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To what extent is the death penalty a tool of racial terror in America, and how can we fix it?

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Introduction:

In this paper, we seek to answer the question: To what extent is the death penalty a tool of racial terror in America, and how can we fix it? America has long been plagued by the legacy of slavery and white supremacy. In the reconstruction era, when slavery was no longer legal, angry white citizens would simply round up African-Americans and lynch them if they felt they had done something "wrong". However, in the modern era, such blatant displays of racism are illegal, and the racist views of society are subverted into the court system. Black men are disproportionately arrested and imprisoned and are a majority of those on death row. In this project, I will attempt to evaluate how the death penalty conviction process is specifically used to subjugate the African-American population to reinforce the stereotype that people of color are inherently more violent and dangerous than white people, and how through legislative action, we can counteract the issues at hand.

There is a great deal of literature on how racial bias affects jury outcomes, and thus how racism can influence incarceration rates of African-American individuals. These research studies tend to imply that the people convicting/applying the death penalty to African-Americans genuinely believe that they are violent, and often are not aware of their racial biases. However, there is doubt as to whether or not they are aware. In 2009, North Carolina passed a racial justice reform act (North Carolina Racial Justice Reform Act), and their rates of African-Americans on death row dropped dramatically after state prosecutors were prohibited from seeking the death penalty solely based on race. In 2013, that law was repealed, and the death penalty convictions of African-Americans have since skyrocketed. After reading about that, it seems impossible that those writing, prosecuting, deciding, and judging the law must be aware of the direct role racism and racial terror plays in the death penalty. If they sought to repeal a law so that they could

specifically target African-Americans for the death penalty solely because they are black, it is clear the message that they are trying to send to African-Americans in their state. Other states (most notably in the South) have enacted similar measures or refused to pass bills like the North Carolina Racial Justice Act, claiming that they are designed to set African-Americans "above" their white counterparts when those laws are merely about making them equal.

Through a thorough analysis of primary and secondary sources, including newspaper articles and accounts taken from the time of the transition to state-sponsored executions, it can be proved that the death penalty is deliberately utilized to reinforce the idea that African-Americans are not just criminals—but extremely violent ones. If white Americans continue to be terrified of their African-American counterparts, then white supremacists can continue to enact increasingly draconian laws that lock up more and more minorities and continue to deny their communities proper funding. In Ibram X. Kendi's book, "How to Be an Antiracist", he notes that in 1993, when the Violent Crime Control and Law Enforcement Act was passed, that Republican senators managed to strip away most of the funding for education and drug rehabilitation programs for marginalized communities stating that those funds were "welfare for criminals". Thus the implication remained that to be black is to be a criminal. Then those communities spiraled into poverty and drug use, and then committed more crimes as a result, and the cycle continued on and on. The only way to solve the problem regarding race and the criminal justice system is to face it head-on and to call it what it is. The hope is that through this project, one might better be able to identify what the true issue is regarding the discriminatory use of the death penalty and implement a series of potential solutions.

Literature Review:

History of Lynching and the Transition to State-Sponsored Execution

The Civil War and Reconstruction eras in the United States marked a defining turning point in lynching violence. Lynching occurred in the Antebellum South, typically as a means of punishing unruly and/or runaway slaves. Lynching as a form of mob violence was less common since slaveowners had the complete power to kill their slaves at will, and didn't require the use of a mob. Lynchings mostly occurred as the result of "slave catcher" groups. However, as author Michael J. Pfeifer (2004, 13) notes, the civil war "...upset prevailing economic, social, racial, legal, and constitutional orders...It precipitated racial leveling, centralization of state authority, and the ascendancy of the North's dynamic industrial and agricultural capitalism." In a space of approximately four years, the South's entire way of life that had existed for hundreds of years vanished. During the next five years following the end of the Civil War, the federal government passed three constitutional amendments that extended civil rights protections to formerly enslaved people: the 13th, 14th, and 15th amendments. These amendments formally abolished slavery (13th), granted formerly enslaved people citizenship (14th), and gave African-American men the right to vote (15th). Thus, over a decade, the racial aristocracy in the Southern United States was completely abolished. These former slaveowners were now federally required to recognize their former slaves as free men and treat them as such.

Pfeifer (2004) goes on to argue that the reason slavery in the United States endured for so much longer than it did in Europe was due more to the desire of some middle- and low-class Europeans to live like nobility than its supposed economic benefits. Important to the maintenance of this faux-nobility system was the racial hierarchy. To ensure that they remained "on top", and to justify *owning* someone, they had to enforce the idea that they were inherently

biologically superior. The United States and the slave trade allowed them to create a society in their image from the ground up. There is a reason why so many of our basic systems are racially biased, and why we continue to struggle with race relations and class inequality to this day.

