

APPLYING THE PRESUMPTION OF INNOCENCE TO POLICING WITH AI

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Abstract

This paper argues that predictive policing, which relies upon former arrest records, hinders the future application of the presumption of innocence. This is established by positing that predictive policing is comparable to traditional criminal investigations in substance and scope. Police records generally do not clarify whether former charges result in dismissal or acquittal, or conversely, conviction. Therefore, police as state actors may unlawfully act in reliance on an individual's former arrest record, despite a favourable disposition. Accordingly, it is argued that the presumption of innocence as a fair trial right may be effectively nullified by predictive policing.

1 Introduction

Artificial intelligence (AI) is a highly disruptive technology in all manners of daily life, its uses ranging from life-saving and convenient, to suspect and even dangerous. Its growing use in criminal justice processes is no different. While it allows for real time intervention in diffusing deadly situations and finding missing persons, it also opens the door to myriad, unprecedented types of control. As a result, it changes the way that we as citizens interact with the law and the way in which we define criminal justice. This paper will examine the right to the presumption of innocence as applies to criminal defendants in the early criminal justice stages. It will argue that the use of risk assessments for predictive policing is incompatible with the presumption of innocence (Presumption), per the case law of the European Court of Human Rights (ECtHR).

The paper will begin by unpacking the use of AI in policing, namely through the use of risk assessments, used interchangeably here with 'predictive policing.' It will compare traditional criminal investigations to predictive policing to demonstrate that the advances made possible by AI change the character of policing and increase the relative position of the state. In the following section, it will define the Presumption per the European Charter of Human Rights (ECHR). The Presumption, though an important procedural, fair trial right, is often debated as to its scope and application. After a brief review of the doctrine, this section will address the Presumption as treated by the ECtHR.

The remainder of the paper will apply the Court's interpretation of the Presumption to the use of predictive policing to support the assertion that they are contradictory in practice. First, it will be demonstrated that the use of police records for risk assessments necessarily include individuals whose former charges may have been dismissed or acquit-

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ted. Second, the role of police as public authorities per the Presumption will be addressed. And finally, the use of risk assessments will be argued as comparable in scope to aspects of traditional criminal investigations, which are subject to the Presumption.

2 Risk Assessments and Predictive Policing

Policing practices have changed in their very essence as responding to crime gives way to prevention. Consequently, not only do practices and technologies evolve, but also the boundary between crime control and investigation is blurring.¹ This trend is made possible and powerful by harnessing AI, and preventing crime is achieved by the use of surveillance and risk assessments.² Though these practices may originate in the legitimate goals of curbing crime and increasing public safety, they also change the relationship between the state to the individual, as well as the application of the law to the individual.³ Traditional criminal investigation is a study of ‘facts presented by a criminal act or pattern of criminal conduct’.⁴ Using this information police may identify and locate individuals believed to be involved with a crime. Risk assessments, which also assess the facts of criminal acts or patterns, albeit historical, are similarly used to identify and locate potential offenders. Though the processes are temporally distinct, similar methods are employed.

Risk assessments are designed to forecast the probability of future crime based on data that reflect past criminal acts, according to an environmental theory of crime.⁵ By assessing the correlation and prevalence of repeat factors that coincide with crime, it should be possible to infer the likelihood of future crime based on the co-existence, or lack of, particular attributes.⁶ These include situational and environmental factors, but largely centre on the temporal and locational details of crime statistics, as recorded in past arrest and crime reports.⁷ AI is critical to the process of identifying correlations because it vastly expands the ability to ascertain connections between large, disparate sets of data. Connections that are virtually unrecognizable to the human eye are reduced to calculations performed in seconds. With the results, policing agencies may then determine how to

¹ Trevor Jones, ‘Governing Security: Pluralization, Privatization, and Polarization in Crime Control and Policing’ in Mike Maguire, Rod Morgan and Robert Reiner (eds) *The Oxford Handbook of Criminology* (5th edn OUP 2007).

² Wim Hardyns and Anneleen Rummens, ‘Predictive Policing as a New Tool for Law Enforcement? Recent Developments and Challenges’ [2018] 24 Eur J Crim Policy Res 201.

³ David Garland, *The Culture of Control* (University of Chicago Press 2001).

⁴ Daniel Reilly, *Finding the Truth with Criminal Investigation* (Rowman & Littlefield 2019) 3–4.

