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The Unequal Application of the Death Penalty in the United States: Critical Analysis and a Just Solution

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Introduction: The Impacts of Racism in the United States Justice System

There are major discrepancies in the application of the death penalty and who the death penalty is applied. According to the American Civil Liberties Union (ACLU) and a report provided by The U.S. Department of Justice in 2000, “Of the 18 prisoners currently on federal death row, 16 are either African-American, Hispanic or Asian. From 1995-2000, 80% of all the federal capital cases recommended by U.S. Attorneys to the Attorney General seeking the death penalty involved people of color” (ACLU 2000). Following review by the Attorney General (AG), it was discovered that “…72% of the cases approved for death penalty prosecution involved minority defendants” (ACLU ND). Combined, the ACLU report and the review of the AG suggest that persons of color are more likely to receive the death sentence than similarly convicted white defendants. This trend raises the questions of whether the death penalty is applied in a discriminatory way in the United States and what, if anything, can be done about this?

Considerable scholarly attention has been devoted to the question of whether the application of the death penalty in the United States is racially biased. This is evident when one considers the criminal justice system’s reliance on the logic of common law. The concern here is that the common law has deep seated roots in furthering the efforts to disenfranchise and disempower Black slaves. According to Hoag (2020, 999), “During the colonial period, the common law was not intended to protect enslaved people; instead, slave codes enabled white people to punish Black people with impunity to maintain power and dominance.” The deep

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1 This source is strictly a web page source, thus no page numbers can be provided.
2 Regarding the importance of common law legal thinking and English common law in particular for American politics and political thinking see Stoner (1992 & 2003).
historical ties that law has with the abuse of Black Americans is significant—and much of these tragic legacies continue to survive today. Later criminal codes would draw on the common law tradition and institutionalize biases against Blacks by codifying sentencing guidelines where blacks would receive harsher penalties than other convicted of the same crime. For example, “Antebellum era criminal codes often explicitly mentioned both the race of the victim and the defendant, making certain acts felonies only when committed by Black people” (Hoag 2020, 1000). Today, it would be considered illegal to allow for criminal codes to explicitly mention the race of both the victims and the defendants when charging an individual. Additionally, the criminal justice system has historically worked to exert social control over Black Americans who were not enslaved, “Northern states also turned to the criminal justice system to exert social control over free black Americans” (Hinton et al. 2018, 2). In the Northern states of the U.S., this was done in subtler ways. Policymakers in the North were especially known for targeting free Black Americans, “Policymakers in the North did not legally target black Americans as explicitly as did their southern counterparts, but disparate enforcement of various laws against “suspicious characters,” disorderly conduct, keeping and visiting disorderly houses, drunkenness, and violations of city ordinances made possible new forms of everyday surveil- lance and punishment in the lives of black people in the Northeast, Midwest, and West” (Hinton et al. 2018, 2). The treatment of Black Americans varied by the geographical location in which they resided, but overall, across the U.S. Black Americans have continuously been the victims of the criminal justice system, despite their treatments manifesting in different ways. However, the legacy of the injustice and racial bias that Black’s experience in the United States continues to manifest in other ways, and the ways in which it continues to manifest have lethal consequences.
The lethality of this is indicated by the fact that persons of color who are convicted of crimes punishable by the death penalty are more likely to receive the death sentence than whites convicted of the same crime. According to McAdams (1998, 154), “…numerous researchers have shown conclusively that African American defendants are far more likely to receive the death penalty than are white defendants charged with the same crime.” While this is an unfortunate reality, it is not a new one. Ten years prior, in the year 1990, a nationwide report provided by the General Accounting Office (GAO), arrived at the following conclusion: “Their review found that for homicides committed under otherwise similar circumstances, and where defendants had similar criminal histories, a defendant was several times more likely to receive the death penalty if the victim was white than if his victim was African American” (ACLU, 200). Regarding why this is the case, one needs to employ an approach designed to reveal the often hidden but powerful sources that explain why Blacks and people of color are more often subject to capital punishment than similar cases involving white perpetrators.

Such an approach is provided by Critical Theory (CT) and Critical Race Theory (CRT). The next section of this thesis provides an overview of CT and CRT. Here, I demonstrate the appropriateness of CRT to questions on inequality (generally) and the unequal application of the death penalty (particularly). The third section applies CRT to the death penalty in the United States. The analysis and argument made here demonstrates that CRT can be used to explain the institutional mechanisms that lead to the unequal application of the death penalty. Having used CRT to identify problems with the application of the death penalty, the fourth section of this thesis shifts focus to what, if anything, should be done about this injustice. Employing insights from the scholarly literatures on reconciliation and restorative justice, I contend that the most appropriate means of confronting capital punishment and the inconsistencies within its
application is through the lens of transitional justice. Finally, the thesis concludes with a policy brief that offers a series of possible solutions to the concerns raised by CRT as applied to the death penalty in the United States.

Critical Theory and Critical Race Theory: An Overview

CT and CRT are uniquely designed to offer an account of the sources responsible for the unequal application of the death penalty. Before turning to this analysis, however, it is necessary to provide an overview of both theories. CT provides one with “enriched conceptions of power” while demonstrating “the value of including the representation of diverse interests” to “bring to the surface suppressed conflict for the sake of reconsideration” (Alvesson and Deetz 1996, 255). In other words, a fundamental purpose of CT is not just to identify the latent causes of conflict, but to use recognition of the cause as a starting point for a process where inequalities stemming from oppression can be remedied. Such a process is necessary as the “exploitation, repression, unfairness, asymmetrical power relations (generated from class, gender, race or position), distorted communication and false consciousness” undermine efforts of the political community and society to meet important human needs (Alveeson and Deetz 1996, 256). Thus, it is possible to view CT as working toward the goal of emancipating humans from all forms of “slavery” where CT acts as a “liberating … influence,” in the effort “to create a world which satisfies the needs and powers of human beings” (Horkheimer 1992, 1).

Given this understanding, it is not surprising that CT is often associated with social movements and social justice. The feminist movement is an example of a movement that is heavily studied by scholars in connection to critical theory. While critical theory is broad in the sense that it is an overarching theory that covers many different avenues of social inquiry, it is narrow in the sense of what falls into the scope of critical theory. With that being said, “...a
critical theory provides the descriptive and normative bases for social inquiry aimed at
decreasing domination and increasing freedom in all their forms” (Bohman 2021, 1). Freedom
and equality sit at the core of CT.

Consequently, CT helps one understand the social and political structures that exist in the
United States. By looking at criminal justice issues through this lens, we can better understand
the challenges faced by people of color. This is possible because, “… critical theories expose and
challenge the communication of dominant social, economic, and political structures. Areas of
inquiry include language, social relationships, organizational structures, politics, economics,
media, cultural ideologies, interpersonal relationships, labor, and other social movements”
(Venditti ND). Critical theory is a vital component to understanding the experiences of people of
color by evaluating the power structure in which they have fallen victims of today and all
throughout United States history.

