

The War on Drugs and Racial Injustice: How Restorative Justice Can Flip the Script on Combatting Drug Crime

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I. Introduction

Before taking part in this year's Restorative Justice and Healing class, my knowledge of racial injustice in society remained surface level at best. I acknowledged racial injustice existed yet had no ideas on how to combat it. The killing of George Floyd brought the already ever-present issue of racial injustice to a nationwide scale, prompting protests and dramatic acts of violence in response. But despite being under curfew, with helicopters flying overhead, I still felt stuck, not understanding the root causes or possible solutions.

Calls were made to defund the police. But despite my awareness of the injustice that permeated throughout society, especially in the criminal justice system, the idea of defunding the police, a force that provided a sense of security throughout my life, seemed wrong, if not altogether dangerous. Retribution and deterrence—the hallmarks of the American Justice system—made sense. Society determined an act is wrong; if you commit the act, society punishes you. The punishment should help deter the societally disapproved action. Retribution and deterrence aren't pleasant—but that's the point.

In contrast, Restorative Justice seemed too extreme. I struggled to answer multiple Restorative Justice-related questions: would the Restorative Justice process resolve harm created by the act? Is the process enough of a deterrent to dissuade individuals from committing the act? What happens if the Restorative Justice process fails and society comes to doubt its effectiveness?

As we explored Restorative Justice throughout class, the source of my ideological roadblock became clearer. Prior to this course, I viewed Restorative Justice as an all-or-nothing

approach, seeking to replace the American criminal justice system as we know it. However, an all-encompassing overthrow of a racially unfair criminal justice system seemed unfathomable. If we upended the criminal justice system, anarchy would reign supreme, and the comfort and safety of our homes would be no more. But once I looked at Restorative Justice not solely as an alternative to the criminal justice system—but as a complementary piece of it—its potential impact became astoundingly clear.

In this short reflection, rather than focusing on Restorative Justice’s impact on the entirety of the criminal justice system, I will focus on one aspect of crime: drug-related offenses. The addictive factors of opioids, meth, and crack cocaine do not care about race. But that’s not what prison statistics will tell you.¹ Decades of racially driven laws and the ideological effect they had on society have driven disproportionate amounts of minorities to prison. Yet, the idea of retribution and deterrence failed to stem the dramatic increase in drug-related issues.² Restorative Justice, however, could play a crucial part in changing society’s viewpoints on drug addiction and the current criminalization practices surrounding drug use.

II. A Brief History of the War on Drugs

Two types of punishment permeate throughout the American criminal justice system: retribution—“the theory that punishment is justified because it is deserved”³, and deterrence—the idea that “people are deterred from actions when they refrain from carrying them out because they have an aversion to the possible consequences of those actions.”⁴ These types of criminal

¹ See Mark Osler, *What We Got Wrong in the War on Drugs*, 17 U. ST. THOMAS L.J. (forthcoming Dec. 2021) (“While Black Americans have born an undue share of imprisonment and the hardships of the War on Drugs, the truth is that Black Americans are no more likely to buy or sell drugs than white Americans.”).

² *Id.* (“In 2019, 70,630 Americans died of drug overdoses, compared to fewer than 20,000 in 1999.”) (citing *Overdose Death Rates*, NAT’L INST. ON DRUG ABUSE (Jan. 29, 2021), <https://www.drugabuse.gov/drug-topics/trends-statistics/overdose-death-rates>).

³ Cyndi Banks, *The Purpose of Criminal Punishment*, in *ETHICS AND THE CRIMINAL JUSTICE SYSTEM* 103, 109 (2015).

⁴ *Id.* at 106.

punishment perpetuate a system of racial injustice in society. Federal and state drug laws show racial injustice in full effect, often alienating minority drug users.