⁵ Nina Brown and Donald Janelle, ‘Robert Park and Ernest Burgess: Urban Ecology Studies, 1925’ (2002) CSISS Classics UC Berkeley <<https://escholarship.org/uc/item/6f39q98d>> accessed 7 October 2021.

⁶ Walter L Perry and others, ‘Predictive Policing: The Role of Crime Forecasting in Law Enforcement Operations’ (RAND 2013) <<http://ebookcentral.proquest.com/lib/unilu-ebooks/detail.action?docID=1437438>> accessed 9 January 2020.

⁷ David Weisburd, ‘The Law of Crime Concentration and the Criminology of Place.’ [2015] 53 Criminology 133.

best allocate their resources accordingly, allowing efficiency gains over traditional investigations that are generally responsive to a single crime event.⁸

Risk assessments are not considered to be proof of criminal behavior nor standalone justification for an arrest or stop.⁹ Regardless, as they guide policing, they factor heavily into real-time judgments on preventative stops and arrests. Though most commonly used for predicting high crime locations, some jurisdictions have also employed risk assessments to profile individuals.¹⁰ This form of patrol has been described as policing by ‘automated suspicion’.¹¹ Pre-emptive patrols alter if not circumvent the standards applied to policing, for instance, forming individualized suspicion. Risk assessments collate a vast quantity of proxy information and make it actionable for policing by creating a suspect profile. This mirrors a traditional criminal investigation, but rather than seeking out an individual, a class or category of suspects is produced. It is asserted here that the use of investigatory tools for crime prevention constitutes a process parallel to a criminal investigation.

Policing formally sits outside the scope of a trial and is not considered a pre-trial process. It therefore is not subject to fair trial guarantees per the European Convention on Human Rights (ECHR). However criminal investigations subsequent to a charge do fall within the scope of pre-trial processes and are subject to the requirements set forth in Article 6. The argument against applying the Presumption to policing generally ends at this point, at which all parties agree that there is a clear divide between trial procedure and policing, as well as the respective standards.¹² However they remain two parts of the same process and it is problematic to disassociate the effects of policing from individuals’ right to a fair trial.

3 Interpreting the Presumption of Innocence

The Presumption receives varied and at times confusing treatment across legal systems. Its application ranges from an evidentiary and procedural standard, to a more expansive approach rooted in normative justifications.¹³ The Presumption is universally defined as

⁸ Martin Innes, ‘The Art, Craft, and Science of Policing’ in (Peter Cane and Herbert M. Kritzer eds), *The Oxford Handbook of Empirical Legal Research* (OUP 2010).

⁹ Andrew Ferguson, ‘Predictive Policing and Reasonable Suspicion’ [2012] 62 *Emory Law Journal* 261.

¹⁰ Amnesty International, ‘Trapped in the Matrix: Secrecy, Stigma, and Bias in the Met’s Gangs Database’ (Amnesty International 2018); David Weisburd, ‘Does Hot Spots Policing Inevitably Lead to Unfair and Abusive Police Practices, or Can We Maximize Both Fairness and Effectiveness in the New Proactive Policing?’ [2016] *University of Chicago Legal Forum* 661.

¹¹ Sabine Gless, ‘Automated Suspicion - and Evidence?’ (Facial recognition vs. Criminal Justice, Council of Europe AI & Law Webinar Series, 2 February 2021) <<https://www.coe.int/en/web/artificial-intelligence/-/ai-law-webinar-9-facial-recognition-vs-criminal-justice?fbclid=IwAR3Y-uYro9TEcar-qr1sJAMJUaThTv9Izhs5L9oNSitOIVaFJuR4Z5sE5Jw>> accessed 2 February 2021.

¹² Kevin Cyr, ‘The Police Officer’s Plight: The Intersection of Policing and the Law’ [2015] 52 *Alberta Law Review* 889.

¹³ RA Duff, ‘Who Must Presume Whom to Be Innocent of What?’ [2013] 13 *Netherlands Journal of Legal Philosophy* 12.

