defense. Me Facing Life: Cyntoia's Story (2011)
[64] Instagram.com. @badgalriri: "Imagine at the age of 16 being sex-trafficked by a pimp named "cut-throat.' After days of being repeatedly drugged and raped by different men you were purchased by a 43-year-old child predator who took you to his home to use you for sex. You end up finding enough courage to fight back and shoot and kill him. Your[e] arrested as [a] result tried and convicted as an adult and sentenced to life in prison. This is the story of Cyntoia Brown. She will be eligible for parole when she is 69 years old. #FreeCyntoiaBrown"

celebrities, and sparked outrage across the United States. As a result, Cyntoia Brown, who is now thirty years old, will be released on August 7, 2019 after being granted clemency Tennessee Governor Bill Haslam[65].

In a CNN interview, legal analyst, Joey Jackson rationalized the case of *Brown v. State* by saying,

> Would any of us do at 21, at 25, at 45, what we would do as a 16-year-old? The answer to that question is no. The question then becomes when you look and analyze [Cyntoia's] actions there's a person dead. That person was 43 years old. There's an indication, at least from the prosecution, that he was shot, and he was robbed. Because she took rifles, and of course his wallet and his pants away from him. So, the question is now, is the punishment appropriate (Andone 2018)?

Though understandable, Jackson's reasoning falls short of acknowledging the detailed events that fueled Cyntoia's crime. Jackson also fails to address the fact that Cyntoia was a minor, solicited for sex, and being controlled against her will. Not as a method to dismiss or excuse her crime, but as important information that is necessary when considering whether or not the punishment for her crime was appropriate. One must consider how an individual who experienced sex trafficking, rape and suffered from familial abandonment, and abuse can still be considered a victim. Cyntoia, however, was excluded from that consideration.

In a post-conviction, mental health evaluation, it was revealed that Cyntoia had an impressive IQ but suffered from alcohol related neurodevelopmental disorder (Hardcastle et al. 308). How does this diagnosis impact the decisions this sixteen-year-olds made, particularly in situation of high stress? Jackson's logic towards Cyntoia's actions serves as a representation to

[65] Statement from Gov. Bill Haslam's office. (January 2019)

the assumptions some of us would make. It is important, however, to consider if we would act the same way or make the same decisions at forty years old that we do at sixteen? The answer, presumably, is no, so how can we account for the experiences of Black women in this American society who de personhood or victimhood.

It is the case that the Black female body is not considered the victim, but *always* perceived to be the criminal in cases concerning physical or sexual harm. In the criminal system, female criminals are viewed as "doubly deviant" for existing outside of social norms and expectations of women, resulting in higher rates of punishment (Hardcastle et al. 308). However, as discussed earlier, the Black female body is denied access to the social norms and expectations of women, so why are their punishments so severe? Their Blackness operates as a contributor to their assumed non-innocence, but there is something else.

The additional layer connects back to the case of Celia, the slave. It was Celia's attempt to use self-defense as a non-human being that led to her verdict of guilty and death sentence. As stated in Celia's case, Judge William Hall knew that allowing Celia to claim self-defense would destroy the very foundation that slavery rests. To prevent this, the narrative of the licentious Black female slave was put forth to distract from the truth. In this position, as the always promiscuous thing that "exists" without any recognition of humanity that the Black female body is considered non-innocent. The Black female body is non-innocent, not for the crime they have committed, necessarily, but deemed not-innocent for disobeying the social order that is sustained through the continued exploitation of the Black female body. Any attempt to challenge this order will result in punishment by the State, as was the case in both Celia and Cyntoia's stories.

