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Black Redemption

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INTRODUCTION

If Black lives matter, why does the criminal legal system treat Black people as if they are disposable? It more often deems Black people habitual offenders and locks them up for life for minor offenses.[1] Black children are disproportionately sentenced to life in prison.[2] The race of the defendant — Black — and the victim's race — white — is also salient to deciding who ends up on death row.[3] The criminal legal

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1. *See* Matthew S. Crow & Kathrine A. Johnson, *Race, Ethnicity, and Habitual-Offender Sentencing: A Multilevel Analysis of Individual and Contextual Threat*, 19 CRIM. JUST. POL'Y REV. 63, 72–73 (2008) ("Black offenders are significantly more likely to be habitualized than White offenders. Specifically, Blacks' odds of being habitualized are 28% greater than Whites' odds of being habitualized.").

2. *See* THE CAMPAIGN FOR THE FAIR SENT'G OF YOUTH, TIPPING POINT: A MAJORITY OF STATES ABANDON LIFE-WITHOUT-PAROLE SENTENCES FOR CHILDREN 2 (2018), https://www.fairsentencingofyouth.org/wp-content/uploads/Tipping-Point.pdf [https://perma.cc/PLX8-J99J] ("[O]f new cases tried since 2012, approximately 72 percent of children sentenced to life without parole have been Black — as compared to approximately 61 percent before 2012.").

3. *See* DEATH PENALTY INFO. CTR., ENDURING INJUSTICE: THE PERSISTENCE OF RACIAL DISCRIMINATION IN THE U.S. DEATH PENALTY 28–29 (2020),

system's harsh treatment of Black people proves it does not value Black lives.

Rehabilitation is supposed to be a core tenet of our criminal legal system.[4] With the concept of rehabilitation comes the notion that people are redeemable. In the words of Bryan Stevenson, "[e]ach of us is more than the worst things we've ever done."[5] Yet our system would rather spend the time and money to cage and kill Black people rather than provide them with the long-deprived resources they need to thrive.[6] When it comes to Black people's involvement in the criminal legal system, retribution has always been the driving focus.

This Essay asserts that if Black lives matter, there needs to be a radical shift in our understanding of punishment. One necessary (but not sufficient) step must be a complete overhaul of current Eighth Amendment jurisprudence to make it reflect the notion that all people, particularly Black people, are redeemable. This requires giving teeth to the "grossly disproportional" standard for deciding whether punishment is excessive — especially when reviewing harsh sentences imposed under habitual offender laws.[7] It requires dispelling the idea that a child could be considered "permanently incorrigible" and thus worthy of being locked away for life.[8] And it requires embracing the

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https://files.deathpenaltyinfo.org/documents/reports/r/Enduring-Injustice-Race-and-the-Death-Penalty-2020.pdf [https://perma.cc/4SXL-K3LK] ("Throughout the modern era of capital punishment, people of color have been overrepresented on death row. . . . Currently, white and African-American prisoners each comprise 42% of those on death row . . . . These figures can be contrasted with the racial and ethnic makeup of the population as a whole. Approximately 60.4% of the population is white.").

4. *See* Williams v. New York, 337 U.S. 241, 248 (1949) ("Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence.").

5. BRYAN STEVENSON, JUST MERCY: A STORY OF JUSTICE AND REDEMPTION 17–18 (2014).

6. The Bureau of Justice Statistics estimates that the annual cost of incarceration, which includes the cost of operating prisons, jails, parole, and probation, is $81 billion. *See Mass Incarceration Costs $182 Billion Every Year, Without Adding Much to Public Safety*, EQUAL JUST. INITIATIVE (Feb. 6, 2017), https://eji.org/news/mass-incarceration-costs-182-billion-annually/ [https://perma.cc/S68W-E28N].

7. *But see* Rummel v. Estelle, 445 U.S. 263, 272 (1980) ("Outside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare."). For a discussion of various three-strikes statutory schemes, see Linda S. Beres & Thomas D. Griffith, *Do Three Strikes Laws Make Sense? Habitual Offender Statutes and Criminal Incapacitation*, 87 GEO. L.J. 103, 110–12 (1998).

8. *But see* Montgomery v. Louisiana, 136 S. Ct. 718, 734 (2016) (holding that the Eighth Amendment does not bar a life without parole sentence for juvenile offenders "whose crimes reflect permanent incorrigibility").

fact that stark racial disparities in the imposition of punishment, especially capital punishment, are enough to prove the punishment is arbitrary, or worse, purposefully discriminatory and thus unconstitutional.[9]

Part I of this Essay looks at the grossly disproportional standard for excessive punishment. Part II tackles juvenile life without parole. Part III examines the racialized imposition of the death penalty. This Essay concludes by calling for an anti-racist reading of the Eighth Amendment. In this moment of racial reckoning, as we interrogate the way race invidiously influences our institutions, particularly our penal system, the Constitution can prove a powerful ally in the fight for racial justice.[10]

Black people matter. Even those, *especially* those, who may have committed a criminal offense. Our criminal legal system must embody this truth. This Essay proposes a necessary step toward realizing this truth by beginning to reimagine current Eighth Amendment jurisprudence.[11]

I. REVAMPING THE GROSS DISPROPORTIONALITY STANDARD FOR EXCESSIVE PUNISHMENT

In 1997, police arrested 38-year-old Fair Wayne Bryant in Shreveport, Louisiana, for trying to steal a pair of used hedge clippers.[12] A prosecutor charged him with simple burglary — a crime for which the maximum penalty is a $2,000 fine or a 12-year prison

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9. *But see* McCleskey v. Kemp, 481 U.S. 279, 312–13 (1987) (holding that proof of the racially disproportionate impact of Georgia's death penalty was insufficient to find the death penalty unconstitutional).

10. *See, e.g.*, Brandon Hasbrouck, *Pack the Court with Color-Conscious Justices*, RICHMOND TIMES DISPATCH (Oct. 8, 2020), https://richmond.com/opinion/columnists/brandon-hasbrouck-column-pack-the-court-with-color-conscious-justices/article_fbd0ab39-0a70-51d0-a144-a889dd96f158.html [https://perma.cc/RD52-TP87] (calling for "a Supreme Court prepared to advance color-conscious constitutionalism").

11. In many ways, this Essay sounds in abolitionist framework, using "a constitutional paradigm that supports prison abolitionists' goals, strategies, and vision." Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 9 (2019). As Professor Amna Akbar explained, the abolitionist "movement is not attempting to operate outside of law, but rather to reimagine its possibilities within a broader attempt to reimagine the state. Law is fundamental to what movement actors are fighting against and for." Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 409 (2018).