prescribing the state to treat an individual as though he/she is factually innocent, despite simultaneously establishing the burden to produce sufficiently convincing evidence to the contrary.¹⁴ It is a legal principle set in juxtaposition to the prosecution's prima facie assertion that a charged individual has engaged in an act which meets the statutory elements of a crime.¹⁵ Though a presumption is by definition a rebuttable logical inference based in fact, in this case the Presumption acts as a procedural instruction to the court based in legal, if not actual fiction.¹⁶ Whether the defendant is legally or factually innocent is not relevant to applying the Presumption, which may be inferred by the fact that the trial process is initiated solely on a belief in factual guilt. Instead, the Presumption sets the basis from which the trial will proceed.¹⁷ It requires a formal stance that an individual is innocent to avoid insinuating or causing prejudice, which may lead to undue deprivation of liberty. It is not an assertion that he/she is innocent, but rather ensures the rule of law is maintained in the criminal process.¹⁸ Therefore the concept underlying the Presumption is in practice, often counterfactual and complicated to define with precision.¹⁹

In common law systems the Presumption is interpreted in terms of procedure and ensures the burden of proof is correctly applied between parties.²⁰ In inquisitorial systems it likewise provides protection to the individual as regards official public treatment and investigatory measures, however it lacks the hard procedural shell it is afforded in the adversarial context.²¹ Jurisdictions subject to the ECHR, which is the focus of this work, apply the Presumption according to its role within the suite of fair trial rights guaranteed in Article 6. Article 6.2 stipulates that 'Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law'.²² Though it is a guaranteed, non-derogable right, its scope is hard to define comprehensively. According to the Article, the Presumption does not *de facto* manifest until the issuance of a charge nor does it

¹⁴ Thomas Weigend, 'Assuming That the Defendant Is Not Guilty: The Presumption of Innocence in the German System of Criminal Justice' (2014) 8 Criminal Law and Philosophy 285 <<https://doi.org/10.1007/s11572-013-9271-4>, 286-287> accessed 10 May 2021.

¹⁵ "The presumption of innocence does not have any cognitive pretensions but prescribes the hypothetical starting point of due process." Van Sliedregt, 'A Contemporary Reflection on the Presumption of Innocence' [2009] 80 RIDP 1, 264; Antonella Galetta, 'The Changing Nature of the Presumption of Innocence in Today's Surveillance Societies: Rewrite Human Rights or Regulate the Use of Surveillance Technologies?' [2013] 4 European Journal of Law and Technology.

¹⁶ Carl-Friedrich Stuckenberg, 'Who Is Presumed Innocent of What by Whom?' [2014] 8 Criminal Law and Philosophy 301, 305.

¹⁷ Sherman Clark, 'The Juror, the Citizen, and the Human Being: The Presumption of Innocence and the Burden of Judgment' [2014] 8 Crim Law and Philos 421, 424.

¹⁸ Hamish Stewart, 'The Right to be Presumed Innocent' [2014] 8 Crim Law and Philos 407, 407.

¹⁹ Ferry de Jong and Leonie van Lent, 'The Presumption of Innocence as a Counterfactual Principle' [2016] 12 Utrecht Law Review 32.

²⁰ Elies Van Sliedregt [15] 247-67; Liz Campbell, 'Criminal Labels, The European Convention on Human Rights and The Presumption of Innocence' [2013] 76 The Modern Law Review 4, 681.

²¹ Weigend [14] 290-291.

²² European Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols Nos. 11 and 14 [1950] ETS 5 art 6.2.

de facto apply following the trial.²³ But the bounds of the criminal process may be malleable and as described in the following section, the Presumption's interpretation is often on a case-by-case base, in accordance with preserving its core aims.²⁴

At its core, the Presumption acts as a protective umbrella over the trial process to secure the space necessary for other fair trial principles to be effective. For instance, in recognizing the general disparity between parties in access to resources and the ability to conduct fact-finding, the Presumption offers the defense equal opportunity to present its case to an unprejudiced court.²⁵ It further shields the defendant from required self-incrimination.²⁶ It is nearly impossible to sever the normative implications of the Presumption from its wider role in ensuring the fairness of the trial.²⁷ The question to which this paper aims to offer an answer, is at the point an individual becomes a suspect subject to investigation, what protections guard this process before he/she formally becomes a defendant.²⁸

As described above, the ECHR provides the baseline at which the Presumption is guaranteed but leaves much room for interpreting its scope. The ECtHR has provided further guidance on situations in which the Presumption may apply. Series of holdings suggest that the Court interprets the Presumption in the manner least likely to eviscerate its value, taking a holistic, fact-based approach. Firstly, the Court has confirmed that in certain situations the Presumption may be applicable beyond pre-trial processes. This includes both police driven pre-trial procedures, such as pre-trial detention, as well as actions taken following an acquittal. Secondly, it has addressed the categories of individuals who may be considered public authorities with the power to sway the opinion of the public as to one's innocence, as well as the content and form of such actions. And finally, it has supported an expanded reading of the Presumption when necessary to ensure its larger, practical applications in day-to-day trials, by applying other fundamental rights in order to safeguard the efficacy of the Presumption.