To further the notion that the Black female body is denied access to victimhood, Saidiya Hartman references the case of Celia and writes, "Her crime is the crime on record: she is the

culpable agent. So, in this formulation of law and its punishment, blackness is on the side of culpability, which makes the crimes of property transparent and affirms the rights to property in captives" (Hartman and Wilderson 192). Both Celia and Cyntoia existed as sex slaves to men who controlled their bodies and depended on them to produce income, yet as Hartman states, they are the culpable agents, they are the criminals; not Newsom for his consistent rape of Celia nor "Kutthroat" or Johnny Allen for their rape of Cyntoia, but Celia and Cyntoia for attempting to regain control of their bodies. Although Celia and Cyntoia were both able to protect themselves from their assailants, it is significant that the State ultimately took back the control over their bodies with a death sentence and a life sentence.

Since Celia's case in 1855, society, laws, and culture have shifted in the United States of America, however, there is a manner in which Celia's case sets precedent for the legal and social perception of the Black female body as non-innocent according to the law. Fortunately, Cyntoia's case recently turned towards a positive direction as a result of media attention, however, due to the threat Celia's case posed to the institution of slavery, Missouri made every effort to suppress and manipulate journalistic coverage to ensure that the possibility of humanity for the Black female body died with Celia's hanging.

From these two cases of Black women, once again we see the presumption of non-innocence on account of their Blackness and the womanness, or lack thereof, as the main contributors to their suffering in the legal system. In the cases of Martin and Brown, self-defense is cited as the claim for both defendants, Zimmerman and Brown, yet one person was found not guilty and the other was sentenced to life in prison. How can it be that a sixteen-year-old, sex victim can be more culpable than a twenty-nine-year-old adult man who consented to

participating in a neighborhood watch? The answer, with which I will conclude rests in the historical presumption of Blackness as non-innocent.

Conclusion

"If we are to seek new goals for our struggles, we must first reassess the worth of the racial assumptions on which, without careful thought, we have presumed too much and relied on too long. Let's begin[66]".

This excerpt from critical race theorist, Derrick Bell, precisely frames the direction towards which we begin to rationalize the presumption of non-innocence for Black people in America presently. It forces us to think through the social and political notions that govern this society and Blackness can exist in a different state than it currently does. In what ways, can the desire for the principle of the presumption of innocence hope to apply to Black bodies when American society completely disregards the inherent anti-Blackness that exists, and the need for Black non-innocence that operates within it?

The presumption of innocence itself is not specifically defined, nor enforced, and is therefore merely a principle regarding the burden of proof in the court of law. The origins of the presumption of innocence rests of two Latin principles, *Actori incumbit probatio*, the accuser bears the burden of proving the guilt of the accused and *Non statim qui accusatur reus est,* until guilt is established society must not treat the accused as guilty (Quintard-Morenas 110-112). Yet, for the Black body the burden of proof is placed on the accused and society treats the body as non-innocent from beginning to end, whether dead or alive. A world where George Zimmerman can follow a young Black boy, shoot and kill him, claim self-defense and walk free, but a 16-year-old girl, raped and forced into prostitution, shoots and kills her assaulter and gets sentenced to life in prison is a world in which Blackness is presumed non-innocent. The presumption of

[66] Derrick Bell. *Faces at the Bottom of the Well*. 14

non-innocence for Black bodies originates from the historical precedent set by southern slave codes in the eighteenth century. The Black body is deemed non-innocent; it is also regarded as non-human. It is in this non-human position that the presumption of non-innocence rests. How can a non-human prove innocence when society disregards their humanity, unless it is to punish them as a criminal? How can society treat the Black body as innocent when the law once considered Black existence only as a slave, piece of property, or thing? Though the slave codes of Virginia, Georgia, Missouri, and others, no longer exist, their influence on modern American jurisprudence remains. The fugitive slave code is comparable to the "stand your ground" law because the language reinforces the standard of who has the right to be presumed innocent and in that right, the right to self-defense. In both the cases of Trayvon and Cyntoia, self-defense was used as an argument, yet the outcomes were very different. Zimmerman left the courtroom free and Cyntoia was sentenced to life in prison. Perceptions of race and gender influenced the outcomes of both. The use of self-defense by Black bodies can also be regarded as an assertion of humanity, an action that completely disrupts the social order. As discussed in both the case of Celia the slave and Cyntoia, the acknowledgement of self-defense as a viable explanation to the murder of their attackers would also be an acknowledgement of their humanity and autonomy over their bodies. Such an acknowledgement was detrimental to the institution of slavery during Celia's case and though plantation slavery no longer exists, the presumed licentious and guilt of the Black female body remains. So much so that a sixteen-year-old girl could be found guilty for protecting herself from an adult man who purchased her, just like Celia, for sex.