12. *See* Teo Armus, *He Got Life for Stealing Hedge Clippers. The Louisiana Supreme Court Says It's a Fair Sentence*, WASH. POST (Aug. 5, 2020, 6:21 AM), https://www.washingtonpost.com/nation/2020/08/05/louisiana-supreme-court-life-sentence/ [https://perma.cc/FCR7-P3WD].

sentence.[13] After a jury found him guilty, a judge sentenced Mr. Bryant to spend the rest of his life in Angola penitentiary, a former plantation.[14] Mr. Bryant received a life sentence for such a minor crime because he had committed other minor offenses in the past.[15] Louisiana's "habitual offender" law allows for sentences up to life in prison after a fourth criminal conviction.[16] Fortunately, the Louisiana Parole Board unanimously granted Mr. Bryant, now over 60 years old, parole in October 2020.[17]

Not everyone is as lucky as Mr. Bryant. While his case was headline grabbing, it is not unique.[18] Every day, courts across the country sentence people to life in prison for minor crimes, as a majority of states have habitual offender or three strikes laws.[19] Habitual offender laws generally provide that persons with a certain number of eligible prior felony convictions (usually two) are subject to enhanced sentences —

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13. *See id.*; *see also* LA. STAT. ANN. § 14:62 (2020). Query whether one should even receive a 12-year sentence for attempting to steal hedge clippers. This speaks to an anchoring problem with criminal sentences in that they are set too high across the board. *See, e.g.*, Melissa Hamilton, *Extreme Prison Sentences: Legal and Normative Consequences*, 38 CARDOZO L. REV. 59, 119 (2016) (explaining that sentencing guidelines act as anchors that appear "to influence normalizing extreme prison sentences").

14. *See* Armus, *supra* note 12.

15. *See id.* Mr. Bryant had previously been convicted of attempted armed robbery (for which he spent ten years in prison), possessing stolen goods, trying to forge a check, and breaking into a home (for which he served another four years). *See id.*

16. *See id.*

17. *See* State v. Bryant, 2020-00077 (La. 07/31/20); 300 So. 3d 392 (Johnson, C.J., dissenting); *see also* Kevin McGill, *Black Man Serving Life for Stealing Hedge Clippers Granted Parole in Louisiana*, USA TODAY (Oct. 16, 2020, 6:10 PM), https://www.usatoday.com/story/news/nation/2020/10/16/fair-wayne-bryant-who-got-life-stealing-hedge-clippers-paroled/3685071001/ [https://perma.cc/KNG8-AW5A].

18. In fact, there are other stark examples from Louisiana. Jacobia Grimes was accused of stealing $31 worth of candy from a Dollar General. The Orleans Parish District Attorney wanted to charge him as a habitual offender given his criminal record, exposing him to a potential life sentence. *See* Emily Lane, *Candy Thief and Habitual Offender Jacobia Grimes Gets 2-Year Sentence*, TIMES-PICAYUNE (July 19, 2019, 12:15 PM), https://www.nola.com/news/traffic/article_16151594-28bf-582c-94c3-aaade5723a0c.html [https://perma.cc/P4TU-YDQF]. Without the habitual offender enhancement, Grimes's crime was punishable by up to two years in prison. *See* John Simerman, *Accused New Orleans Candy Snatcher Facing 20 Years for Pocketing $31 in Sweets*, TIMES-PICAYUNE (Apr. 4, 2016, 4:47 PM), https://www.nola.com/news/article_bff5afa5-6915-5197-bf9b-22524aea7a7a.html [https://perma.cc/S3GE-S9VA]. Grimes pleaded guilty to the unenhanced charge and received a two-year sentence. *See* Lane, *supra* note 18.

19. *See* Michael Tonry, *Making American Sentencing Just, Humane, and Effective*, 46 CRIME & JUST. 441, 464 (2017) (explaining that 26 states have three strikes or habitual offender laws).

up to life in prison — for a subsequent conviction (the third strike).[20] A bulk of these laws were passed in the early to mid-1990s[21] when the country adopted a "tough on crime" law enforcement approach[22] and the war on drugs was in full swing.[23] Given the focal point of the war on drugs and tough on crime law enforcement was the Black community,[24] it is no surprise that courts disproportionately sentence Black people to the harshest of prison terms under habitual offender laws. Indeed, in her dissent from the Louisiana Supreme Court's

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20. *See* Beres & Griffith, *supra* note 7, at 103. What counts as a strike or the number of strikes necessary for an enhanced habitual offender sentence varies by jurisdiction. For example, some states only count certain "violent" felonies as strikes, while other states include most "serious" felonies. *See id.* at 110–11. And while most states with habitual offender laws are three strike laws, Georgia, South Carolina, and Tennessee habitual offender laws only require two strikes. *See* GA. CODE ANN. § 17-10-7(b)(2) (2015) (mandating a life without parole sentence for two "serious violent felony" convictions); S.C. CODE ANN. § 17-25-45(A)(1) (2015) (requiring a life without parole sentence for one or more prior convictions for a "most serious offense"); TENN. CODE ANN. § 40-35-120 (2010) (labeling a repeat violent offender as someone with at least one "violent offense"). The federal three strikes statute provides that any person convicted of a "serious violent felony" is subject to a mandatory sentence of life imprisonment if they have been convicted of two or more "serious violent felonies." *See* 18 U.S.C. § 3559(c)(1)(A).

21. *See* Ahmed A. White, *The Juridical Structure of Habitual Offender Laws and the Jurisprudence of Authoritarian Social Control*, 37 U. TOL. L. REV. 705, 705 (2006) (stating the "resurgent trend in the use of habitual offender laws culminated in the 1990s, when a number of states rushed to adopt 'three strikes' laws").

22. In 1988, George H.W. Bush campaigned and won the presidency in part by touting a tough on crime platform. *See* Peter Baker, *Bush Made Willie Horton an Issue in 1988, and the Racial Scars Are Still Fresh*, N.Y. TIMES (Dec. 3, 2018), https://www.nytimes.com/2018/12/03/us/politics/bush-willie-horton.html [https://perma.cc/7TLU-4UPX].