The alienation approach found its foothold during the Nixon presidency where, despite calls to provide therapy for drug addicts, the administration decided to frame drug users as “criminals attacking the moral fiber of the nation, people who deserved only incarceration and punishment.”⁵ Nixon’s law and order approach created two sides of America. One consisted of the white middle and upper class, largely isolated from the inner-city drug violence.⁶ The other consisted largely of minorities living in the inner cities being ravaged by drug-related violence.⁷ Sometimes, Congress blatantly acknowledged a primary purpose of racially charged drug laws: preventing drugs from entering America’s picturesque white suburban society.⁸

The post-1970s law and order America⁹ has disproportionately affected minorities. Since the advent of the War on Drugs, Black and Latino incarceration rates rose dramatically while the white incarceration rate grew at a much slower pace.¹⁰ With drug use came rampant violence, providing further support for harsh drug sentences.¹¹ Minorities faced the brunt of the harsh sentences, frequently facing life imprisonment. But, for the minorities fortunate to be released, the outside world provided little hope—especially for addicts.

⁵ Emily Dufton, *The War on Drugs: How President Nixon Tied Addiction to Crime*, ATLANTIC (Mar. 26, 2012), <https://www.theatlantic.com/health/archive/2012/03/the-war-on-drugs-how-president-nixon-tied-addiction-to-crime/254319/>.

⁶ *Id.*

⁷ *Id.*

⁸ See Osler, *supra* note 1 (noting one purpose for tough crack laws was the worry that the “drug might move from ‘the burned out, abandoned buildings of our large metropolitan areas’ to ‘the tree-lined streets of small towns and villages.’”) (citing Richard Dvorak, *Cracking the Code: De-Coding Colorblind Slurs During the Congressional Crack Cocaine Debates*, 5 MICH. J. RACE & L. 611, 654–55 (2000)).

⁹ *Id.*

¹⁰ Aaron Morrison, *50-year war on drugs imprisoned millions of Black Americans*, ASSOCIATED PRESS NEWS (July 23, 2021), <https://apnews.com/article/war-on-drugs-75e61c224de3a394235df80de7d70b70>.

¹¹ *Id.*

Support systems for addicts are virtually non-existent.¹² They are left to fight through the barriers society puts in place while simultaneously fighting a debilitating addiction. Society subjects released individuals to a legal form of discrimination, a felony charge affects their ability to get housing, employment, and education.¹³ Formerly incarcerated minorities—already outsiders because of the color of their skin—are increasingly isolated because of the limited opportunities available to them post-release.

Society views criminals as outsiders. The problem is they are anything but that. 98 percent of people in jail reenter society.¹⁴ These outsiders are our neighbors and coworkers. Yet, the current criminal justice system, and often communities altogether, ignore them—until they commit another crime.¹⁵

III. How Restorative Justice Can Help

A Restorative Justice approach, connecting the community, victims, and offenders, while also providing a support system for drug addicts, provides a solution to attack one aspect of society's racial injustice. Restorative Justice-focused conversations can be used as a jumping point to drive change that combats deep-rooted systemic racism. Crixell Shell and *Coming to the Table* provide a four-point framework¹⁶ that showcases how Restorative Justice can attack the 50 years of racial harm caused by the War on Drugs.

i. Uncovering History

¹² Jake Arthur, *Jail can make drug addiction worse. Oregon decriminalizing hard drugs can break the cycle*, NBC NEWS (Nov. 18, 2020), <https://www.nbcnews.com/think/opinion/jail-can-make-drug-addiction-worse-oregon-decriminalizing-hard-drugs-ncna1248050>.

¹³ See e.g., FANIA DAVIS, *THE LITTLE BOOK OF RACE AND RESTORATIVE JUSTICE: BLACK LIVES, HEALING, AND US SOCIAL TRANSFORMATION* 35-40 (2019).

¹⁴ Prof. Hank Shea, *Exploring the Nature of Justice – Different Theories of Punishment, Restorative Justice, Law and Healing* (Aug. 23, 2021).

¹⁵ See e.g., John Jackson, *Discussion in Restorative Justice, Law and Healing* (Sep. 17, 2021).

¹⁶ Crixell Shell, *Restorative Justice in Practice: Part 2, Restorative Justice, Law and Healing* (Aug. 25, 2021).