Following the Court's treatment of the Presumption, it may be suggested that a case-by-case analysis is necessary for ensuring the aims of the Presumption are fulfilled. Though the Court appears hesitant to apply the Presumption to determining permissive uses of coercive pre-trial processes such as pre-trial detention and intrusive criminal investigatory measures, the rationale underlying the Presumption is invoked.²⁹ In the use of pre-trial detention it has held that there is no comprehensive prohibition, but rather the essence of Article 6.2 should be a means of guidance on the limited use of the practices

²³ Van Sliedregt [15] 260.

²⁴ Galetta [15].

²⁵ Campbell, 'Criminal Labels, The European Convention on Human Rights and The Presumption of Innocence' [2013] 76 *The Modern Law Review* 4, 683.

²⁶ Van Sliedregt [15].

²⁷ Weigend [14].

²⁸ Duff [13] 4.

²⁹ Directive (EU) 2016/343 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings [2016] OJ L65 art 2.

deemed acceptable prior to trial.³⁰ This must necessarily be true. As the Presumption protects the innocent against wrongful convictions and subsequent punishment, the innocent must also be protected against undue harsh treatment prior to the trial.³¹ If the trial were to function according to the requirements of the Presumption but a gap in application allows that a suspect may languish in pre-trial detention for an unreasonable period, it is arguable that punishment has already been enacted and to apply the Presumption only at the beginning of a trial is completely arbitrary and meaningless.³² This approach extends the Presumption's legitimacy at all points throughout the criminal justice process in order to ensure its value is solid, rather than an itinerant procedural principle.³³

Similarly, the Court has held that the Presumption is also applicable to those who have not been found guilty. In the case of acquittals, the ECtHR has held that the Presumption applies against actions, statements, and manifestations of a belief by state authorities that the acquitted individual is in fact guilty. In *Asan Rushiti v. Austria* the Court held that the issuance of a final acquittal makes even the 'voicing of suspicions regarding the accused's innocence' by a public authority, 'incompatible' with the Presumption.³⁴ In this case, the applicant's compensation claim was denied following his narrow acquittal due to a judicial determination that there was still a reasonable, and credible suspicion that the individual was in fact guilty, regardless of his acquittal.³⁵ By extending the Presumption beyond the scope of trial the Court is not only upholding its procedural uses, but ensuring that its underlying rationale retains legitimacy. Were the Presumption to end with the trial, the state may informally and publicly treat the acquitted as guilty and the court's power to find an individual innocent would be totally hollow in practice.

Next, the Court has clarified what actions taken by which parties are subject to Article 6.2. It has recognized that police and comparable authorities are state authorities or agents, who have in their control the capacity to make public manifestations that would have the same adverse, substantive effects on an individual's right to be viewed as innocent as if spoken by a courtroom official.³⁶ The public use of coercive measures by police in the pursuit of an arrest arguably represents a high degree of belief in the guilt of an

³⁰ Lonneke Stevens, 'Pre-Trial Detention: The Presumption of Innocence and Article 5 of the European Convention on Human Rights Cannot and Does Not Limit Its Increasing Use' [2009] 17 *European Journal of Crime, Criminal Law and Criminal Justice*, 165, 167-168; Van Sliedregt [15] 263.

³¹ Herbert Packer, 'Two Models of the Criminal Process' [1964] 113 *University of Pennsylvania Law Review* 1, 16; Stewart [18].

³² *ibid* 411.

³³ Marco Mendola, 'One Step Further in the "Surveillance Society": The Case of Predictive Policing' [2016] *Leiden University Tech and Law Center*.

³⁴ *Case of Asan Rushiti v. Austria* App no 28389/95 (ECHR, 21 March 2000) para 31.

³⁵ *ibid*.