23. *See, e.g.*, William W. Berry III, *Eighth Amendment Presumptions: A Constitutional Framework for Curbing Mass Incarceration*, 89 S. CAL. L. REV. 67, 96 (2015) (explaining that the war on drugs and the introduction of recidivist statutes led to an explosion of the number of people incarcerated for non-violent offenses); Carol S. Steiker & Jordan M. Steiker, *The Death Penalty and Mass Incarceration: Convergences and Divergences*, 41 AM. J. CRIM. L. 189, 192 (2014) ("'Three strikes and you're out' and the 'war on drugs' were shibboleths that won many backers for life sentences for recidivists (even for some nonviolent ones) and mandatory minimum drug sentences (even for some fairly low-level offenders).").

24. *See, e.g.*, Kenneth B. Nunn, *Race, Crime and the Pool of Surplus Criminality: Or Why the "War on Drugs" Was a "War on Blacks,"* 6 J. GENDER RACE & JUST. 381, 381–82 (2002) ("The War on Drugs has had a devastating effect on African American communities nationwide. Throughout the drug war, African Americans have been disproportionately investigated, detained, searched, arrested and charged with the use, possession and sale of illegal drugs. Vast numbers of African Americans have been jailed and imprisoned pursuant to the nation's tough drug trafficking laws, implemented as part of the War on Drugs. . . . Indeed, it appears that African Americans-and African American males in particular-are the real targets of the country's drug enforcement efforts." (footnotes omitted)).

refusal to hear Mr. Bryant's case, Chief Justice Bernette Joshua Johnson — the only Black justice on the court — likened Louisiana's habitual offender statute to "Pig Laws" southern states enacted post Reconstruction as a tool to re-enslave African Americans by imposing extreme sentences for petty offenses and then "using forced-labor . . . as punishment for a crime."[25]

Chief Justice Johnson's analogy was apt when considering the racial disparities in sentencing under habitual offender laws, which have given states license to lock Black people up and throw away the key.[26] For instance, in Florida, a study found that, compared to non-Black defendants, following prosecutors' charging decisions, judges were 2.3 times more likely to sentence Black defendants as habitual offenders for property crimes and 3.6 times more likely to sentence Black defendants as habitual offenders for drug crimes.[27] A study showed that in Georgia, prosecutors charged only 1% of eligible white defendants under the State's two strikes law for drug offenses, yet charged 16% of eligible Black defendants.[28] As a result, 98.4% of those serving life sentences under Georgia's law are Black.[29] Similarly, in California, Black defendants were sentenced to "'third-strike life sentences' at a rate thirteen times that of whites."[30] To be sure, much like Georgia and Florida, California does not reserve these life sentences for those who committed horrendous crimes — 75% of second and third strikes imposed in California were for non-violent offenses.[31] Moreover, states and the federal government are willing to impose these most severe sentences despite the incredible financial

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25. *See* State v. Bryant, 2020-00077 (La. 07/31/20); 300 So. 3d 392, 392 (Johnson, C.J., dissenting).

26. This is not to say that nothing is gained from incarcerating Black people. As Professor SpearIt explained, "mass incarceration has been profitable for Whites, including tough on crime politics that have built many a political career and tax dollars that have provided jobs to depressed rural regions, enriching construction company coffers and providing wealth for private corporations." SpearIt, *Economic Interest Convergence in Downsizing Imprisonment*, 75 U. PITT. L. REV. 475, 478 (2014). Therefore, there are political, social, and financial incentives that support the mass incarceration of Black people.

27. *See* Charles Crawford, Ted Chiricos & Gary Kleck, *Race, Racial Threat, and Sentencing of Habitual Offenders*, 36 CRIMINOLOGY 481, 498 (1998).

28. *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 114 (2012).

29. *See id.*

30. Sahar Fathi, *Race and Social Justice as a Budget Filter: The Solution to Racial Bias in the State Legislature?*, 47 GONZ. L. REV. 531, 539 (2012).

31. *See id.*

cost.[32] For instance, California's corrections budget tripled between 1995 — the year after the State passed its three strikes law — and 2009, jumping from $3.6 billion to $9.6 billion annually.[33]

The Eighth Amendment theoretically protects defendants against sentences that are "grossly disproportionate to the severity of the crime."[34] In deciding whether a sentence is unconstitutional, courts must consider the "gravity of the offense and the harshness of the penalty," which requires an inquiry into "the harm caused or threatened to the victim or society, and the culpability of the offender."[35] While such an inquiry could be robust, the Supreme Court has made clear that a finding of gross disproportionality should be "exceedingly rare" and that courts should accord "substantial deference" to legislatures in prescribing appropriate punishment.[36]

According to the Supreme Court, the Eighth Amendment tolerates extreme sentences imposed for minor crimes under habitual offender laws. The Court's narrow interpretation of gross disproportionality has effectively rendered the Eighth Amendment's protection against excessive sentences toothless.[37] For example, the Supreme Court has rejected constitutional challenges to a life without parole sentence

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32. For example, the federal government estimates that it costs over $35,000 per year to incarcerate a single person. *See* Notice, 83 Fed. Reg. 18863 (Apr. 30, 2018) (reporting that the average cost of incarceration for federal prisoners was $36,299.25 in Fiscal Year 2017). On average, based on a 2015 report, states pay $33,274 per year to incarcerate someone. *See* VERA INST. OF JUST., THE PRICE OF PRISONS (2017), https://www.vera.org/publications/price-of-prisons-2015-state-spending-trends/price-of-prisons-2015-state-spending-trends/price-of-prisons-2015-state-spending-trends-prison-spending [https://perma.cc/2CBV-F9V4].

33. *See* Fathi, *supra* note 30, at 539. As proof of just how wedded the country is to the incarceration of Black people despite the great cost, a recent report found that since 1989, U.S. taxpayers have spent $944 million to incarcerate *innocent* Black people (Black people who have since been exonerated). *See* Kristin Myers, *US Taxpayers Spent Almost $1 Billion Incarcerating Innocent Black People*, YAHOO! FIN. (Nov. 20, 2019),
https://finance.yahoo.com/news/us-taxpayers-spent-over-4-billion-incarcerating-innocent-people-184439282.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAAD52pCVROgPKq8ftw-fceM7dxsWLQCteJQ6MLPI9-DCUWYwvoztKk8gqF4XZoocxcm8mGJoU21RrDCNaw6O6DcQaKdOvRtuwnEUvCb3jdiPN4GOroXhu9QLsXDRnLDiSa3DrhqEnV1h12Od87X-Fc_j615uFI_jBsGgyCI8MR3Tw [https://perma.cc/W5PA-PLBM]. This number jumps to $1.2 billion when considering the wrongful incarceration of Hispanic people. *See id.*

34. Solem v. Helm, 463 U.S. 277, 306 (1983) (quoting Rummel v. Estelle, 445 U.S. 263, 271 (1980)).

35. *Id.* at 292.