As time goes on, new forms of critical theory have developed in response to differences
in lived experience. Speaking of this development and its importance for democratic ideals and
practices, Bohman (2021, 65) argues that “As new forms of critical theory emerge related to
racism, sexism, and colonialism, reflective social agents have transformed these same
democratic ideals and practices in the interest of emancipation. In entrenching new social
facts, agents transform the ideals themselves as well as their institutional form.” Here, one
sees the power of CT and its many varieties. According to Bohman, an important consequence of
the application of CT has been a reconsideration of both democratic ideals and practices and to
reform them with an eye to greater freedom and equality. Another way to say this is to conclude
that CT facilitates the efforts to democracy to clarify its standards and to satisfy the requirements
of these standards. As newer forms of critical theory continue to emerge, we can see that they not
only begin to highlight the freedoms of different groups and lack thereof, but they also begin to
explain institutional failures within political structures. CRT is an example of a newly emerged
theory that works to share this idea.

Despite all the noise currently surrounding CRT, it is fundamentally an academic and
legal framework that claims that systemic racism is embedded within American society. The
origins of CRT can be traced back to developments in the legal academy as a response by legal
scholars to understand the retrenchment that took place in American constitutional law after the
Court’s decision in *Brown v. Board of Education* (1954) (see Crenshaw et al. 1995; Delgado
1994; Delgado and Stefancic 2001). In short, CRT focuses on issues including housing,
employment, education, and incarceration and works to explain the relationship between racism
and its connection to U.S. laws, policies, and institutions. CRT also recognizes that the problem
in the U.S. is not individual prejudice and bias. Rather, “The crisis in our social system is our
collective failure to adequately perceive or to address racism. This crisis, according to CRT, is at
least in part caused by false understanding of ‘racism’ as an intentional, isolated, individual
phenomenon, equivalent to prejudice. This false understanding, however, can be corrected by
CRT, which redescribes racism as a structural flaw in our society” (Harris 1994, 752). When
viewing racism as a structural flaw in our society, we are able to view the flaws within all
aspects of U.S. society, including the structural flaws within our own governmental institutions.
Institutionalized racism has been cumulative process in which inequalities have grown greater
between people of color and whites in almost all areas of society. CRT is highly relevant to U.S.
history while simultaneously being relevant in present-day American society and institutions.

Institutions in the United States have been shaped by the United States’ complex history
of white supremacy, white dominance and Black suppression. CRT works to explain this
phenomenon—highlighting the idea that we should interrogate the role of race and racism in society (American Bar Association 2021). CRT also recognizes that racism is not an issue of the past. The racism that is present today is largely a legacy of slavery, segregation, and discrimination against Black Americans. Tocqueville famously illustrates this reality of whites historically planting themselves in superior, more powerful positions above Blacks, “…the whole white race formed an aristocratic body having at its head a certain number of privileged persons whose wealth was permanent and leisure hereditary. These leaders of the American nobility perpetuated the traditional prejudices of the white race in the body they represented, making idleness honorable" (Tocqueville, 1988, 349). Tocqueville further emphasizes that white privilege is not only a feature of political life in the United States, but also a result of the laws and politics that grew out of the “mores” that accompanied the rise of slavery. Tocqueville and critical theorists both are committed to the belief that racist cultural norms and democracy are features of the United States that effect each other interdependently.3 Rather than ignoring this legacy or dismissing its importance, CRT “acknowledges that the legacy of slavery, segregation, and the imposition of second-class citizenship on Black Americans and other people of color continue to permeate the social fabric of this nation” (American Bar Association 2021).4 A way in which we can begin to understand the issues of racial bias that infect the criminal justice system is by observing the institution through the lens of critical race theory.

4 This text is strictly a web page source article published by the American Bar Association in 2021. For this reason, no page numbers can be provided for this text.
The central tenet of CRT is recognition and acknowledgement of the fact that racism is embedded within both our society, systems, and institutions. CRT denies the notion that there are significantly differentiated races in favor of the view that racial identities are socially constructed. Racial hierarchies are socially constructed to perpetuate existing power structures. Racism is a feature of our social norms, laws, and institutions, it is not an outlier/bug in the system. Racist institutions are made this way by design. Racism occurs at the structural level. It is not merely an individual-level problem. Considering this, we can see that racism perpetuates contemporary inequalities and injustices in US society. Application of CRT to America’s criminal justice system offers insights into why significant racial discrepancies permeate the system. In doing so, one must acknowledge “that racism is a normal feature of society and is embedded within systems and institutions, like the legal system, that replicate racial inequality. This dismisses the idea that racist incidents are aberrations but instead are manifestations of structural and systemic racism” (American Bar Association 2021; see also Delgado 1994, Bell 1988, Lopez 1994, Harris 1993). While racism within the criminal justice system is historically consistent with the treatment of people of color in the United States, it is important to recognize that the problems within the criminal justice system hold several layers as many different actors are at play. The law itself, judges, juries, prosecutors, defense, and police officers are all examples of parties that play a major role in how cases are treated, determined, and ultimately whether they are “successful.”

**Applying Critical Race Theory**

Both CT and CRT hypothesize that the unequal treatment of persons of color in America’s criminal justice system has its origins in American political and legal history.
Historically, Harris (1993), identifies the efforts and motivations of colonial courts to support the “hyper-exploitation of black labor.” Colonial institutions treated individuals differently based on racial categories, ultimately with the goal of driving Blacks deeper into slavery (Harris 1993, 1721). After slavery became the most dominant labor system in mid-Atlantic and predominately Southern colonies, whiteness became a form of property that ensured “sources of privilege and protection” (Harris 1993, 1723). It is clear that historically whites have contributed not only to the disenfranchisement of Black communities, but also the lack of power that these communities hold. Whites have benefited from the suppression of Blacks both historically and today. The implications of common law are still greatly visible today, and it manifests in a number of ways.