In the decades immediately following the Civil War, southern whites, often through organized terrorist groups such as the KKK, took it upon themselves to disenfranchise African-American men and reinforce the racial hierarchy through physical violence and racially biased legislation. In a series of orchestrated attacks beginning in the early 1870s, white supremacist paramilitary groups began to attack African-American voters at the polls, while their political counterparts enacted grandfather clauses[1], poll taxes[2], and literacy tests[3] to legally disenfranchise them (Segura, 2018). At the same time, legislatures in the South began to codify new criminal codes that made certain crimes only punishable by death for African-Americans (the so-called "Black Codes"). By making more crimes punishable by death for African-Americans, Southern legislatures falsely created the impression that African-Americans were inherently violent and dangerous. The general psychological impression of capital punishment is that if someone is put to death, they must have done something horrible. Thus, in society's eyes, as soon as the slaves were freed, the violent crime rate exponentially went up, even though in reality, it did not. However, white supremacists in the southern states felt that while the legislative and executive branches were very useful for their cause, the court and all of

[1] Definition of *grandfather clause:* a provision in several southern state constitutions designed to enfranchise poor whites and disenfranchise Blacks by waiving high voting requirements for descendants of men voting before 1867; Merriam-Webster. (n.d.). Grandfather clause. In Merriam-Webster.com dictionary. Retrieved April 3, 2021, from https://www.merriam-webster.com/dictionary/grandfather%20clause

[2] Definition of *poll tax:* a tax of a fixed amount per person levied on adults and often linked to the right to vote; Merriam-Webster. (n.d.). Poll tax. In Merriam-Webster.com dictionary. Retrieved April 3, 2021, from https://www.merriam-webster.com/dictionary/poll%20tax

[3] Definition of *literacy test:*A literacy test measures a person's proficiency in reading and writing. Beginning in the 19th century, literacy tests were used in the voter registration process in southern states of the U.S. with the intent to disenfranchise Black voters, many of whom had limited literacy skills; Marder, Lisa. (2021, February 16). What Is a Literacy Test? Retrieved from https://www.thoughtco.com/literacy-test-definition-4137422

its bothersome requirements for criminal rights were "too slow" in executing their Black victims (Ogletree and Sarat, 2006). Thus, lynch mobs began to come into popularity, since a violent mob could quickly satisfy the public's bloodlust and reinforce the racial hierarchy with brutal effectiveness.

Lynching saw its peak during the 1880s-1920s, with its decline beginning in the 1930s as it began to become socially unpopular. Public lynching finally collapsed in on itself in the 1940s, as decades of abolitionist campaigning from notable activists such as Ida B. Wells convinced white southerners to have a change of heart. White southerners began to see it as "un-Christian" and "backward" (*Besides, blatant racial genocide was not a good look for the United States in the 1940s as we attempted to villainize Germany for its racial genocide*) (Dray, 2002). To secure the moral high ground, and establish ourselves as a beacon of liberty and freedom, the United States needed to appear to be a nation that handled the differences between races smoothly. With lynching out of vogue, white supremacists finally turned to the courts to seek the racialized "justice" they desired. The courts obliged, with show trials[4] that involved ineffective counsel and all-white juries. The process took longer, but the court system allowed white supremacists to mask their true intentions in the "sanitized" process of a trial so that they could claim it was not about race specifically. At the time that the transition from public lynchings to state-sponsored executions occurred, being racially violent was starting to be viewed as embarrassing and primitive. Society had "evolved past that", and all of its needs could be handled within the court system. Now white supremacists could continue to enforce the racial hierarchy and terrorize the African-American populace, all while being able to claim plausible deniability that they had not

[4] Definition of *show trial*: a trial (usually involving political opponents) in which the verdict is rigged and a public confession is often extracted; Merriam-Webster. (n.d.). Show trial. In Merriam-Webster.com dictionary. Retrieved April 3, 2021, from https://www.merriam-webster.com/dictionary/show%20trial

attacked the defendant in a violent mob, but allowed them to receive “the same treatment” as they would if they committed a crime.