³⁶ Council of Europe, *Guide on Article 6 of the European Convention on Human Rights; Right to a Fair Trial (Criminal Limb)* (2020) 62.

individual and may affect the determination of legal culpability in a system where verdict is reached by a jury of one's peers.³⁷ It would diminish the value of the Presumption to not apply its weight to all state authorities with influence on public opinion. The unique role of police is indicated by the Court's bright line distinctions between the police and other influential actors, such as media, political actors, and prosecutors.³⁸

Finally, the Court has demonstrated the importance of maintaining the Presumption's essence, even when necessary to do so by pursuing avenues legally based in other fundamental rights. For instance, it has stopped short of extending the Presumption to informal manifestations of suspicion, but it has recognized the power of a label or categorization of suspicious for the practical effects it has on an individual's rights.³⁹ In its reasoning that was very much a justification supported by the Presumption, it held that such acts are unlawful according to Article 8 of the ECHR.⁴⁰

The category of suspect, or even defendant, brings with it some degree of deprivation of liberty as well as other unavoidable varieties of treatment to which an innocent person will not be subjected.⁴¹ Similarly, an individual deemed to be in a class of persons likely to commit a crime, becomes subject to a different type of treatment than the individual considered innocent.⁴² The stigma of an arrest *de facto* labels and separates the guilty from the rest of society.⁴³ The Court in *S. and Marper v The United Kingdom* accordingly supported the value of an individual's right to be seen as innocent and asserted that there is a 'reputational' aspect to the Presumption, such that a finding of innocence should not be undermined by a stigma of guilt.⁴⁴

4 Applying the Presumption to Policing by Risk Assessment

As addressed above, the Presumption is intended to guard against impediments to a fair trial, holding in place procedural standards and supporting additional fundamental rights. As stated by the ECtHR, there is no value to the Presumption should its application be so narrow in scope that myriad processes surrounding the trial may cause the same injustices it is intended to shield.⁴⁵ This section asserts that predictive policing should be subject to the Presumption for three reasons. First, the use of criminal records as the main source of data in risk assessments is problematic in that it does not properly

³⁷ Campbell [23] 685; Clark [17].

³⁸ Council of Europe [34] 65.

³⁹ Galetta [15].

⁴⁰ *Case of S. and Marper v. The United Kingdom* App nos 30562/04 and 30566/04 (ECHR 4 December 2008).

⁴¹ Peter DeAngelis, 'Racial Profiling and the Presumption of Innocence' [2014] 43 *Netherlands Journal of Legal Philosophy* 1, 43, 54.

⁴² Pamela Ferguson, 'The Presumption of Innocence and Its Role in The Criminal Process' [2016] *Criminal Law Forum* 27, 131, 141.

⁴³ David Wolitz, 'The Stigma of Conviction: Coram Nobis, Civil Disabilities, and the Right to Clear One's Name' [2009] *Brigham Young University Law Review* 5, 1277, 1276.

⁴⁴ Liz Campbell [23]; O.J. Gstrein, A. Bunnik, and A. Zwitter, 'Ethical, Legal and Social Challenges of Predictive Policing' [2019] 3 *Catolica Law Review* 77, 10.

⁴⁵ *Case of Allenet de Ribemont v France* App no 15176/89 (ECHR 1995) para 94.

extract individuals' records whose arrest was not followed by a conviction. Should a risk assessment assign an individual the status of suspect based on categorical profiling, a violation of the Presumption may occur. Secondly, police act as public authorities with the ability to prejudice the fairness of a trial if making a statement or acting in a way that causes the prejudgment of a suspect. Finally, predictive policing with the aid of risk assessments is a *de facto* use of investigatory techniques for preventing crime. This level of intrusion on the individual without targeted suspicion is parallel in process to a pre-trial criminal investigation subsequent to a charge and should therefore also require the same level of procedural protection as found in the Presumption.

4.1 Criminal records as incomplete data

Risk assessments are as effective as the data which inform their output, the more data that are used the more accurate the crime forecast.⁴⁶ In the case of risk assessments to predict likely crime, historical crime data are the most important information available.⁴⁷ Some software rely almost exclusively upon static crime data as collected and recorded by police agencies,⁴⁸ and include any combination of arrest records, calls for assistance, or non-custodial stops.⁴⁹ Due to the emphasis on historic data, prior offenders and those who share their characteristics, are often considered to be likely future offenders.⁵⁰ Indeed, data on prior offenders inform both geographic and individual predictive profiles, based on a perception that these shared traits indicate a 'propensity to commit harmful behaviour'.⁵¹ The ECtHR has held that the Presumption is not violated by the mere retention of acquitted individuals' data in a law enforcement database.⁵² However, in the case of predictive policing, it is not the database at issue but rather its use to inform police action toward individuals labelled as 'suspect'.⁵³

This article uses the term 'static' to describe crime data, referring to the fact that data based on arrests, for instance, do not account for the subsequent disposition of charges. For the purposes of a predictive software using historical arrest data, the arrest stands alone as a historical fact, regardless of whether a conviction follows.⁵⁴ For the purposes of police records this is a legitimate means of recording data. Police do not collect data for the sole purpose of risk assessments and so these data are not recorded in a manner

⁴⁶ Matteo Pasquinelli, 'How a Machine Learns and Fails - a Grammar of Error for Artificial Intelligence' [2019] *Journal for Digital Culture* (Spectres of AI no 5).