Reliance on the logic of the common law discussed previously supports this hypothesis. Generalizing further, the treatment of Black slaves in history foreshadows the treatment of Blacks in capital punishment cases today. Citing the example of the state of Georgia, Hoag (2020, 1001) finds that “rape committed by a white man was never regarded as sufficiently serious to warrant a penalty greater than 20 years imprisonment. Rape committed by a slave or a free person of color upon a white woman was punishable by death.” Early American criminal law lays the foundation for the racial disparities we continue to observe in contemporary capital punishment (2020, 1001). Today, we often see discrepancies in the criminal punishments and convictions given to whites versus Blacks. While the unequal treatment of Blacks in comparison to whites in terms of non-violent drug offenses is both significant and frustrating, there are other cases in which these discrepancies lead to a loss of life—this is disproportionately true for Blacks. The racial bias that is deeply connected to the death penalty not only allows for Blacks to have a higher likelihood of being executed via capital punishment, but it also allows for minority victims of crime to be taken less seriously in their cases and trials in court.
The increased likelihood of receiving the death penalty is only a small part of the criminal justice system in how the United States discriminates against people of color. According to John C. McAdams text *Racial Disparity and The Death Penalty 1998*, it is accurate to claim Black murder victims are less likely to have “justice” sought on their behalf than white murder victims. He states, “…offenders who killed whites are overrepresented, and those who killed Blacks or Hispanics were underrepresented on death row” (McAdams 1998, 157). Despite the majority of homicide victims being people of color, the application of the death penalty works in a way that favors white victims of crime and homicide. In fact, murder victims of any other race outside of Blacks are extended the same level of legal protections while Black murder victims are extended minimal legal protections. Consequently, it is necessary to conclude that “Black victims of murder are not extended the same legal protection as victims of other races; their killers are presumed more innocent than those who kill members of other racial groups” (Cholbi & Madva 2018, 524). While white victims of crime and homicide have the perks of added legal protections, their perpetrators are also more likely to be convicted to the fullest extent, including being sentenced to death. In contrast, those who murder Blacks are less likely to be sentenced to death. Here, “a wide body of studies indicate that (a) Black capital defendants are more likely to be subject to execution than defendants of other races and (b) those who murder blacks are less likely to be subject to execution than are those who murder members of other races” (Cholbi & Madva 2018, 517).

Interestingly, Blacks are not only overrepresented on death rows, but they are also less likely to have their murderers executed as well. Despite Blacks being more likely to be victims of murder, their cases often receive minimal attention, and the convictions of their murderers are also often insignificant. A report provided by the Bureau of Justice Statistics (BJS), *Homicide*
Trends in the United States (2010), shares, “Blacks are disproportionately represented as both homicide victims and offenders. The victimization rates for Blacks were 6 times higher than those for whites” (BJS 2010, 11). This indicates a presence of racial bias within our justice system, as Blacks and other people of color are devalued and disproportionately targeted. In the United States, Blacks, Hispanics/Latinos, and Indigenous Peoples are more likely to be victims of homicide than any other race. The Prison Policy Initiative (PPI) begins to touch on this issue, by offering graphs that depict the numbers of male and female homicide victims per 100,000 population. In each graph, we can clearly see that Black men and women are murdered at significantly higher rates than whites. Following Blacks, indigenous peoples and Latinx individuals tend to be victims of homicide. Whites and Asians are the least likely to be murdered of all the races, which further shows the disproportionate treatment of capital cases dealing with persons of color and white individuals.

![Image of a graph illustrating trends in homicide victimization by race and gender from 1980 to 2015.](image)

*Figure 1: Prison Policy Initiative; illustrates that despite the decrease in murder rates, male murder victimization has persisted, especially for males of color.*
Figure 2: Prison Policy Initiative; depicts that overall Black, Hispanic or Latinx, American Indian and Alaskan Native individuals are murdered at significantly higher rates than their or Asian and Pacific Islander counterparts.

That this is the case finds additional support when one looks at The Death Penalty Information Center’s (DPIC) report *Facts About the Death Penalty 2021*. According to the report, “More than 75% of the murder victims in cases resulting in execution were white, even though nationally only 50% of murder victims generally are white” (DPIC 2021). While it is less likely for whites to be victims of homicide, white victims are typically favored in the justice system more so than victims of color. We can see this especially by looking at the number of individuals residing on death row who have been convicted of cases involving white victims. Of the individuals residing on death row currently, “…82% were convicted in cases involving white victims” (PPI ND, 1). The discrepancies between the race of the victims and the race of those convicted of the crimes illustrates a justice system where racial bias and discrimination are very

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5 The Death Penalty Information Center’s (DPIC) report is solely a web-page article source. This explains why page numbers are not provided here.
much present in its institutional structures and operations. Alexis Hoag brings this idea to light in the text, *Valuing Black Lives: A Case for Ending the Death Penalty*, when she shares the following quote:

[O]ut of the Black victim cases…you’ll find perhaps over a thousand occur in something like a family dispute, a lover dispute, a fight involving liquor of some sort, where some…one party is drunk or the [o]ther party is drunk. Those types of disputes occur so frequently in Black victim cases that they… fall out of the system much earlier, and --- leaving the much m[o]re aggravated, the more highly aggravated white victim cases, involving armed robberies, and such things as property disputes…And for whatever reason, frequently more times we’ll see torture involving white victim cases than you do in black victim cases (Hoag 2020, 988).

Here, Hoag begins to touch on the idea that the focus is not to bring justice to all victims of crime, the focus is to bring justice to white victims of crime. When we focus more on justice for whites, more Black victims of crime fall through the cracks of our judicial systems and fail to have the opportunity to have their cases heard. The normalization of violence against Blacks is likely a contributor to this, as historically speaking, Blacks have always been subject to violence at the hands of our government and our judicial systems in the United States.

The increased likelihood of receiving the death penalty and the lack of justice for victims who are persons of color points to problems stemming from the considerable amount of discretion afforded prosecutors by the criminal justice system. This discretion allows the prosecutor to decide whether a case becomes a capital case. This allows for unjust situations to arise, tampering one’s case. Prosecutorial misconduct has a greater opportunity to take place when prosecutors have this level of unrestrained power in cases and convictions. Not only is their level of power an area of concern, but the lack of ethnic diversity among those working as prosecutors also calls for concern, “Notably among the 38 states that allow the death penalty, approximately 98% of the prosecutors are white” (ACLU 2000). With 98% of prosecutors in the United States being white, it is possible and likely that racial bias and discrimination is very
much present, especially keeping in mind the discrepancies between the treatment of white victims and crime versus Black victims of crime. It is possible that if there were more people of color working as prosecutors, that racial bias and discrimination would be less present in the courtroom. Having more people of color hired as prosecutors could also potentially facilitate a more trusting relationship between people of color and our justice system.

Despite there being several different avenues that criminal justice reform needs to address, minimal reforms related to criminal justice have taken place. While some reforms in recent years have worked to move forward, like the Obama administration’s 2009 Hate Crimes Prevention Act and the 2010 Fair Sentencing Act, other criminal justice reforms have taken us backwards—an example of this would be when former Attorney General Jeff Sessions famously announced that the Department of Justice would pull back from investigating civil rights suits that were brought forward against police departments throughout the United States. While Sessions argued that this would offer more effective policing for communities, others argued that this action specifically threatens the livelihoods of poor Americans and persons of color. Sessions did not view this action as a threat to civil rights or human rights, but that is of course debatable.