Racism and the Criminal Justice System

Racism is pervasive throughout our modern criminal justice system, and racially biased juries play a role in that, but a smaller one than initially expected when this project began. Many research studies have been conducted to prove the obvious link between racially biased juries and wrongful convictions of African-Americans--something that does occur. Some of the most notable of these studies include Gould & Leon, 2017; Butler et. al, 2010; Kotch & Mosteller, 2010, etc. These studies have attempted to analyze the correlation between racial biases, the racial hierarchy in the United States, and the disproportionate number of African-American men sentenced to death. One such study by John Cochran and colleagues (2019) examined the degree to which the cultural legacy of lethal violence against African-Americans has endured to the present day. The researchers did this by examining the joint effects of offender race as well as a rape or sexual assault charge on the capital sentencing outcomes of a murder trial involving white female victims (Cochran et.al, 2019). In all the models conducted, African-Americans were 18-26% more likely to receive a death sentence for the murder of a white female than a white defendant who committed the same crime. A high death penalty sentencing rate for African-Americans helps to reinforce the white supremacist belief that white people are less violent and thus, “superior” to their black counterparts.

However, a closer analysis of the laws and common practices within the criminal justice system reveals a racially biased legal system, crafted a long time ago. Effective racial subjugation involves not just physical violence, but also limited legitimate opportunities that lead to higher rates of poverty. If a community cannot educate themselves and escape poverty, they

will always be limited. One of the simpler forms of racism within the criminal justice system is the use of cash bail. African-Americans are historically poor, due to limited education and work opportunities throughout the 19th and 20th centuries. Thus, the accumulation of generational wealth within African-American communities is relatively low, and those defendants are often forced to remain in jail (whether or not they are guilty) because they cannot afford their bail (Harriot, 2018). This often results in them losing their employment and needing to find a way to support their families. Thus the cycle of poverty and incarceration continues. Other practices such as "stop-and-frisk" and racial profiling policies often affect how an African-American ends up in the criminal justice system as well.

Racism within the criminal justice system extends from simple racially biased policies up to the disproportionate application of the death penalty. The United States' cultural legacy of disproportionately executing African-American men for their alleged crimes has endured well into the 21st century, with the modern death penalty often described as the "stepchild of lynching" (The Innocence Project, 2015). An article from the Innocence Project published in 2015 remarked that not only did 80% of lynchings occur in the south, but approximately 80% of the 1,400 legal executions since 1976 have also occurred in the south (The Innocence Project, 2015). There is a clear correlation between the South's legacy of a racial hierarchy and racialized violence and how their death penalty is applied today. As a whole, the criminal legal system in the United States is designed to reinforce the racial hierarchy. Many white people of all socioeconomic classes have a vested interest in retaining the racial hierarchy and will fight to hold on to each last little piece of it.

Theory:

State Crime

When this project began, I struggled with which theory best explained the behaviors exemplified by those actors involved. Traditional criminology appeared not to be a match, as it sought to explain the motivations behind the actions of criminals (i.e., why they commit a crime and what motivates them to recidivate). The problem with this is that in this paper, we are not concerned with the actions or perhaps even the innocence of those on death row. We are primarily interested in the actions of those writing and adjudicating the laws that put them there. The most accurate branch of criminology that applies to the subject matter of this paper is critical criminology, and more specifically, "state crime".

Critical criminology is a family of theories in criminology that focus on challenging traditional beliefs about crime/criminal justice, often by taking a "conflict" perspective, such as political economy theory, critical theory, feminism, or marxism (Drislane and Parkinson, 2002). Critical criminology focuses on examining not only the causes of crime but what Drislane and Parkinson (2002) call "the nature of justice within the social structure of a class and status inequalities". Law and the punishment of crime are believed to be connected to an existing system of social inequality and as the means of producing/perpetuating said inequality. Through careful research and analysis, the theory that best fit the subject of analysis in this paper was "state crime". Green and Ward (2005) define state crime as "illegal or deviant activities perpetrated by the state, or with the complicity of state agencies" (Green and Ward, 2005).

Regarding the subject matter of this paper, the racially biased criminal justice system (and the application of the death penalty in particular) falls into the category of state crime as it has been used to reinforce the existing racial hierarchy over many decades. Thompson (2016) argues that there are four main subsections of state crime: (1) Crimes by security forces – e.g.

genocide, torture, imprisonment without trial and disappearance of dissidents, (2) Political Crimes – e.g. censorship or corruption, (3) Economic crimes – e.g. violation of health and safety laws, and (4) Social and cultural crimes – e.g. institutional racism (Thompson, 2016). The form of state crime described in this paper most closely fits into subsection four--*social and cultural crimes.* Thompson (2016) argues that a social crime such as institutional racism does fall under the category of state crime because the "powers that be" who run this country are primarily wealthy white men. These men have a vested interest in securing their place (and the place of their progeny) in the ruling upper class. Since the United States does not have the restrictions of an aristocracy or the constraints of a caste system, there is no way to ensure that your children and grandchildren will have power and wealth simply because they are white. Besides, if the wealthy white does not continue to run America, there is no guarantee that the government would have as much power as it continues to have. In that sense, the government has a vested interest in maintaining the racial hierarchy in America.