36. *See* Harmelin v. Michigan, 501 U.S. 957, 999, 1001 (1991) (Kennedy, J., concurring).

37. *See* Eva S. Nilsen, *Decency, Dignity, and Desert: Restoring Ideals of Humane Punishment to Constitutional Discourse*, 41 U.C. DAVIS L. REV. 111, 153 (2007).

imposed under Texas's recidivist statute against a person accused of writing a bad check,[38] a 25-years-to-life sentence imposed under California's three strikes law against a person accused of stealing three golf clubs,[39] and a 25-years-to-life sentence also imposed under California's three strikes law against a person accused of stealing videotapes.[40]

It does not have to be this way. Other scholars have explained that the grossly disproportionate test could provide a meaningful check against exorbitant prison sentences if courts, including the Supreme Court, were willing to take it seriously.[41] Here are a few ways courts could breathe life into the grossly disproportional test.

First, before imbuing a sentence with a presumption of legitimacy, courts should consider the context within which a law was enacted. Given that many three strikes provisions were passed as a tool to wage the war on drugs, and most can now agree how wrongheaded and racist this so-called war was,[42] there is no weighty reason to presume the legitimacy of habitual offender laws. This is especially true in light of the evidence showing how habitual offender laws have targeted Black people, and our evolving recognition that the laws never worked to curb crime effectively.[43] This context undermines any presumption of

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38. *See Rummel*, 445 U.S. 263.

39. *See* Ewing v. California, 538 U.S. 11 (2003).

40. *See* Lockyer v. Andrade, 538 U.S. 63 (2003). The Supreme Court "has invalidated only three noncapital sentences over the last two centuries, approving life sentences for minor property crimes and single drug offenses." Julia Fong Sheketoff, *State Innovations in Noncapital Proportionality Doctrine*, 85 N.Y.U. L. REV. 2209, 2210 (2010) (footnotes omitted).

41. *See, e.g.*, Donna H. Lee, *Resuscitating Proportionality in Noncapital Criminal Sentencing*, 40 ARIZ. ST. L.J. 527, 544–53 (2008) (conducting a literature review).

42. *See* Maggie Astor, *Left and Right Agree on Criminal Justice: They Were Both Wrong Before*, N.Y. TIMES (May 16, 2019), https://www.nytimes.com/2019/05/16/us/politics/criminal-justice-system.html [https://perma.cc/WHZ2-XU8K]; Arit John, *A Timeline of the Rise and Fall of 'Tough on Crime' Drug Sentencing*, ATLANTIC (Apr. 22, 2014), https://www.theatlantic.com/politics/archive/2014/04/a-timeline-of-the-rise-and-fall-of-tough-on-crime-drug-sentencing/360983/ [https://perma.cc/U97T-XPZY]. Even an intractably divided Congress passed legislation in attempt to unravel some of the damage wrought by the war on drugs. *See* First Step Act, Pub. L. No. 115-391, 132 Stat. 5194 (2018).

43. *See, e.g.*, Ranya Shannon, *3 Ways the 1994 Crime Bill Continues to Hurt Communities of Color*, CTR. FOR AM. PROGRESS (May 10, 2019, 9:03 AM), https://www.americanprogress.org/issues/race/news/2019/05/10/469642/3-ways-1994-crime-bill-continues-hurt-communities-color/ [https://perma.cc/HMM3-JWW4].

legitimacy[44] and should be relevant when considering the excessiveness of punishment.

Second, when considering the culpability of the offender, courts should contemplate the social and historical inequities the offender faced.[45] Crime, especially non-violent crime, usually stems from deep underlying root causes, which are directly traceable to a persistent lack of investment in Black communities and a dearth of opportunities for African American advancement.[46] This should be relevant to culpability. Moreover, what about if, when weighing the culpability of the offender, we also consider how white people — who are not policed at the same rate, prosecuted with the same vigor, or sentenced with the same harshness — are treated.[47] The lackadaisical treatment of similarly situated white offenders undercuts the notion that the crime is so severe that such a harsh sentence is warranted. Then, if we paid close attention to the relative lack of harm visited upon society by the minor, non-violent offenses for which so many Black people are now languishing in prison for life, it would only confirm the disproportionality of many, if not most, three strikes sentences. Courts should critically consider these factors when determining the constitutionality of a sentence. If they did, it would surely lead to the more compassionate treatment of Black defendants.

Finally, Eighth Amendment jurisprudence should reflect our "evolving standards of decency"[48] and recognize that there may be

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44. *Cf.* Ramos v. Louisiana, 140 S. Ct. 1390 (2020) (reciting the racist history of Louisiana's non-unanimous jury provision in the course of finding the law unconstitutional).

45. This could be seen as a small step towards "[a]bolitionist justice" in that it "better responds to the dignity and humanity of those who have perpetrated wrongs. At the same time, it aims to address the surrounding contexts and causes of criminalized conduct." Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1647 (2019).

46. *See generally* Elizabeth A. Gaynes, *The Urban Criminal Justice System: Where Young + Black + Male = Probable Cause*, 20 FORDHAM URB. L.J. 621, 633 (1993) (explaining that "[t]he social reform orientation emphasizes root causes of crime and the need to address them through 'social and economic reconstruction, stressing that policies aimed at strengthening families and communities need to be coupled with efforts to promote economic development and full employment.' This orientation relies on logic, as well as evidence that traditional social welfare programs and policies can reduce crime" (footnotes omitted)).

47. *See, e.g.*, Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 25–38 (1998) (discussing how race plays into the discretionary decisions of prosecutors and police).

48. Graham v. Florida, 560 U.S. 48, 58 (2010) (quoting Estelle v. Gamble, 429 U.S. 97, 102 (1976)).

sentences so severe that they "offend our felt sense of justice."[49] As we begin to reckon with the innumerable injustices Black Americans have faced and continue to face, our collective sense of justice must shift away from the idea that Black people should be thrown away for life for minor crimes, and our understanding of the Constitution must shift with it. The Eighth Amendment reinforces "the duty of the government to respect the dignity of all persons,"[50] and it is time for Eighth Amendment jurisprudence to reflect Black people's dignity that the criminal legal system has for too long denied.