Criminal justice reform often fails due to the negative externalities of white privilege. Because white superiority in the United States has been a foundation for political and economic interests, it has been incredibly difficult for programs, efforts, and legislation that do not favor whites to successfully pass. Bell’s 1988 article, *White Superiority in America*, illustrates this idea as he emphasizes the impact of the “Caucasian commitment” and its role in encouraging whites to “support programs that undermine their own economic interests as long as those policies provided them with a status superior to that of blacks” (Bell 1988, 767). Essentially, the
commitment to white privilege has the effect of encouraging whites to support policies and programs contrary to their self-interest as long as their privileged status is preserved. This commitment is so deeply ingrained within the white community that it has significant implications for criminal justice reform, and it prevents meaningful criminal justice reform from passing. Meaningful criminal justice reform is impossible to successfully pass without the support of whites, so with lack of support, participation and confidence in criminal justice related legislative efforts, it is incredibly difficult, if not impossible to pass. The Black interest of racial equality is only possible when done so in the self-interest of whites.

**The Unequal Application of the Death Penalty: Solutions**

In response to these critiques of the criminal justice system, the legal profession has done little to address the issue of systemic racism and the mass incarceration of persons of color. In the history of public interest law, scholars have found some problematic elements of its history. Essentially, individuals who work within the legal profession may even withhold racial biases themselves, which allows them to contribute greater to the issues of systemic racism and mass incarceration of persons of color. Racial biases are not exclusive to institutions in the United States, rather they work in combination with those in the legal profession that further empower systemic racism, “Public defenders, legal aid attorneys, and pro bono lawyers can harbor hazardous racial biases” (Adediran et al. 2021, 2). Historically, scholars have found this to be present in regard to some abolitionist lawyers, as they led with the motivations of self-interest rather than racial equality, “Some abolitionist lawyers were self-serving advocates who did not see Black people as equals. In their quest for a more egalitarian economic social order, progressives were often susceptible to racial favoritism and focused their legal efforts on ethnic Whites to the exclusion of Black, Asian American, and Latinx peoples” (Adediran, et al. 2021,1-
2). Despite there being the assumption that public interest law and public interest related organizations operate under anti-racist principles, this is unfortunately not the reality. Just as the institutions within the United States offer negative influences on systemic racism and mass incarceration, the legal profession is not innocent to contributing negatively in a similar manner. Racial biases are at all levels in the U.S. justice system, from institutions all the way down to the public defenders—racism is everywhere.

Transitional Justice

A means in which we can address the problems that CRT recognize regarding racial bias and injustice, is through exploring a new response to persons of color within the criminal justice system. Transitional justice is a way in which we can begin the process of fostering a more trustworthy relationship between people of color and the judicial system. The International Center for Transitional Justice (ICTJ) defines transitional justice as, “a response to systematic or widespread violations of human rights. It seeks recognition for victims and promotion of possibilities for peace, reconciliation and democracy. Transitional justice is not a special form of justice but justice adapted to societies transforming themselves after a period of pervasive human rights abuse. In some cases, these transformations happen suddenly; in others, they may take place over many decades” (ICTJ 2009, 1). Transitional justice is a way in which we may not be able to fix the past per say—but it allows for us to address and take responsibility for past actions while also offering opportunities to reconcile.

Transitional justice should only be considered in specific circumstances. More specifically, transitional justice should only be considered as an option for use when in relation to cases that occur against a background of institutional inequality: “The wrongdoing of interest in transitional settings characteristically occurs against a background of what has been called
“pervasive structural inequality” (Wexler, Robbennolt, & Murphy 2019, 97). That is, it occurs against a background of inequality in the institutionally defined terms of interaction among citizens and between citizens and officials (Wexler, Robbennolt, & Murphy 2019, 97). Inequalities are present everywhere; however transitional justice mainly works to address institutional inequality, inequality between citizens and institutional structures. Transitional justice addresses the concerns that CRT present by implementing a means of addressing the racism that is embedded within all areas of American life. It also works to recognize the historical significance of the racism that exists within our institutions, while also allowing for opportunities to change. There are two main ways in which interactions between citizens and institutions may be considered unequal, yet they are very closely related. Inequalities may be present in both direct and indirect ways, “There are two senses in which these institutionally defined terms for interaction can be unequal. They can be unequal in that they generate substantially different opportunities for groups of citizens to do and become things of value, such as being educated, being employed, participating in political institutions, or avoiding prison. Differences in rates of employment, education, participation in political institutions, or incarceration, then, are not substantially a function of the different preferences or choices of those citizens” (Wexler, Robbennolt, & Murphy 2019, 97). Inequalities can be obvious by examining the relationship between persons of color and employment, institutions, trials, etc. However, inequalities may be less obvious to distinguish when considering these ideas. It is important to consider the fact that they are not necessarily the choices of the persons of color to not have the same opportunities that their white counterparts may have. Oftentimes there is debate surrounding the unequal treatment of persons of color in all areas of society where others argue that this is their choice, and that if they are not treated equally, it is because they simply
did not work hard enough. We see this very often with the debate on Affirmative Action specifically as well. The opposition related to Affirmative Action typically refers to individuals viewing the legislation as unfair, giving persons of color a free pass from needing to put work into their career and education goals. Unfortunately, this is not the case, and the legislation actually works to even out the employment and education playing fields, and it is meant to allow persons of color into spaces in which they are qualified to belong. Transitional justice offers a similar approach: acknowledging the past injustices and inequalities while also working to promote a future with less of these injustices and inequalities present.

Restorative justice is slightly different from transitional justice because it focuses mostly on repairing relationships between offenders and survivors, while also working to address the root causes of crime. According to the Restorative Justice Network (RJN) (2022), restorative justice may be defined as “a response to wrongdoing that prioritizes repairing harm and recognizes that maintaining positive relationships with others is a core human need. It seeks to address the root causes of crime, even to the point of transforming unjust systems and structures.” 6 In order to achieve restorative justice, the process holds several mechanisms in place that have shared values and commitments to a number of different goals within restorative justice. According to Wexler, Robbenolt, and Murphy (2019, 71), “Restorative justice, then, refers to a loose collection of practices or mechanisms that share a number of core commitments, including: direct participation of offenders and victims in the process along with representatives of the relevant community; narration of the wrongful behavior and its effects; acknowledgement of the offense and acceptance of responsibility for it by the offender; joint efforts to find appropriate ways to

6 This source is an informational web page source. Due to this, no page numbers can be provided.
repair the harm done; and reintegration of the offender into the broader community.” Restorative justice promotes the goal of understanding the experiences of offenders and the collective moments that led them down the criminal path. With that conversation at play in combination with allowing survivors some form of closure and apologies from their offenders, offenders and survivors can be offered a new chance at healing and moving forward, “These processes may provide opportunities for apology, restitution, forgiveness of the offender, an improved understanding of the underlying reasons for the harmful behavior, reconciliation, and new understandings of or renewed commitments to standards for appropriate behavior—though these are not all necessary or guaranteed” (Wexler, Robbennolt, & Murphy 2019, 71). Of course, there are concerns to consider when examining the positive impact of restorative justice and whether it is effective. Scholars heavily debate the efficacy of restorative justice and whether it actually offers survivors the tools in which they need to move forward. Survivors having communication with their offenders is where the greatest level of debate stems from in regard to restorative justice.