⁴⁷ Perry [5].

⁴⁸ Hardyns and Rummens [2].

⁴⁹ Kristian Lum and William Isaac, 'To Predict and Serve?' [2016] 13 *Significance* 14.

⁵⁰ For more information on the inaccuracies and the inability to correct police records, Interview with Phillip Atiba Goff, 'How Police Reports Became Bulletproof' (*All Things Considered*, 26 May 2021) <<https://www.npr.org/2021/05/26/1000598495/how-police-reports-became-bulletproof>> accessed 7 October 2021.

⁵¹ Campbell [23] 25; Mendola [31] 15.

⁵² Campbell [23] 698; *Marper v. UK* [38].

⁵³ Elizabeth Joh, 'Policing by Numbers: Big Data and the Fourth Amendment' [2014] 89 *Washington Law Review* 35, 55.

⁵⁴ Aleš Završnik, 'Algorithmic Justice: Algorithms and Big Data in Criminal Justice Settings' [2019] 18 *European Journal of Criminology* 5.

aligned with the legal implications of a risk assessment.⁵⁵ In this way, an inference is made that an individual who was charged, even if later found by a court to be innocent, will be algorithmically processed as one found guilty.

This misapplication of data directly invokes the Court's assertion that authorities may violate the tenets of the Presumption when ascribing guilt in the absence of a guilty finding.⁵⁶ The Court makes a clear distinction between found not guilty and not found guilty, determining the Presumption applies to both. In the case of *Clive v. Germany* the Court held that in order to ensure the Presumption is 'practical and effective', it applies beyond the context of pending criminal proceedings, including following an acquittal, dismissal, or discontinuance.⁵⁷ The Court further held in *Minelli v. Switzerland* that in the absence of a guilty finding a judicial opinion which suggests that an individual is guilty will violate the Presumption, even in the absence of a formal finding.⁵⁸ In *Allen v. United Kingdom*, the Court offered this:

in keeping with the need to ensure that the right guaranteed by Article 6 § 2 is practical and effective ... Its general aim ... to protect individuals who have been acquitted of a criminal charge, or in respect of whom criminal proceedings have been discontinued, from being treated by public officials and authorities as though they are in fact guilty of the offence charged. In these cases, the presumption of innocence has already operated, through the application at trial of the various requirements inherent in the procedural guarantee it affords, to prevent an unfair criminal conviction being imposed. Without protection to ensure respect for the acquittal or the discontinuation decision in any other proceedings, the fairtrial guarantees of Article 6 § 2 could risk becoming theoretical and illusory.⁵⁹

In the instant case of predictive policing, in which police records include charges which resulted in conviction, acquittal, dismissal or some other discontinuance of proceedings, there must be a clear distinction between the data used. In relying upon risk assessments to generate suspicion, police may be acting in reliance on data relative to a prior arrest, despite the fact that a court may have subsequently found him/her not guilty of the offense. It therefore follows that predictive policing predicated on the use of any arrest record that resulted in anything other than a conviction may cause a violation of the Presumption when relied upon by policing authorities to identify potential 'suspects'.⁶⁰

⁵⁵ Phillip Goff and Kimberly Barsamian Kahn, 'Racial Bias in Policing: Why We Know Less Than We Should' [2012] 6 Social Issues and Policy Review 177; Joh [51].

⁵⁶ *Case of Sekanina v. Austria* App no 13126/87 (ECHR 25 August 1993) para 37; Galetta [15] citing *Sekanina v. Austria*.

⁵⁷ *Case of Cleve. v. Germany* App no 48144/09 (ECHR 15 January 2015) para 35.

⁵⁸ *Case of Minelli v. Switzerland* App no 8660/79 (ECHR 25 March 1983) para 37.

⁵⁹ *Case of Allenet de Ribemont v. France* [43] para 94.

⁶⁰ *Case of Minelli v. Switzerland* [57] 37.