Fair Wayne Bryant was sentenced to life in prison for a botched hedge clippers heist. And even though the Louisiana Parole Board granted him release, he never deserved to be sentenced to life in prison in the first place. His life matters more than that, as do the lives of all Black people who have fallen prey to harsh habitual offender laws. We need to revamp the grossly disproportional test to more appropriately reflect the value of Black lives.

II. RETHINKING JUVENILE LIFE WITHOUT PAROLE

Joey Chandler was a 17-year-old high school student when he started selling marijuana to support his pregnant girlfriend.[51] One night, his cousin broke into his car and stole his stash; Joey confronted him.[52] The confrontation ended with Joey shooting his cousin twice, killing him.[53] For his crime, a judge sentenced Joey to life in prison without the possibility of parole.[54] In prison, Joey has been the model of rehabilitation. He received his GED and completed college-level courses in Bible studies.[55] He earned trade skills certifications and availed himself of anger management and substance abuse counseling.[56] He has a virtually spotless disciplinary record.[57] He has

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49. Rummel v. Estelle, 445 U.S. 263, 288 (1980) (Powell, J., dissenting); *see also* Mugambi Jouet, *Mass Incarceration Paradigm Shift?: Convergence in an Age of Divergence*, 109 J. CRIM. L. & CRIMINOLOGY 703, 734 (2019) ("[T]he Supreme Court has long recognized that the protection of human dignity is a guiding principle to interpret the Eighth Amendment.").

50. Roper v. Simmons, 543 U.S. 551, 560 (2005).

51. *See* Petition for Writ of Certiorari at *3, Chandler v. State of Mississippi, No. 18-203, 2018 WL 3952035 (2018).

52. *See id.*

53. *See id.*

54. *See id.* at *4.

55. *See id.*

56. *See id.*

57. *See id.* at *5.

a job lined up and a place to live should he ever be eligible for release.[58] Despite all of this, now 34 years old, Joey is still serving a life sentence without the possibility of parole for a crime he committed as a child.[59]

Over the past 15 years, the Supreme Court has made clear that the Eighth Amendment provides special protections for juvenile offenders. First, the Court held that the Eighth Amendment forbids the juvenile death penalty.[60] Then, it declared that the Eighth Amendment does not permit a judge to sentence a juvenile to life in prison without the possibility of parole for non-homicide offenses.[61] Finally, the Court held that mandatory life without parole sentences are unconstitutional for all crimes committed by juveniles, including homicides.[62] This holding requires juveniles sentenced to life without parole be provided with "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[63] Given that juvenile life without parole — the harshest sentence possible for a juvenile — is the equivalent of a juvenile death sentence, the Court underscored that only "the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility," should spend their lives behind bars.[64]

The Court erected these special constitutional protections for juvenile defendants because children lack maturity and have an "underdeveloped sense of responsibility."[65] As the Court explained, "juveniles are more vulnerable or susceptible to negative influences."[66] Their characters are less formed, and their personality traits are less fixed when compared to adults.[67] As a result, many juvenile crimes reflect the "transient immaturity of youth,"[68] and for that reason, children are inherently more prone to rehabilitation as they grow into adulthood.

Despite the Supreme Court's admonition, life sentences for childhood crimes are not rare. Nearly 12,000 people in the United States are serving life or virtual life sentences for crimes they

58. *See id.*
59. *See id.* at *5–*6.
60. *See* Roper v. Simmons, 543 U.S. 551, 575 (2005).
61. *See* Graham v. Florida, 560 U.S. 48, 82 (2010).
62. *See* Miller v. Alabama, 567 U.S. 460, 489 (2012).
63. *Graham*, 560 U.S. at 75.
64. Montgomery v. Louisiana, 136 S. Ct. 718, 734 (2016).
65. *Roper*, 543 U.S. at 569.
66. *Id.*
67. *See id.* at 570.
68. *Montgomery*, 136 S. Ct. at 734.

committed as juveniles.[69] The racial disparities within this population are staggering. Despite Black people comprising only 13% of the United States' total population,[70] 64.4% of those serving virtual life sentences for juvenile crimes are Black.[71] Of those serving life sentences with the possibility for parole for juvenile crimes, 49.9% are Black.[72] Also, 63.4% of the people sentenced to life in prison *without* the possibility of parole for juvenile crimes are Black.[73]

The country's willingness to send Black juvenile offenders to prison for life reflects the reality that Black children do not receive the same benefit of youth bestowed upon white children. Studies show that from age ten, Black boys are perceived as older and more likely to be guilty than their white peers.[74] Studies also show that society has the same warped view of Black girls, as they too are more likely to be perceived as older and less innocent than white girls of the same age.[75] One particularly harmful stereotype that contributes to the harsh

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69. *See* ASHLEY NELLIS, STILL LIFE: AMERICA'S INCREASING USE OF LIFE AND LONG-TERM SENTENCES (2017), https://www.sentencingproject.org/publications/still-life-americas-increasing-use-life-long-term-sentences/ [https://perma.cc/KXM4-NEP4].

70. *See Quick Facts: United States*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/US/PST045219 [https://perma.cc/ZVU5-L7FP] (last visited Jan. 21, 2021) (providing population estimates as of July 1, 2019).

71. *See* NELLIS, *supra* note 69, at 17. A virtual life sentence is a term-of-years sentence that is so long that the person is guaranteed to spend the rest of their life in prison.

72. *See id.*

73. *See id.* Before *Graham* and *Miller* were decided, Black juvenile offenders were sentenced to life in prison without parole at a rate ten times that of white offenders. *See* Letter from U.S. & Int'l Hum. Rts. Orgs. to the Comm. on the Elimination of Racial Discrimination 3 (June 4, 2009), https://www.aclu.org/files/pdfs/humanrights/jlwop_cerd_cmte.pdf [https://perma.cc/8KB2-E4CM]. As further proof of the disproportionately harsh treatment of Black children, between 1985 and 1995, the proportion of white youth detained in juvenile detention facilities decreased, while the detention rate for Black youth increased by 76%. *See* Robin Walker Sterling, *"Children Are Different": Implicit Bias, Rehabilitation, and the "New" Juvenile Jurisprudence*, 46 LOY. L.A. L. REV. 1019, 1048 (2013).

74. *See* Phillip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. PERSONALITY & SOC. PSYCH. 526, 539–40 (2014). One study showed that police perceive Black boys, on average, to be 4.5 years older than they actually are, while they perceive white youth to be younger than their actual ages. *See id.* at 541.