Reconciliation

Reconciliation is another potentially valuable tool for addressing the unequal application of the death penalty in the United States. Reconciliation refers to the goal of creating, “an improvement in the relations among parties formerly at odds with one another” (Murphy & Radzik 2021, 1). It is important to highlight that reconciliation often also refers to the idea that there is the possibility that two parties may be unable to reconcile without one party having taken responsibility of the past. This offers a space for compromise to take place. To the extent that there is some ownership of wrongdoing to be present, moving forward may be easier, when done
correctly, “on some accounts, two parties will count as reconciled only if their better future relations result from their having satisfactorily dealt with the emotional, epistemic, and/or material legacy of the past” (Murphy & Radzik 2021, 1). Transitional justice advocates for reconciliation to take place—which is something that the current U.S. justice system is not concerned with.

The processes associated with reconciliation are as follows (Murphy & Radzik 2021, 13-27):

- **Apologies**- “A well-formed apology requires at least acknowledgement of both the fact of wrongdoing and responsibility by the wrongdoer, as well as an expression of regret or remorse” (Tavuchis 1991, 13). In an ideal world, the wrongdoer would have the ability to address the victim. However, apologies may be made to indirect victims as well.

- **Memorials**- Memorials take a number of different forms, such as monuments, preserved sites of important or tragic events, museums, archives, ceremonies or educational activities (Barsalou and Baxter 2007, Zembylas 2011, 10).

- **Truth Telling**- Truth telling has the ability to “…ameliorate ongoing suffering of victims and survivors who lack information about what happened and who was (or was not) responsible for abuses” (Zalaquett 1995, 16). It can counter certain forms of denial (Zalaquett 1995, Dyzenhaus 2000, 16) and help combat the social structures that cultivate ignorance among more privileged populations (Regan 2010, Steyn 2012, 16).

- **Amnesties**- “Amnesties, which grant legal protection from civil and/or criminal liability, are a particularly controversial form of reconciliation process. Amnesty can be granted to individuals or classes of persons. It can be granted unconditionally or conditionally” (Murphy & Radzik 2021, 18).

- **Trials and Punishment**- “Trials signal the official disapproval of the actions for which an individual is being prosecuted, actions that may not have been officially condemned before. Criminal trials and punishment are also claimed to make a crucial contribution to societal reconciliation by reaffirming the normative standards that should govern interaction. Punishment can signify or cultivate a commitment to the rule of law, as well as the faith in law and decency among officials upon which the rule of law depends” (C. Murphy 2010, 21).
• **Lustration**—“Lustration refers to legal measures that permit or require the investigation of individuals running for election, serving in the military, or working in government agencies, universities, or the media. Individuals found to have connections to past injustices or perpetrating groups may then be publicly exposed or excluded from serving in public roles” (David 2011, 21).

• **Reparations**—“A narrow use of the term refers to a transfer of land, goods, or wealth that is intended to directly compensate for goods that were taken, damaged or destroyed” (Murphy & Radzik 2021, 22).

• ** Forgiveness**—The overcoming or forswearing of resentment (or similar negative attitudes) that were the result of wrongdoing, and (some would add) the reestablishment of positive attitudes, such as goodwill, toward the wrongdoer (see J. Murphy 2003, Pettigrove 2012, 24).

• **Participation in Deliberative Process**—“Restorative justice models also value the active participation of offenders in finding a resolution to wrongdoing (Zehr 1990, 27). For example, offenders may be asked to propose forms of reparation they could offer to victims. In being allowed an opportunity to play a role in building a better future, the offender may avoid a dangerous rage-shame spiral and regain a sense of self-worth” (Braithwaite 2000, 27).

Of these, criminal trials and punishments, participation in the deliberative process, truth-telling and reparations are most relevant regarding the death penalty. How each serves as a relevant response to the unequal application of the death penalty is discussed below.

Criminal trials and punishments offer an opportunity for institutions to prove their commitments to the rule of law-- if they are handled properly. In cases where trials are not mishandled, trials can offer a fair and just means of concluding a case. When done correctly, criminal trials and punishments may even offer a space and opportunity for institutions to restore faith in the criminal justice system, especially considering that there is a significant lack of trust within these governmental institutions and judicial processes. In particular, the lack of trust that exists mostly is from the minority perspective, as people of color are more likely to be treated unfairly by the criminal justice system at all levels. According to a PBS NewsHour public
opinion poll, 48% of African Americans surveyed had little to no confidence that local law enforcement would treat them equally to whites. While the lack of trust extends beyond policing, it ultimately starts with policing. When there is a lack of trust at all levels of governmental institutions in the U.S., from policing to judicial processes and incarceration, there is limited ability for minorities to have faith that these institutions are treating them in fair and just ways. This makes persons of color question the legitimacy of these institutions, and it creates greater tensions between all parties involved.

Figure 3: 2020 PBS NewsHour Poll suggests that African Americans are less likely to trust that local police will treat Blacks and whites equally. This figure confirms the lack of trust that persons of color hold in regard to law enforcement.

There are many benefits that criminal trials and punishments may present in capital cases. According to Colleen Murphy (2010, 21) “Criminal trials and punishment are also claimed to make a crucial contribution to societal reconciliation by reaffirming the normative standards that should govern interaction. Punishment can signify or cultivate a commitment to the rule of law, as well as the faith in law and decency among officials upon which the rule of law depends.” The punishments an offender may ultimately receive should consider that if the offender is unable to participate in a restorative process, then the punishment is less effective in preventing the offender from re-offending. Offender participation in the restorative process also allows
offenders to have a more productive experience while incarcerated, and it allows them to regain a sense of self-worth. When offenders have no connection or ability to right their wrongdoings, they are more likely to be filled with guilt and shame. Offender participation will give them the opportunity to have a more transformative experience while incarcerated. According to Zehr (1990, 27), “Restorative justice models also value the active participation of offenders in finding a resolution to wrongdoing.” For example, offenders may be asked to propose forms of reparation they could offer to victims. In being allowed an opportunity to play a role in building a better future, the offender may avoid a dangerous rage-shame spiral and regain a sense of self-worth” (Braithwaite 2000, 27). Offender participation in the deliberative process allows for the opportunity for offenders to grow as individuals and it allows them a sense of value. Rehabilitation is not the goal, rather transformation of offenders is.