State crime helps to provide a theoretical explanation as to why a government may engage in criminal behavior that seems against its creed. According to Doig and Croall (2011), state crime is not the actions of "...a few people engaging in immoral, unethical and/or illegal behavior, (but rather) as the product of organizational pressures to achieve organizational goals"(Doig and Croall 2011, 93). The disproportionate application of the death penalty is not the action of a few racist individuals but is a systemic issue at an institutional level. It is important to understand how many people reinforcing a similar action can influence the mechanism used to perform said action permanently. The death penalty, when analyzed from a theoretical point, is not racist; it cannot hold an opinion, it is not sentient. However, through the racist actions of many generations of people applying it, the death penalty takes on racial biases

as the goals of the government mold themselves to the goals of those who apply it. When people grow up consistently seeing African-American men sentenced to death, they learn that they are inherently extremely violent and that the only way to protect the public and "their way of life" is to continue to ensure that these people will never get out of prison. As we discussed in the literature review section, the death penalty has been used as a sanitized version of lynching since as early as the 1920s. The system has had a full century to adapt to the goals of white supremacy.

As noted earlier in the paper, when lynching began to fall out of favor, white supremacists turned to the legal system, in which it was much easier to mask their blatant racism in vague "race-neutral" laws designed to punish criminals. Thus, with the death penalty, those who wish to reinforce the racial hierarchy in America can perpetuate stereotypes about the level of violence "inherently" embedded in African-Americans. They can also use the threat of an easy death penalty conviction to pressure innocent minorities on trial to take a plea deal, thus reaffirming to the (white) public that African-Americans are inherently criminals. What is important to consider when discussing this topic is that the government is made up of many individuals. The government is not free from racial biases because those who make up the government are not free from racial biases.

Methods:

The North Carolina Racial Justice Act as a Case Study

A clear problem has been identified through this paper--but how does one go about solving it? The reality is that to truly rid our criminal legal system of the racial biases that plague it, we would have to change the hearts and minds of the American populace. In due time, that is theoretically possible, as this nation has made slow but steady racial progress throughout the decades. However, actual lives hang in the balance when it comes to the death penalty, so we

must endeavor to take any action we can (no matter how meager) as soon as possible. One such action is to craft legislative solutions that would allow prisoners who believe racial bias played a significant factor in their death penalty conviction to apply for commutation. Perhaps one of the greatest examples of that type of legislative solution was the North Carolina Racial Justice Act (2009). The NCRJA sought to combat implicit/explicit racial bias in the courtroom by allowing convicted prisoners on death row to appeal their sentence if they believed there was significant racial bias involved. The legislative history of the NCRJA encouraged a "plain reading" of the statute, as it states that a defendant only has to prove discrimination at any stage of the trial process, at any location (county, district, state, etc.) to apply for relief (ABA, 2020). The NCRJA outlined three methods by which relief could be given: "(1) the prisoner can demonstrate that race was a significant factor based on the race of the defendant; (2) the prisoner can demonstrate that race was a significant factor based on the race of the victim; and (3) the prisoner can demonstrate that race was a significant factor in jury decisions" (Eacho 2013, 654).

A particularly apt research study into the NCRJA came from Kotch and Mosteller (2010), who began their analysis of the NCRJA by taking note of the long history of racially biased death penalty convictions in North Carolina. Part I of their article analyzed the period of 1910-1961, (which, as noted earlier in the paper, marks the transition from lynching to state-sponsored execution). They found that of the 362 people executed in the state of North Carolina during that time, 283 (or 78%) were African-American (Kotch and Mosteller 2010, 2039). Kotch and Mosteller (2010) argued that while the death penalty was "...not exclusively imposed on African-Americans, it was principally reserved for them, a fact that was deeply embedded in the mindset of the state's populace" (Kotch and Mosteller 2010, 2039). In Part II of their article, they discovered that in all periods when the death penalty has been legalized

(Pre-1961), and (1976-Present), white victims have "...predominated in all periods for those (African-Americans) executed and for those currently awaiting execution…(and that) only one white person was executed for the murder of an African-American" (Kotch and Mosteller 2010, 2042). The statistics do not lie but show a clear bias in the justice system against African-Americans. The death penalty statistics compiled by Kotch and Mosteller show, as outlined in the theory section on state crime, how the actions of many racially-biased persons can affect the organization involved. That is not to say that those racially biased people affecting the criminal legal system only existed in the past--racial biases are well and alive today, and many people do not want to see the racial hierarchy changed any more than it already has been.