75. *See* REBECCA EPSTEIN, JAMILIA J. BLAKE & THALIA GONZÁLEZ, CTR. ON POVERTY & INEQ., GEORGETOWN L., GIRL INTERRUPTED: THE ERASURE OF BLACK GIRLS' CHILDHOOD 6 (2017), https://www.law.georgetown.edu/poverty-inequality-center/wp-content/uploads/sites/14/2017/08/girlhood-interrupted.pdf [https://perma.cc/6ZWA-7B6X].

sentencing of Black children is the "super-predator" myth that took root in the 1990s.[76] This thoroughly debunked trope cast teenagers from "black inner-city neighborhoods" as being especially depraved, immoral, relentless, and dangerous, and thus responsible for the most heinous crimes.[77] As Professor Kim Taylor-Thompson explained, the super-predator "lie is an American phenomenon with intergenerational effects."[78] There is no doubt the negative stereotypes surrounding Black children influence how the criminal legal system treats them. In fact, studies show that "at virtually every stage of the juvenile justice process, [Black youth] receive harsher treatment than white youth, even when faced with identical charges and offending histories."[79]

This is important to remember when considering whether a child can ever be found to be permanently incorrigible and thus deserving to be locked away for life. Others have argued that branding juveniles as permanently incorrigible flouts the understanding that children are still developing and are thus particularly susceptible to rehabilitation.[80]

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76. *See* Perry L. Moriearty & William Carson, *Cognitive Warfare and Young Black Males in America*, 15 J. GENDER RACE & JUST. 281, 293, 313 (2012) (describing "the emergence of the iconographic image of the adolescent 'super-predator' as a symbol of juvenile crime in the United States," and explaining how the myth of the super-predator has "indelibly altered the meaning of 'young black male' within our society").

77. *See, e.g.*, Peter Annin, *'Superpredators' Arrive*, NEWSWEEK, Jan. 22, 1996, at 57; David Gergen, Editorial, *Taming Teenage Wolf Packs*, U.S. NEWS & WORLD REP., Mar. 17, 1996, at 68; Richard Zoglin, *Now for the Bad News: A Teenage Time Bomb*, TIME, Jan. 15, 1996, at 52; John DiIulio, *The Coming of the Super-Predators*, WKLY. STANDARD (Nov. 27, 1995, 12:00 AM), https://www.weeklystandard.com/john-j-dilulio-jr/the-coming-of-the-super-predators [https://perma.cc/J6MA-GPUB]. John J. DiIulio, Jr., then Professor of Criminology at Princeton University, coined the term "super-predator" in 1995. *See* Carroll Bogert, *Analysis: How the Media Created a 'Superpredator' Myth That Harmed a Generation of Black Youth*, NBC NEWS (Nov. 20, 2020, 6:00 AM), https://www.nbcnews.com/news/us-news/analysis-how-media-created-superpredator-myth-harmed-generation-black-youth-n1248101 [https://perma.cc/54DT-TEQ2].

78. Kim Taylor-Thompson, *Why America Is Still Living with the Damage Done by the 'Superpredator' Lie*, L.A. TIMES (Nov. 27, 2020, 4:00 AM), https://www.latimes.com/opinion/story/2020-11-27/racism-criminal-justice-superpredators [https://perma.cc/9PR3-8J8X].

79. Ellen Marrus & Nadia N. Seeratan, *What's Race Got to Do with It? Just About Everything: Challenging Implicit Bias to Reduce Minority Youth Incarceration in America*, 8 J. MARSHALL L.J. 437, 440 (2015).

80. *See, e.g.*, Alice Reichman Hoesterey, *Confusion in* Montgomery*'s Wake: State Responses, the Mandates of* Montgomery*, and Why a Complete Categorical Ban on Life Without Parole for Juveniles Is the Only Constitutional Option*, 45 FORDHAM URB. L.J. 149, 181–82 (2017); Casey Matsumoto, Note, *"Permanently Incorrigible" Is a Patently Ineffective Standard: Reforming the Administration of Juvenile Life Without Parole*, 88 GEO. WASH. L. REV. 239, 251 (2020).

Additionally, decision-makers cannot ignore that the children most likely to be labeled "permanently incorrigible" are Black, not because they are permanently incorrigible, but because of the negative stereotypes that society has foisted upon them. During the October 2020 Term, the Supreme Court will decide whether a judge has to explicitly find a juvenile offender permanently incorrigible before sentencing them to life in prison without parole.[81] But the question needs to be much more fundamental: whether we should continue to allow juvenile life without parole sentences when experience shows that the courts disproportionately impose this sentence against *Black* juvenile offenders, not the *worst* juvenile offenders.[82]

Joey Chandler's story highlights that Black children, like most (if not all) children, can redeem themselves if given a chance. Still, the system too easily casts young Black people like Joey Chandler away. If Black lives really do matter, given the stark racial disparities in the imposition of juvenile life sentences, we need to jettison the notion that the law can label a child permanently incorrigible.

III. REVISITING RACIAL DISPARITIES IN CAPITAL PUNISHMENT

Finally, if Black lives matter, we must end the death penalty. The racial disparities in the imposition of the ultimate punishment have remained remarkably consistent, proving that it is impossible to divorce race from capital sentencing. Black defendants disproportionately populate death row. In 2019, 42% of people on death row were Black.[83] White people comprise the same percentage of death row prisoners even though 60% of the population is white, and only 13% is Black.[84] These racial disparities are slightly worse than they were 30 years ago. In 1980, 39.8% of people on death row were Black.[85]

The victim's race also influences the decision of who supposedly deserves death. Data show that "those who kill 'white victims have

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81. *See* Jones v. Mississippi, 140 S. Ct. 1293 (2020). The Supreme Court decided to hear the case involving a white juvenile offender, while Joey Chandler's petition for certiorari, filed earlier, was denied despite raising the same question.

82. *See* Hoesterey, *supra* note 80, at 183 ("The inconsistent imposition of juvenile life without parole will inevitably have a significant discriminatory impact on juveniles of color, especially African American youth.").

83. *See* DEATH PENALTY INFO. CTR., *supra* note 3, at 29.

84. *Id.* at 28–29, 59.