4.2 Clarifying prejudicial acts

If the police data used are incomplete as described above, acts taken by the police may constitute prejudicial behavior by a public authority or an individual of public standing.⁶¹ The ECtHR has held that expressive acts by public authorities which have the effect of prejudicing an individual in the course of a criminal trial may constitute a violation of the Presumption. In *Alenet de Ribemont v. France*, the Court held that the obligations imposed by the Presumption are not limited to officials of criminal courts, but also other authorities.⁶² In its assessment, the Court held that a proclamation of guilt by a senior police officer ‘firstly, encouraged the public to believe him guilty and, secondly, prejudged the assessment of the facts by the competent judicial authority’.⁶³ It further determined that statements made by police in the course of an investigation parallel to arrest and detention, have the ‘foreseeable’ effect of prejudicing the defendant in a public manner, amounting to prejudgment.⁶⁴ Therefore the Presumption can be infringed by any public authorities who in their official capacity may have some bearing on the outcome of a trial.⁶⁵

The Court distinguishes legitimate acts, such as the factual notification to the public of the existence of a criminal investigation.⁶⁶ The Court has further clarified that acts which stand in as indirect statements on believed guilt may amount to a violation of the Presumption, whereas a passive utterance of suspicion alone will unlikely constitute a violation.⁶⁷ The Court has further indicated that, ‘...a fundamental distinction must be made between a statement that someone is merely suspected of having committed a crime and a clear declaration’.⁶⁸ It is then a reasonable assertion that the public arrest of an individual in the presence of bystanders is an inherently clear declaration of official suspicion against an individual that supersedes ‘mere’ suspicion.⁶⁹ In its analysis in *Marper*, the Court held that though not a formal declaration of guilt, the retention of acquitted individuals’ DNA equates to treating innocent people as guilty, in practical contradiction of an acquittal and outside the spirit of the Presumption.⁷⁰ Predictive policing which is predicated on the use of data, similarly relies on the retention of records of arrests which may have also ended in acquittal.⁷¹ Inclusion in a DNA database, though

⁶¹ Dovydas Vitkauskas and Grigoriy Dikov, *Protecting the Right to a Fair Trial Under the European Convention on Human Rights; A Handbook for Legal Practitioners* (2nd ed Council of Europe 2017) 113 <<https://rm.coe.int/protecting-the-right-to-a-fair-trial-under-the-european-convention-on-/168075a4dd>> accessed 10 February 2021.

⁶² *Case of Alenet de Ribemont v. France* [43] para 33.

⁶³ *ibid* 41.

⁶⁴ *Case of Alenet de Ribemont v. France* [43] 37; Campbell [23] 694.

⁶⁵ Galetta [15] citing *Case of Alenet de Ribemont v. France* [43].

⁶⁶ Council of Europe [34] 65.

⁶⁷ Liz Campbell, ‘A Rights-Based Analysis of DNA Retention’ [2012] *Criminal Law Review* 12, 7.

⁶⁸ *Case of Ismoilov and Others v. Russia* App no 2947/06 (ECHR 1 December 2008) para 166.

⁶⁹ DeAngelis [39] 56.

⁷⁰ Campbell [65] 902-905.

⁷¹ Campbell [23] 5-6, 21-23.

certainly more intrusive, is only used to compare against evidence. Risk assessments used by police are continuously and proactively inducing police action. This clearly meets the standard as described in *Marper*.

The Court in *Marper* further differentiated between official manifestations of perceived guilt by the state and stigma as a result of state action. In addressing the inclusion of acquitted individuals in a DNA repository, the Court further held that to be treated as guilty after having been found not guilty of an offence leads to a presumption against innocence and risks stigmatization.⁷² In addition, it found that inclusion in a database used to locate criminals ‘...enlarges the category of “suspect”’,⁷³ and that this could not be considered necessary in light of the undue consequences on individuals’ reputations.⁷⁴ It is therefore argued that risk assessments relying on historic crime data for the purpose of building suspicion similarly leads to categorizing individuals according to their degree of guilt, creating new distinctions between citizen, suspect, and defendant.⁷⁵ It is well documented that increased police encounters and scrutiny result in ‘evidence-based’ stigmatization,⁷⁶ which extends well beyond the criminal justice system into applications for jobs, housing, and credit.⁷⁷ Studies demonstrate that in both the U.K. and U.S. criminal justice systems, which utilize predictive policing at increasing levels, criminal stigmatization often extends to whole communities.