The North Carolina Racial Justice Act sought to help provide a legislative solution to racial biases within the legal system, and on April 30, 2012, the first application of the NCRJA was decided by Judge Gregory Weeks in *North Carolina v. Robinson*. In Robinson's case, his death sentence was commuted down to life in prison after he was able to prove that race was a significant factor in the improper peremptory jury strikes at his trial (Eacho 2013, 655). Robinson's team used statistical analysis to show evidence of discrimination. In 2012, Judge Gregory Weeks also commuted the death sentences of four other prisoners under the NCRJA (Tilmon Golphin, Quintel Augustine, Christina Walters, and Marcus Robinson) (Eacho 2013, 655). However, in 2013, the political landscape of the North Carolina legislature changed, and the newly Republican-led legislature voted to repeal the NCRJA. They did so due to the fact that the NCRJA does not require a defendant to prove explicit racial discrimination, so according to them, it offered "...a judicial loophole to avoid the death penalty and not a path to justice" by allowing African-American defendants to claim "the race card" (Smith, 2013). The fact that the

legislature would blatantly ignore hundreds of statistics going back nearly a century proving racial bias in the application of the death penalty demonstrates their complicity.

However, in 2020, the North Carolina Supreme Court decided that "...retroactive application of the RJA repeal amounted to an unconstitutional ex post facto law that changed the punishment for a crime that had already been committed, (and that) racial bias in criminal proceedings undermines the integrity of our judicial system and extends to society as a whole" (ABA, 2020). This decision offers progressives and activists hope that the racial justice act could potentially be reinstated, and once again offer North Carolinians the opportunity to negate any racial biases that affect their sentences. The idea of racial justice acts is catching on, and four other states have now either passed racial justice acts themselves, or are currently in the process of doing so (Kentucky, California, Nebraska, and Texas).

Conclusion:

Throughout this paper, we have attempted to answer the question: To what extent is the death penalty a tool of racial terror in America, and how can we fix it? Through the analysis of a series of primary and secondary sources, as well as several research studies on the effectiveness of corrective legislation, I believe that I have isolated the true issue at hand and the only logical way to rectify it.

The truth of the matter is that our history of state-sponsored racism is not a thing of the past, but a cancerous legacy that is still poisoning our criminal legal system to this day. As noted in the theory section of this paper, state crime is committed when groups of people continue to use the power of the government to do criminal acts over and over again. Over time, the government takes on the criminal goal itself and infects anyone who enters it. Sons of senators

past enter the profession themselves, reinforcing the system so that their grandchildren can enjoy the same powers and privileges that they did. In time, the system itself is set to reinforce the racial hierarchy because of the actions of many generations of people. The system itself takes on the racial biases, and thus influences anyone who joins it. Thus, as the result of generations of people reinforcing the same belief repeatedly while utilizing the strength and power of the federal government, the government's goal becomes the goals of those who ran it.

The reason that those in power are actively resisting significant reform to the criminal legal system is that all white people (to one degree or another, consciously or subconsciously) benefit from the racial hierarchy. It provides them increased power, opportunities, and prestige. It benefits those in power (in terms of financial interests), and those not in power (in terms of psychological benefit). They have a vested interest in keeping the racial hierarchy as it is. We see this when we witness legislators actively resisting police reform, or when the legislators in North Carolina repealed the NCRJA because according to them, "it allowed (African-American defendants) to use the race card to avoid justice" (Smith, 2013). The truth is that sometimes what we see really is as simple as it appears to be. Our criminal legal system (particularly the application of the death penalty) is plagued by racism because white people in power want it to be. If one can convince the general public that African-American people are inherently dangerous, then the public will continue to fear them. They'll continue to vote in senators and representatives that blatantly deny funding to marginalized communities, and won't fight back when minorities are denied jobs/opportunities or are treated poorly by the police.

The only practical solution to this is corrective legislation like the NCRJA (and its sister bills in Kentucky, California, Nebraska, and Texas). The North Carolina Racial Justice act sought to alleviate the clear racial bias issue that their death penalty system suffers from by allowing

prisoners to use those past statistics and any evidence of current racial bias to appeal for commutation of their sentence. Because of the reality of the difficulty of attempting to get rid of racism in the United States, legislative solutions like the NCRJA offer activists a clear opportunity to right any wrongs that may be done to criminal defendants. Criminals deserve the right to only be judged on their actions, and not have their race unduly affect their sentencing.

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