85. *DPIC Analysis: Racial Disparities Persisted in U.S. Death Sentences and Executions in 2019*, DEATH PENALTY INFO. CTR. (Jan. 21, 2020), https://deathpenaltyinfo.org/news/dpic-analysis-racial-disparities-persisted-in-the-u-s-death-sentences-and-executions-in-2019 [https://perma.cc/PJC2-U4NZ].

more than four times the likelihood of execution than' those who kill African Americans."[86] Starker still, murderers of Black men have less than one-thirteenth the execution rate of murderers of white females, even though white women are "the least likely of any population group to be the victim of homicide."[87] As one scholar cogently explained, "[c]apital punishment is supposed to be reserved for those who commit the 'worst of the worst' crimes. Instead, as a result of bias, prejudice and racism, it is disproportiona[tely] reserved for those charged with killing white victims."[88]

The Supreme Court faced the racial disparities in the imposition of the death penalty in *McCleskey v. Kemp*.[89] Warren McCleskey was a Black man sentenced to death for killing a white police officer in Georgia.[90] Mr. McCleskey proffered a complex statistical study conducted by law professor David Baldus which revealed the racial disparities in the imposition of the death penalty in Georgia.[91] The Baldus study examined over 2,000 murder cases in Georgia and found that "defendants charged with killing white persons received the death penalty in 11% of the cases, but defendants charged with killing blacks received the death penalty in only 1% of the cases."[92]

> The capital sentencing rate for all white-victim cases was almost *11 times* greater than the rate for black-victim cases. Furthermore, blacks who kill[ed] whites [were] sentenced to death at nearly *22 times* the rate of blacks who kill[ed] blacks, and more than *7 times* the rate of whites who kill[ed] blacks.[93]

These numbers were the "product of sophisticated multiple-regression analysis," a methodology "particularly well suited to identify the influence of impermissible considerations in sentencing, since it is able to control for permissible factors that may explain an apparent

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86. DEATH PENALTY INFO. CTR., *supra* note 3, at 32.

87. *See id.* (quoting Frank R. Baumgartner et al., *These Lives Matter, Those Ones Don't: Comparing Execution Rates by the Race and Gender of the Victim in the U.S. and in the Top Death Penalty States*, 79 ALB. L. REV. 797, 803 (2016)).

88. Alexis Hoag, *Valuing Black Lives: A Case for Ending the Death Penalty*, 51 COLUM. HUM. RTS. L. REV. 983, 987 (2020). Hoag argued for the abolition of the death penalty based on Fourteenth Amendment equal protection principles since the data shows a persistent devaluing of the lives of Black crime victims. *See id.* at 1003–06.

89. 481 U.S. 279 (1987).

90. *See id.* at 282–85.

91. *See generally* David C. Baldus, Charles Pulaski & George Woodworth, *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661 (1983).

92. *McCleskey*, 481 U.S. at 286.

93. *Id.* at 326–27 (Brennan, J., dissenting) (emphasis in original) (citation omitted).

arbitrary pattern."[94] The Court had to decide whether the study "indicate[d] a risk that racial considerations enter into capital sentencing determinations prove[d] . . . McCleskey's capital sentence [was] unconstitutional under the Eighth . . . Amendment."[95]

In a 5–4 decision, the Court rejected Mr. McCleskey's claim. Writing for the Court, Justice Lewis F. Powell concluded that "[a]t most, the Baldus study indicates a discrepancy that appears to correlate with race," and these "disparities in sentencing are an inevitable part of our criminal justice system."[96] The majority then reasoned that taking Mr. McCleskey's claim seriously would call into "question the principles that underlie our entire criminal justice system."[97] The Court worried that if it "accepted McCleskey's claim that racial bias has impermissibly tainted the capital sentencing decision, [it] could soon be faced with similar claims as to other types of penalty."[98]

In a memorable dissent, Justice William J. Brennan asserted that the Court's "unwillingness to regard petitioner's evidence as sufficient is based in part on the fear that recognition of McCleskey's claim would open the door to widespread challenges to all aspects of criminal sentencing" — "a fear of too much justice."[99] Justice Brennan retorted that although

> the prospect that there may be more widespread abuse than McCleskey documents may be dismaying, . . . it does not justify complete abdication of [the Court's] judicial role. The Constitution was framed fundamentally as a bulwark against governmental power, and preventing the arbitrary administration of punishment is a basic ideal of any society that purports to be governed by the rule of law.[100]

Justice Powell later came to openly regret his deciding vote in *McCleskey*,[101] and many view *McCleskey* as one of the Court's most odious decisions in recent memory, of the ilk of *Dred Scott*, *Plessy*, and *Korematsu*.[102]

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94. *See id.* at 327.

95. *Id.* at 282–83 (opinion of the Court). Mr. McCleskey also raised a Fourteenth Amendment challenge. *See id.*

96. *Id.* at 312.

97. *Id.* at 314–15.

98. *Id.* at 315.

99. *Id.* at 339 (Brennan, J., dissenting).

100. *Id.*

101. *See Justice Powell's New Wisdom*, N.Y. TIMES (June 11, 1994), https://www.nytimes.com/1994/06/11/opinion/justice-powell-s-new-wisdom.html [https://perma.cc/DU2G-5HQV].

102. *See, e.g.*, Anthony G. Amsterdam, *Opening Remarks: Race and the Death Penalty Before and After* McCleskey, 39 COLUM. HUM. RTS. L. REV. 34, 47 (2007)

It is time to revisit *McCleskey* and the constitutionality of the death penalty. Of late, Justice Breyer has been leading this call, noting that research still shows that racial disparities plague the death penalty, which "strongly suggests that the death penalty is imposed arbitrarily."[103] He believes that it "no longer seems likely" that the Court could "interpret the Eighth Amendment in ways that would significantly limit the arbitrary application of the death sentence."[104] Indeed, the stubborn racial disparities in the imposition of the death penalty show that there is no way to cleanse it of the arbitrariness and outright racism baked into its core.[105]

While the *McCleskey* Court feared the broader implications of finding the death penalty unconstitutional, the Court recently made clear in a different context that "the magnitude of a legal wrong is no reason to perpetuate it."[106] Racism has tainted capital punishment since its inception. If Black lives matter — both the lives of Black capital defendants *and* those of Black victims of crime — the Court should hold that the Eighth Amendment does not tolerate capital punishment in the face of statistical evidence that relentlessly documents the risk that the death penalty is "influenced by racial considerations."[107] We cannot be afraid of too much justice when, too often, race decides who gets to live versus whom the government condemns to die.[108]

(calling *McCleskey* "the *Dred Scott* decision of our time"); John H. Blume & Sheri Lynn Johnson, *Unholy Parallels Between* McCleskey v. Kemp *and* Plessy v. Ferguson*: Why* McCleskey *(Still) Matters*, 10 OHIO ST. J. CRIM. L. 37, 63 (2012) (stating that "*McCleskey*, like *Plessy*, was 'wrong the day it was decided"'); *Keynote Address by Mr. Bryan Stevenson*, 53 DEPAUL L. REV. 1699, 1707 (2004) (comparing *McCleskey* to *Plessy* and *Dred Scott*).