Participation in the deliberative process allows for the opportunity for this sort of transformation to take place for offenders. Not only does offender’s participation in the deliberative process allow for offenders to experience a higher sense of self-worth, but it also allows for the establishment of norms that would be greatly beneficial to future generations. Participation in the deliberative process allows for a meaningful start to establishing new norms for resolving conflicts that may have not been considered in the past, despite it being highly beneficial to all parties involved, as it offers the ability to “establish norms for resolving disagreements in a peaceful, just and equitable manner” (Murphy & Razdik 2021, 28). The way current processes stand, offenders hold minimal ability to participate in the deliberative process. Inviting offenders to participate in this process could have lasting change in the criminal justice system and how it handles criminal cases. Even if there is no lasting change in the criminal
justice system due to the implementation of this process, it would offer lasting change in the lives of offenders and survivors.

According to Fourth Purpose, a criminal justice reform centered non-profit organization founded by formerly incarcerated social entrepreneur Josh Smith, there are four main purposes of incarceration: retribution, incapacitation, deterrence and rehabilitation. However, in the organization’s opinion the fourth purpose of rehabilitation should actually be changed to the word “transformation.” The organization emphasizes that many of those in the criminal justice reform sphere often use the term “rehabilitation” when conversing about criminal justice reform efforts. Fourth Purpose argues that rehabilitation is not the ultimate goal, as rehabilitation refers to returning an individual to their original state; rather the purpose of incarceration in theory is not to prevent offenders from re-offending or returning to their original state. Transformation, Fourth Purpose argues, is the fourth and final purpose of incarceration, is truly transformation—as we hope to have offenders leave facilities as better people from when they first entered the system.

Another means of reconciliation that is most relevant to the death penalty is truth-telling. Truth-telling allows survivors and/or their families the ability to know the facts of what events took place. This can play a meaningful role in reconciliation as it allows victims and survivors the ability to move on from the uncertainty that they may have had in relation to their cases. This is possible because “Individual victims and survivors often find themselves unable to move on when they are uncertain about crucial facts of the past. What precisely happened to their loved one? Did she suffer? Who exactly committed the violent act? Who gave the order? Where is the body buried” (Murphy & Radzik 2021, 16)? Essentially, truth-telling begins the healing process of survivors and victim’s families. When institutions are solely focused
on the punishment of offenders, the process ignores the fact that victims and survivors deserve the ability to know the facts around what had happened to them. This is meant to work towards lessening the emotional suffering of survivors and victim’s families. Truth telling, the argument goes, can ameliorate ongoing suffering of victims and survivors who lack information about what happened and who was (or was not) responsible for abuses (Zalaquett 1995). It can counter certain forms of denial (Zalaquett 1995, Dyzenhaus 2000) and help combat the social structures that cultivate ignorance among more privileged populations (Regan 2010, Steyn 2012). Interestingly, truth-telling does not only offer some form of reconciliation to the victims and survivors of crime, but it could also create a means of education for future generations. Through using records of truth-telling in educational materials, it is possible prevent future generations from repeating actions from the past. Razdik (2021, 16) argues, “Truth telling may also serve as a way of making reparation for those not actually implicated in crimes. Efforts to record and archive this information, as well as to distribute it in the form of educational materials, aim at ensuring that future generations will not repeat the past.” Truth-telling offers benefits to all parties involved in the process, however, there still are some concerns in regard to how the truth is obtained and whether or not victims and survivors truly benefit from this process.

Despite there being many benefits to truth-telling in the restorative process, it remains highly controversial. Most of the concerns related to truth-telling are related to the specific actions used to encourage offenders to share the truth. There are also concerns regarding whether or not victims and survivors actually benefit from the truth-telling process. Here, critics do not focus on “the means used to encourage perpetrators to testify, such as amnesty from prosecution. Others object to the ways in which truth commissions (sometimes subtly) pressure victims
toward a forgiveness or reconciliation they may want to resist (Dyzenhaus 2000, Gutmann and Thompson 2000, C. Murphy 2010), or question the psychological benefits of giving testimony for victims” (Hamber 2009, 18). Along with these concerns, there are also doubts in regard to the reconciliatory effects of truth-telling, as there are times where there is failure to take action against those who facilitated the wrongdoings.

It is important to note that reconciliation and accepting reparations of any kind are not equal to forgiveness in regard to the unjust actions that individuals have experienced. The reparations that are often discussed in transformative justice most often refers to, “…efforts to repair the harm that results from a wrong or conflict. A narrow use of the term refers to a transfer of land, goods, or wealth that is intended to directly compensate for goods that were taken, damaged or destroyed” (Murphy & Razdik 2021, 22). It is a significant concern of victims that accepting reparation payments following the reconciliation period indicates that they are now “healed” or moved on in some way. This is false, and it is a fear that hinders victims from accepting reparations in fear of the image it may portray to the other parties involved. Balkan (2000, 23), for example, observes that, “Victims and their descendants, for their part, sometimes worry that accepting reparation payments may be seen as drawing a line under the past, as implying the moral debt is paid of that all is forgiven.” Reparations are not meant to be used in a way that forgives, discredits, ignores or exempts the guilty party from its past actions, if anything, they are meant to be used in a way that shares remorse, guilt and apology.

There are other reasons explaining why victims of crime are also hesitant to be in support of reconciliation, one main one being—much of reconciliation is heavily reliant on survivors’ participation in the process. This is mainly relevant to the criminal sentencing process as “Restorative justice approaches to criminal sentencing place a premium on victims’
participation” (Johnstone 2002, 27). For survivors of violent crimes, this process may be quite painful, especially given that they may not have a great ability to disconnect from their case because of how involved they are from start to finish. This is a potential caveat to truth-telling to consider, that it could potentially add another layer of grief to victim’s families and survivors of crimes. Transitional justice does not offer a one size fits all approach to addressing the death penalty and capital defendants, but it does offer a means of offering a transformative and healing process that does not have a lethal cost. According to the Equal Justice Initiative based out of Montgomery, Alabama, for every nine people executed, one person residing on death row has been exonerated. The United States government has unfortunately executed innocent people who were wrongfully convicted, which illustrates just how lifesaving transitional justice is.