If Black bodies have the right to self-defense, then they also have the right to defend their humanity under the law, which would grant them the ability to be considered innocent. To avoid this, Blackness is deemed non-innocent to maintain the social order that intentionally

distinguishes whiteness and Blackness. In this distinction, non-innocence becomes not necessarily the antithesis for innocence but its precondition. In order to develop an understanding what is innocent, one must make sense of what is not. This is where the presumption of non-innocence rests: in the use of Blackness and Black bodies as the thing from which whiteness is understood. The law *needs* this concept of non-innocence to ensure that the racial distinctions between Blackness and whiteness is sustained.

As a student studying African-American studies and Philosophy, I understand the importance of not only interpreting a problem, but also through research, providing an explanation that will hopefully lead to fundamental change[67].Though I argue that the presumption of non-innocence is a presumption that exists within the law, and is inherent to American society, I now want to explore three potential solutions to this issue. The first solution being the fair implementation of Black bodies as human under the law and in society. The second solution being the enforcement of the original intent for the presumption of innocence, both inside and outside of the courtroom. The third solution, influenced by Fanon, is a complete destruction and reorganization of violent and oppressive institutions, in this case, the institution would be in reference to the laws that govern our criminal justice system.

Recognizing the Black body as human is a feasible solution to the presumption of non-innocence because, as it stands, the law only applies to human beings. If Blackness is considered human, and sheds the history associated with slavery and subjecthood, then principles like the presumption of innocence would be extended to Black people, and, the Black body can reclaim its humanness by undoing the subject narrative. Sylvia Wynter, in her letter to her colleagues following the acquittal in the Rodney King trials, supports this option and concludes that it is

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[67] *Inspired by* Marx, Theses on Feurbach (1845). XI: "The philosophers have only *interpreted* the world, in various ways; the point, however, is to *change* it."

within the responsibilities of the Black bodies to assert their humanity. Wynter writes, "It is we who institute this 'Truth'. We must now undo their narratively condemned status" (Wynter 53-4). While there is great power in self-definition, one must question how possible this solution can be in a society that depends on the "condemned status" of the Black body to survive.

Can we be certain that the recognition of humanity for the Black body is sufficient to render it due the rights of the law and society? Also, is it possible to regard Blackness as human when the history of slavery that has long plagued American continues to operate in new forms with each decade, only adjusting and reformatting the same practices and tactics used to manipulate and control the Black body during slavery? Also skeptical of humanity as a viable solution to the presumption of non-innocence for the Black body is Saidiya Hartman who writes,

> However, suppose that the recognition of humanity held out the promise not of liberating the flesh or redeeming one's suffering but rather of intensifying it? Or what if this acknowledgement was little more than a pretext for punishment, dissimulation of the violence of chattel slavery and the sanction given it by the law and the state, and an instantiation of racial hierarchy? What if the presumed endowments of man—conscience, sentiment, and reason—rather than assuring liberty or negating slavery acted to yoke slavery and freedom? Or what if the heart, the soul, and the mind were simply the inroads of discipline rather than that which confirmed the crime of slavery and proved that black were men and brothers…" (Hartman 5).

Hartman's concern with the recognition of humanity as a "pretext for punishment" is one supported by the case of Celia and slave codes of the seventeenth century. In any other circumstance, slaves were considered property or things, however, when on trial for a capital crime, it was every intention of the court to temporarily acknowledge the slave's humanity as a

means to issue a punishment (Goodell 309). Therefore, even if Blackness itself reclaims its humanity and undoes the "condemned status", it will only serve to the benefit of the social order that will continue to punish Blackness for attempting to assert its humanity like Cyntoia Brown and Celia did. As discussed previously, it is the action of asserting humanity within Blackness that contributes to the need for punishment.