103. Glossip v. Gross, 576 U.S. 863, 917, 920 (2015) (Breyer, J., dissenting).

104. *Id.* at 921.

105. *See* Hoag, *supra* note 88, at 1006 (explaining that the remedy for the persistent devaluing of the lives of Black murder victims is abolition of the death penalty).

106. McGirt v. Oklahoma, 140 S. Ct. 2452, 2480 (2020) (making this statement while holding that much of eastern Oklahoma is a Native American reservation and thus "Indian country" for purposes of the Major Crimes Act).

107. *See* McCleskey v. Kemp, 481 U.S. 279, 328 (1987) (Brennan, J., dissenting).

108. This, too, sounds in an abolitionist framework. *See* Allegra McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1216–17 (2015) ("This narrative — effectively about the intolerable threat posed by grinding the wheels of justice to a halt — leads the Court to tolerate a death-sentencing regime that impacts African Americans and white defendants differently on the basis of their race. So here, too, an abolitionist ethic, particularly in its attention to the racial violence that inheres at the core of the criminal process, makes available a response to racially infected moral wrongs in criminal sentencing that is less defensive, less sure of the desirability of avoiding similar claims as to other types of penalty, and perhaps even willing to extend moral and constitutional concern to less obvious and deliberate sites of racial bias, as

CONCLUSION: THE ANTI-RACIST EIGHTH AMENDMENT

This Essay calls for an anti-racist reading of the Eighth Amendment.[109] Professor Dorothy Roberts explained that change agents could invoke the Constitution to "mitigate the harms inflicted by carceral punishment" and further the goal of prison abolition.[110] Under this framing, the Constitution can be critical to incremental change. Indeed, as Professor Roberts pointed out, though courts have historically interpreted the Constitution in ways that legitimize oppression and subordination, both the racial justice and prisoners' rights movements have successfully deployed Constitution-based arguments to advance the cause of equality.[111] We can and should push for a reading of the Constitution that "seek[s] to abolish historical forms of oppression."[112]

In particular, courts could read the Eighth Amendment in a way that imbues it with powerful anti-racist properties.[113] According to the Supreme Court, the Eighth Amendment embodies the "broad and idealistic concepts of dignity, civilized standards, humanity, and decency"[114] and "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[115] As the Court declared decades ago, "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State

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well as to persons who stand convicted of serious crimes." (internal quotation marks omitted)).

109. As Professor Ibrahim X. Kendi explained in his seminal work *How to Be an Antiracist*, "[a]ntiracism is a powerful collection of antiracist policies that lead to racial equity and are substantiated by antiracist ideas." IBRAHIM X. KENDI, HOW TO BE AN ANTIRACIST 20 (2019). An "antiracist idea is any idea that suggests the racial groups are equals in all their apparent differences — that there is nothing right or wrong with any racial group. Antiracist ideas argue that racist policies are the cause of racial inequities." *Id.* The Author plans to further develop the call for adopting anti-racist readings of the constitutional amendments concerning criminal punishment and procedure in a future project.

110. Roberts, *supra* note 11, at 118.

111. *See id.* at 100–13.

112. *Id.* at 120.

113. Scholars have persuasively invoked the Thirteenth Amendment as a potential tool in the fight for racial justice and other progressive causes. *See, e.g.*, Jamal Greene, *Thirteenth Amendment Optimism*, 112 COLUM. L. REV. 1733 (2012); Brandon Hasbrouck, *Abolishing Racist Policing with the Thirteenth Amendment*, 67 UCLA L. REV. 1108 (2020).

114. Estelle v. Gamble, 429 U.S. 97, 102 (1976) (quoting Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968)).

115. Trop v. Dulles, 356 U.S. 86, 101 (1958).

has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards."[116]

Historically, the State has used its power to punish as a means to subordinate Black people. Punishment as a tool of racial subordination has morphed, yet remained omnipresent throughout United States history. After the Civil War, state governments designed penal labor systems to replicate slavery.[117] Post-Reconstruction, "Jim Crow police and private citizens who abetted them used terror primarily to enforce racial subjugation, not to apprehend people culpable for crimes."[118] And following the Civil Rights Movement and the end of Jim Crow, "mass incarceration . . . emerged as a stunningly comprehensive and well-disguised system of racialized social control."[119] The American use of punishment is vital to its story of Black subjugation.

Given this history, any conceptualization of the "evolving decency" required by Eighth Amendment jurisprudence must include an account of how the government has used punishment as a means of racial subordination. While the Nation experiences the current moment of racial reckoning and as we are having serious discussions about its "persistent refusal to view black people as equals,"[120] one step would be to embrace an understanding of the Eighth Amendment that is sensitive to the symbiotic relationship between punishment and the denial of equal citizenship for Black Americans. We must push for a view of the Eighth Amendment that not only acknowledges the corrosive relationship between race and punishment in the United States, but also protects against and works to undo that toxic relationship. If, in fact, the Framers designed the Eighth Amendment to capture our evolving standards of decency, then Eighth Amendment jurisprudence must recognize that the government has wielded punishment in fundamentally *indecent* ways when it comes to the treatment of Black people in the criminal legal system. While washing away the stain of racism from the United States will take much work (and may very well be impossible), this moment of reckoning is a

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116. *Id.* at 100.

117. *See* DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II 57 (2008) ("[C]onvict leasing adopted practices almost identical to those emerging in slavery in the 1850s.").

118. Roberts, *supra* note 11, at 23.

119. ALEXANDER, *supra* note 28, at 4.

120. Isaac Chotiner, *Bryan Stevenson on the Frustration Behind the George Floyd Protests*, NEW YORKER (June 1, 2020), https://www.newyorker.com/news/q-and-a/bryan-stevenson-on-the-frustration-behind-the-george-floyd-protests [https://perma.cc/38JW-5MG5].

chance to catalyze our evolution into a more just society. Eighth Amendment jurisprudence must evolve accordingly to capture the fundamental truth that Black lives matter.