Overview

The application of the death penalty in the United States disproportionately targets persons of color. With that being said, persons of color in the U.S. are also more likely to be victimized due to violence against them. The treatment of minority populations whom are also victims of crime varies greatly from the treatment of white victims of crime. Essentially, people of color experience discrimination at all levels of the criminal justice system, even if they are victims themselves. Perpetrators who commit crimes against white victims, are more likely to be sentenced to death than those who commit crimes against victims of color. This indicates that white life may be considered of higher value in American institutions and society.

CT and CRT together provide a framework for understanding the sources of the unequal application of the death penalty in the United States. Through understanding these theoretical perspectives, we can better understand the experiences of persons of color in the U.S. through several different ways. Political, economic, and social structures along with media and labor are
all examples of the countless areas of inquiry for critical theories. CRT works specifically to emphasize that racism is embedded within all aspects of American society. Ultimately, CRT explains why we see such significant discrepancies in the application of the death penalty both historically and today.

Transitional justice is a process that works to confront the present situation, while acknowledging the past and the root of the issue at hand. Through using transitional justice, we can not only foster a more trustworthy relationship between minorities and the criminal justice system, but we can also finally take responsibility for past actions that violated the rights of people of color in the United States. Because the United States has a brutal history of pervasive human rights abuses that have existing legacies, transitional justice can successfully provide a way in which the devastating past for persons of color are recognized. A major problem that currently exists within the criminal justice system is that it does not acknowledge the past, yet it upholds the legacies of the past. Transitional justice works to eliminate this problem, while also promoting a fresh start for perpetrators and survivors of crime.

**Policy Recommendations**

The final section of this Honors Thesis provides a policy brief containing recommendations for what might be done to address the inequalities associated with the death penalty identified above. The solutions discussed here draw on the discussion transitional justice provided above. Thus, one should view this section as a practical application of the theoretical argument made up to this point. In this section, I follow the standard format of a policy brief which means that some of the information provided here repeats information and analysis already provided.

*Executive Summary*
The issue of capital punishment is heavily debated in the United States for a number of reasons. While some Americans are in support of the death penalty, others do not favor it as there are a number of human rights concerns to consider when looking at the application of the death penalty. The main reasons in which the death penalty has raised concerns is due to both how it is applied, and to whom it is applied to. Unfair trials, systemic racism, racial biases, and mass incarceration are all examples of factors that negatively impact the legitimacy of the judicial processes that lead to capital convictions. This, in combination with wrongful convictions and exonerations post-execution, have brought questions to the forefront concerning whether the death penalty should still be legal in the United States.
Figure 4: Pew Research Center 2021 public opinion poll suggests that Americans recognize three major concerns in regard to the death penalty: the unequal application of the death penalty used against Blacks, the inability for the death penalty to successfully deter individuals from committing crimes, and the risk of executing innocent individuals for crimes that they did not commit. This data is valuable to highlight as it affirms that scholars and the American public all collectively understand that there are concerns related to the unequal application of the death penalty.

Another major concern related to the death penalty and who it is applied to can be illustrated by looking at the race of executions by defendant, and by the race of the victim. By observing the number of executions carried out by the race of the victim, we can see that our institutions have prioritized justice for white lives more so than any other race. Minority populations are more likely to be victimized than whites, yet it is somewhat rare for their perpetrators to be executed for their crimes against people of color. In general, Americans do indeed recognize that there are discrepancies in regard to the death penalty. Americans also recognize that there is some element of risk in continuing to hold executions. Despite the average American not holding extensive knowledge of criminal justice processes and capital punishment, they can still see that in general, there are still major concerns and inequalities to consider when examining the death penalty. If the general American public can recognize that there are major problems connected to capital punishment, why are our policymakers failing to address these problems? Scholars, data, and the American public all understand that there are major inequalities and concerns related to capital punishment, yet little action has been taken in order address these issues.
Figure 5: Death Penalty Information Center and AP News article works to share the discrepancies between the executions by the race of the victim, versus the executions by race of the defendant. Here, we can see clearly that more people have been put to death for killing whites more so than any other race.

There are a number of costs to consider when looking at the death penalty. Of course, there is a human cost—a lethal cost, but there is also a significant monetary cost. According to redacted government financial records that were obtained by the ACLU, the Federal Bureau of Prisons spent nearly $4.7 million dollars on the first five executions in July of 2020 and August of 2020, carried out by the Trump Administration. This amount alone burdens United States taxpayers with the cost of each execution—but in this case the execution cost burdened U.S. taxpayers with a price tag that is greater than the amount necessary to incarcerate one federal prisoner for twenty-five years. The costs associated with death penalty cases are most significant prior to and during trial. According to Amnesty International, the costs of post-conviction proceedings are fewer than the costs leading up to and during trial, “Even if all post-conviction
proceedings (appeals) were abolished, the death penalty would still be more expensive than alternative sentences” (Amnesty International 2017). This would explain why poor people are more likely to get executed than rich people are—because the rich can afford to withstand the enormous costs of trial. However, this points to another major problem with the death penalty, as it offers justice for some, rather than justice for all.

There are a number of ways in which these issues should be addressed. Abolishing the death penalty and successfully passing bipartisan criminal justice reform are more obvious examples of how these issues may be addressed. Another course of action would be exploring the death penalty through the lens of transitional justice, which considers the root of abuses, and allows for the transformation of the political systems and institutions in the United States. Ultimately, the complexities and biases within the U.S. justice system and the application of the death penalty are largely in part due to the legacies of slavery. This is why the approach to addressing them must be multifaceted in nature.

Background

The treatment of minority populations within the U.S. justice system is largely in part due to the legacies of slavery. As death penalty convictions discriminate along racial lines, and is disproportionately inflicted on the poor, slavery and the death penalty have much in common. This is valuable to recognize especially because slavery is also marked by these types of divisions. Race and class rest at the core of slavery, which is eerily similar to the same factors that are at the center of death penalty convictions. Interestingly, executions most often take place in former slave states. These are also areas that had high levels of lynching’s for the Black community.

7 This source is a web page source, which is why page numbers are unable to be provided.
These historical legacies hold great significance and power in how persons of color are treated in the U.S. justice system today. Without keeping these in mind, we are unable to understand how deeply ingrained racism is involved with U.S. institutions and society. In order to confront the issues of systemic racism and mass incarceration by means of a process like transitional justice, we must first understand the root of the issue and the scope of the treatment of persons of color throughout U.S. history. Slavery is an example of a major abuse that was backed by the U.S. policy, similar to how the death penalty is today.
Literature Review

Existing scholarship suggests that capital punishment and race are deeply connected to one another. It also suggests that institutions in the U.S. play an important role in how the death penalty is applied, and who the death penalty is applied to. Much of this can be explained through the lens of critical race theory, and through the investigation of how persons of color have been treated throughout U.S. history. The legacies of slavery are significant when considering the treatment of persons of color in the U.S. justice system, and the relationship that people of color have with U.S. institutions are unfortunately strained. People of color have little to no trust in the criminal justice system in the U.S. indicating that the problems associated with our criminal justice system are reflected in the minority communities. The lack of trust that people of color have in regard to our criminal justice system sadly may be mirrored by means of research and data, indicating that the concerns people of color hold are validated by the decisions of U.S. institutions and policies.