So, if the Black body is unable to dismantle the presumption of non-innocence because of the lack of, and inability to assert, humanity, then a solution that involves the legal enforcement of the presumption of innocence could help undo this notion. If neglect of the presumption of innocence was considered a violation of the law here in the United States, not only would the burden of proof shift from Black individuals accused of crime back to the accuser and court, but it would be the responsibility of the media to regard the accused as innocent as well. This would presumably curb the presumption of non-innocence for Black bodies and limit the societal notion of Blackness as inherently non-innocent as the proof provided outside of the courtroom. This solution would have been helped in the case of *Zimmerman*, where the jurors, specifically Juror B37, was heavily influenced by information she received outside of the courtroom that regarded Zimmerman as innocent and Trayvon as guilty (Dance 151). However, given the historical precedent that a number of laws that were meant to be inclusive to Black people set[68], I question how successful legal enforcement of the presumption of innocence would be. Also skeptical of this claim is Calvin Warren who in his article, "Black Nihilism and the Politics of Hope" writes,

> The Political, we are told, provides the material or substance of our hope; it is within the Political that we are to find, if we search with vigilance and work tirelessly, the "answer" to the ontological equation— hard work, suffering, and diligence will restore the

[68] *See* the Declaration of Independence and Civil War Amendments.

> fractioned three-fifths with its alienated two-fifths and, finally, create One that we can include in our declaration that "All men are created equal." We are still awaiting this "event" (Warren 215-248).

Is it logical to expect the law, which has long before discounted and worked to negate the existence of Blackness to also restore the very thing it was meant to destroy? As Warren suggests, it is difficult to imagine the law as the tool through which humanity is restored to the Black body when in the twenty-first century this eighteenth-century declaration has yet to be actualized. We must also question, in a similar manner to Saidiya Hartman in *Scenes of Subjection*, if the privileges and rights in this society can truly be available to all. How long would it take for a new law regarding the presumption of innocence take to apply to Blackness? From this, it is apparent that the collective decision to self-identify Blackness as human though possible, would ultimately be unsuccessful given the power of the social order. Thus far in American society, the law has been used as a tool to aid and protect whiteness, so the enforcement of the presumption of innocence would likely follow suit and continue to only protect whiteness.

With both of these solutions proving to be possible but not guaranteed given the evidence that anti-Blackness that is intentionally excluded from being considered human and without the human attribute, renders them unable to be recognized under the law—regardless of whether the laws are inclusive or enforced—a plausible solution would be one that gets at the root of the issue, anti-Blackness. One possible solution, I propose, rests in Frantz Fanon's concept of a "program of complete disorder" regarding decolonization (Hartman 6). In this text Fanon describes the process as one that will involve violence, but from this a new order and structure will emerge. Fanon writes,

> Decolonization never takes place unnoticed, for it influences individuals and modifies them fundamentally. It transforms spectators crushed with their inessentiality into privileged actors, with the grandiose glare of history's floodlights upon them. It brings a natural rhythm into existence, introduced by new men, and with it a new language and a new humanity. Decolonization is the veritable creation of new men. But this creation owes nothing of its legitimacy to any supernatural power; the "thing" which has been colonized becomes man during the same process by which it frees itself (Fanon 36-7).

Though Fanon speaks directly to the issues concerning colonization, his logic can be applied to the need for anti-Blackness to be rid from society in order to actualize the humanity of the Black body. From this Fanon predicts the birth of new men, new language, and new humanity, all necessary for the recognition of Blackness as human. As it stands, the concept of humanity does not extend to the Black body, and neither does any other categorical term created under this structure, like gender, because anti-Blackness is the foundation of the current order. However, in this process of decolonization, and rethinking the grammar and institutional structures that provide us with knowledge about our social order that protects whiteness, the Black body that was once categorized as property and render a ‘thing’, as Fanon says, becomes free. Free from the social order that excludes Blackness from the rights and privileges of society, but from this a new social order is created where Blackness is considered human, or whatever category deemed fit.