Because predictive policing is the identification of relevant factors to anticipate future crimes, it is logical and necessary that police utilize their own records to fuel risk assessments. However as established, police records are not often updated to reflect the disposition of legal processes and this creates an inaccuracy as regards the disposition of charges.⁷⁸ When risk assessments are used to generate suspicion and induce police action, acquitted or otherwise cleared individuals may become subject of police scrutiny based on disposed of charges. In this case, the Presumption of Innocence has been violated.

4.3 Prevention as investigation

Finally, it is argued here that the act of predictive policing mirrors a criminal investigation much more closely than a police patrol and therefore should be subject to the pro-

⁷² Mendola[31] 15; Katerina Hadjimatheou, ‘Surveillance, the Moral Presumption of Innocence, the Right to Be Free from Criminal Stigmatisation and Trust’ (SURVEILLE Seventh Framework Programme, 30 September 2013).

⁷³ The ECHR refers to this as the ‘pérennisation de la catégorie de “suspect”’ Galetta [15].

⁷⁴ *Case of S. and Marper v. United Kingdom* [38]; *ibid*.

⁷⁵ Amber Marks, Benjamin Bowling and Colman Keenan, ‘Automatic Justice? Technology, Crime and Social Control’ (Roger Brownsword, Eloise Scotford and Karen Yeung eds) *The Oxford Handbook of the Law and Regulation of Technology* (OUP 2017); Andrew Ashworth, ‘Four Threats to the Presumption of Innocence’ [2006] 10 *The International Journal of Evidence & Proof* 241.

⁷⁶ Gstrein, Bunnik, and Zwitter [42] 10; Duff [13] 13.

⁷⁷ Amnesty International [10].

⁷⁸ Mendola [31] 17.

tection of the Presumption afforded subjects of criminal investigations. Criminal investigations, a recognized pre-trial process, require that police resources be utilized to determine the perpetrator of a crime which has been committed and catalogued by police. Criminal investigation is a process which is organized and methodical, using all available information.⁷⁹ The use of tools that may generate a profile based on factual evidence allow for the targeting of individuals who are in some way connected to the details of a crime.⁸⁰ Predictive policing uses a similar method, whereby the evidence and elements of former crimes are used to build the profile of individuals who may be similar to past offenders and therefore potentially likely to commit future crimes.⁸¹ This thereby creates a categorical profile for suspects who warrant heightened police attention in the form of what may equate to a criminal investigation.

Whereas earlier forms of sophisticated techniques, or first-generation forensic technology, were used to confirm or deny suspicion, the second generation is capable of being used for proactive investigations, perfectly illustrated by risk assessments.⁸² The main difference between the two methods is the commission of a crime, a temporal place holder at which a charge may be filed, and the pre-trial protections are afforded the suspect. Without the crime there is no charge and the potential suspect, so treated by police, may not also garner the protections of the legal process. As alluded to above, this has real, detrimental effects on an individuals' rights. It is argued that as action against the individual is increasingly executed in a preventative context, the protections against arbitrary state action should follow accordingly.⁸³

5 Conclusion

Predictive policing, risk assessments, and other uses of surveillance technology for law enforcement show no signs of declining, but instead are becoming increasingly prominent. This article has argued that as these powerful enforcement tools become more ubiquitous, the attendant due process protections provided for within criminal justice must also evolve. Further, it asserted that the events leading to a criminal trial are set in motion by policing and that as a result policing practices carry numerous implications to the fairness and outcome of a trial. In the case of predictive policing, the legitimacy of the Presumption of Innocence is tested at its very core. Due to the imprecise manner in which police data are used to include charges later dismissed for forming suspicion; the ability of the police to act as state authorities with the potential to prejudice a trial outcome; and the intensive investigation processes invoked by predictive policing, a deep misalignment is forming between the application of Article 6.2 of the ECHR and policing. Without

⁷⁹ Garland [3].

⁸⁰ DeAngelis [39].

⁸¹ Marks, Bowling and Keenan [73].

⁸² *ibid.*

⁸³ Lucia Sommerer, 'The Presumption of Innocence's Janus Head in Data-Driven Government' (Emre Bayamlioglu, Irina Baraliuc, Liisa Janssens, Mireille Hildebrandt eds) *Being Profiled* (Amsterdam University Press 2018).

accounting for the new realities inherent in building a criminal charge, applying the Presumption to the resulting criminal trial process is likely to be hollow in effect.

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