More than eight-in-ten black adults say blacks are treated less fairly than whites by police, criminal justice system

% who say, in general in our country these days, blacks are treated less fairly than whites ...  

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<td>In dealing with the police</td>
<td>63</td>
<td>84</td>
<td>67</td>
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<td>By the criminal justice system</td>
<td>61</td>
<td>87</td>
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Note: White and black adults include those who report being only one race and are non-Hispanic.
PEW RESEARCH CENTER

Figure 7: 2019 Pew Research public opinion poll indicates the lack of trust Blacks have in the U.S. criminal justice system.
Capital punishment in the United States is often not favorable by persons of color due to its unequal application. Existing literature and data suggest a number of ways in which the problem may be addressed, from abolishing the death penalty to criminal justice reform, scholars emphasize the importance of finding a way to offer some sort of solution to this institution problem. My research and contributions suggest that an even greater way in which we can work towards finding a solution to this problem is through the use of transitional justice to address cases that would be considered capital cases. Through the implementation of transitional justice, not only do actors within the criminal justice system need to acknowledge the past, they also must work to find appropriate solutions for all parties involved—usually by means of collaboration, reconciliation, and participation. Transitional justice has the ability to work towards righting the wrongs of the past, while also working towards a brighter, more informed future for perpetrators, and the general public.

**Most whites – but only around a third of blacks – support the death penalty**

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Note: Don’t know responses not shown.
Source: Survey of U.S. adults conducted April 25-May 1, 2018.
PEW RESEARCH CENTER

Figure 8: 2018 Pew Research public opinion poll indicates that whites are more likely to be in favor of the death penalty in comparison to Blacks.
Research Findings

Contrary to popular belief, capital punishment does not hold an effect on deterring crime in the United States. Essentially, the death penalty does not hold any benefits to public safety, despite that being a major argument in its favor. It is important to also emphasize that the death penalty is both costly and discriminatory, sometimes even executing innocent lives in the U.S. According to the ACLU, “Since 1973, over 156 people have been released from death rows in 26 states because of innocence. Nationally, at least one person is exonerated for every 10 that are executed” (ACLU, ND). This indicates a major problem with the death penalty, and it poses the question of whether Americans can genuinely trust that capital punishment does its job. How is this conviction effective if it also leads to the deaths of innocent life? Isn’t this process meant to only eliminate those who are threats U.S. society and safety? Research suggests that the death penalty is unequally applied by race and class, and its application is sometimes also against the innocent individuals. This is a major concern for many reasons, but especially due to injustice and a violation of human rights.

Potential Policy Solutions

• Abolishing the death penalty: works to hinder the ability for the U.S. justice system to sentence persons of color to death.

• Bipartisan criminal justice reform: allows for members of both political parties to work together to pass legislation that addresses the unfair treatment of persons of color in the justice system.

• Transitional Justice: encourages acknowledgement of all parties involved in the process. Establishes a means of addressing the past while offering a future with lesser injustice. If all of the principals of transitional justice cannot be adopted into the U.S. criminal justice
system, then at a minimum, individuals who are members of ethnic groups that have experienced historically significant the methods of institutional inequality should have their cases evaluated through this understanding. For these individuals, the reconciliation processes set forth in transitional justice should be considered on a case-by-case basis.

There are three main ways in which the issue of systemic racism in our criminal justice may be addressed in regard to the unequal application of the death penalty. Abolishing the death penalty, bipartisan criminal justice reform, and the implementation of transitional justice are all means in which this problem may be addressed.

Potential Implications of Policy Solutions

No policy solution is perfect, and there are implications of each route regardless of which one is taken. The implications of these policy solutions are as follows:

- Abolishing the death penalty eliminates the ability for persons of color to be executed disproportionately. Unfortunately, abolishing the death penalty alone does not address the actual problem of racial biases, systemic racism, and mass incarceration in the United States.

- Bipartisan criminal justice reform would most definitely offer stronger protections for persons of color that are subject to criminal trials and proceedings. However, the scope in which legislation alone holds power is limited. Legislation is helpful for the court room, but its effectiveness is lessened when individuals are subject to the discretion of police officers, prosecutors, and others who work in the legal profession.

- Transitional justice encourages healing for all parties involved in criminal trials. However, there is conflicting scholarship that indicates that transitional justice may not be as healing for survivors of crime and their families as it is portrayed. It is possible that
survivors’ participation in transitional justice processes with their perpetrators may not be as positive as some existing literature suggests.

Conclusion

The issues related to systemic racism and racial biases will likely never disappear from U.S. institutions and society. The legacies of slavery and its implications still exist in the present-day United States, and it is noticeable at all levels of American life. From employment and housing to education and incarceration, we can see that systemic racism is impossible to ignore. Drawing from the insights of critical race theory, we can see that there are theoretical explanations of why the U.S. justice system looks the way it does today. Transitional justice is a means in which we can address the legacies that led to the U.S. present-day problems, and work towards eliminating these problems for the future. The death penalty is one of many examples of injustice that persons of color in the United States experience, and it is an incredibly complex political, monetary, ethical, and moral issue to address.

Beyond these suggested policy recommendations, there is limited research that confirms the positive impact for survivors of crime in regard to the methods of reconciliation that are presented in transitional justice processes. Scholarship is conflicted in this particular subject area, more specifically scholarship is conflicting in whether survivors’ actually experience personal positive impacts through taking part in these processes. While some scholars argue that the reconciliation processes mentioned earlier in this paper are positive for all participants, (offenders, survivors and their families) (Johnstone 2002, 27), other scholars argue that these processes offer little to no benefit for survivors(McGary 2010, 29). Opposing scholarship also highlights that these reconciliation processes offer greater positive impacts for offenders than they do for survivors and their families.
Despite these concerns, it is vital to consider the lessons that CT and CRT set forth in relation to social justice, race, inequality and institutionalized racism. Through using these perspectives in understanding the U.S. criminal justice system, we can better address the historically significant structural inequality that exists in the United States. Of course, CT and CRT do not have the bandwidth to offer extensive policy suggestions that work to confront the major implications related to the racial inequalities and capital punishment in the United States. However, CT and CRT work to explain these trends, and it is the role of the policymaker to consider these perspectives in the policy-making process. CT, CRT, and transitional justice are all limited without those in political power taking these perspectives into consideration and political action. CT and CRT set forth the problems, but it is our job to set forth the solutions.