The process of complete disorder seems to be a tenable solution that acknowledges the historical relationship Blackness has with the exploitation, violence, and death throughout the law and society. This process also follows through with Derrick Bell’s assertion that in order to overcome the struggles associated with Blackness, the solution must exist outside of the

structures that have governed society thus far. Yet, as Fanon and other critical race theorists and scholars affirm, in order to be successful, violence is a necessary component to accomplish this "program of complete disorder". Violence becomes necessary due to the relationship anti-Blackness has with maintaining the social order. Any disruption to this order will be met with violence from the dominant group who will be fearful of the destruction of the social order. Although Fanon calls for the participants in the process of decolonization to be prepared for "absolute violence" (Fanon 37), I am hesitant to proceed with this solution. Hesitant because history in the United States of America has shown us the extent towards which the dominant group will go to protect and defend the social order that privileges them. Any effort to actualize the humanity of the Black body, to allow for principles such as the presumption of innocence to be effective, would in fact result in resistance and violence. There is no limit to the level of violence that can and will be used against the Black body if this solution was carried out. Although anti-Blackness is necessary to the social order, the physical Black body is not. Meaning the complete and utter destruction of Black bodies through violence may very well be a possibility. I am not suggesting that Black people should operate in fear of this, I am however, raising the issue to create the space for another solution that would not necessarily result in a massacre of Black bodies.

So, for now, an acknowledgment of the issue that is the presumption of non-innocence associated with Black bodies is a necessary first step. The next would be the continued use of modern media outlets, such as social media, as a tool in raising awareness of the overt use of the law to criminalize Black people. Had it not been for the use of these outlets, Cyntoia Brown would still be serving a life sentence and remain ineligible for parole until she was fifty years

old. However, although she is released, she will still be subject to State control and subjection, as well as the criminal history to corroborate her non-innocence.

As more individuals existing within this social order become aware of the presumption of non-innocence the more the original purpose of the principle becomes actualized. No longer is it possible to disseminate criminally suggestive images of young Black teenage boys without the public to question the inherent biases associated with the image choices. So, even though it may not necessarily be possible to legally demand that the presumption of innocence be treated as a law in the public and in the courtroom, it has been the effort of organizers, activists, and scholars to combat the presumption of non-innocence and hold the public opinion of Black bodies accountable.

Spider on the Wall

I often think of the fear some human beings have to seeing a spider of the wall. In my experience, shock comes first, fear, and then the overwhelming desire to get rid of the spider by any means necessary. In those moments, the spider has consumed my entire existence. I find myself unable to more from my location out of fear that the spider will somehow grow, in a matter of seconds, and attack me. So, the only solution is to the kill it and then the fear is gone. It is my fear of spiders that led me to take a cultural look at the presumption of innocence or non-innocence for the Black body because, for me, the Black body is like a spider on the wall. Historically, the Black body has been routinely reduced to chattel and categorized alongside the animals on the plantation. In illustrating an analogous relationship between the Black body and a spider I am not agreeing with the dehumanization of the Black body, instead, I am focusing on

the level of fear that such a small insect can invoke in some humans along with the notion that Blackness has long been considered in non-humanistic categories.

The spider is feared first because it is somewhere it does not belong and disrupts the order of things that places insects outside, in nature. Being out of order, however, justifies the law of destruction which leads to the desire for some individuals to kill the spider and killing the spider is the only way to subdue the fear of it. It follows that there is no legal or social consequence for killing the spider, nor is any sympathetic action or justice invoked from its killing.

This is where I position the story of Trayvon Martin, and so many other Black bodies killed on account of police violence. Then, I wanted to analyze what leads to the fear of the Black body in manner similar to that of a spider on the wall. Thus, I found the principle of the presumption of innocence and began to think through how the principle is non-existent for the spider and for the Black body as the beginnings of an explanation to the routine State and social violence against the Black body.

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