The history of racially charged drug laws provided above is a mere CliffsNotes version of America’s discriminatory laws. But multiple questions must be answered to understand how minorities became so affected by these laws: How did America’s inner-cities, once booming and bustling, become crime-ridden and drug-filled? As white Americans left the inner city for newly constructed suburbs, why were minorities left to the neglected and crumbling metropolitan areas? Drug laws themselves don’t provide the answers but discussing a history of racially charged laws provides a glimpse of the two-sided America.¹⁷

“Understanding [h]istory properly requires that we learn from it.”¹⁸ Restorative Justice circles, and their innate ability to facilitate deep and meaningful discussion, help uncover and illuminate this history for individuals who do not understand the impact these laws have on minority Americans. As noted in Bryan Stevenson’s *Just Mercy*, “It’s . . . important to understand where we’re coming from.”¹⁹ Using Restorative Justice to uncover a potentially unknown history helps level the playing field between offenders, community members, and victims. Once everyone is talking with a deeper understanding of the uneven landscape that drug-related offenders face, the connecting and healing process can be facilitated in a much more meaningful way.

ii. *Making Connections*

“Sharing stories helps us connect, identify common ground and learn about things that have been entirely outside of our experiences.”²⁰ In *Just Mercy*, Mr. Stevenson highlights the power of

¹⁷ For example, racially driven zoning laws have been prevalent through America’s history. See Chair Cecilia Rouse, Jared Bernstein, Helen Knudsen, and Jeffery Zhang, *Exclusionary Zoning: Its Effect on Racial Discrimination in the Housing Market*, THE WHITE HOUSE (Jun. 17, 2021), <https://www.whitehouse.gov/cea/blog/2021/06/17/exclusionary-zoning-its-effect-on-racial-discrimination-in-the-housing-market/>.

¹⁸ *Stories of Facing History*, COMING TO THE TABLE, <https://comingtothetable.org/project/stories-of-facing-history/> (last visited Sep. 27, 2021).

¹⁹ BRYAN STEVENSON, *JUST MERCY: A STORY OF JUSTICE AND REDEMPTION* 201 (2019).

²⁰ *Stories of Making Connections*, COMING TO THE TABLE, <https://comingtothetable.org/project/stories-of-making-connections/> (last visited Sep. 27, 2021).

finding common ground, recounting a particularly jarring prison encounter. While visiting a client, a prison guard approached Mr. Stevenson, and following a round of questions, directed Mr. Stevenson to go well beyond the requirements for legal visits: “You’re going to go into the bathroom and take everything off if you expect to get into my prison.”²¹ Mr. Stevenson complied, stripping down for a full body search.²² After continued provocation, the guard allowed Mr. Stevenson to see his client.²³

One would expect a repeat of this horrific experience upon Mr. Stevenson’s next visit. But the unexpected happened. The guard greeted Mr. Stevenson with cordiality and something completely unanticipated: a welcoming demeanor.²⁴ Storytelling led this prison guard to a change of heart. Once the guard heard the testimony of Mr. Stevenson’s client, describing a rough childhood bouncing around the foster care system, an instant, and unexpected, connection formed between the client and the guard. Why? Because the prison guard himself had gone through the foster care system.²⁵ The guard’s subsequent conversation with Mr. Stevenson highlighted the power of connections and finding common ground: “I didn’t think anybody had it as bad as me But listening to what you was saying about [the client] made me realize that there were other people who had it as bad as I did.” The guard, the client, and Mr. Stevenson found their common ground, and all it took was a story.

Similarly, John Jackson, and the healing circle supporting him, found common ground in helping Mr. Jackson achieve his goal of sharing his story through public speaking.²⁶ The common ground provides benefits to Mr. Jackson and the community: (1) it enables Mr. Jackson to hone

²¹ STEVENSON, *supra* note 19, at 194-95.

²² STEVENSON, *supra* note 19, at 194-95.

²³ STEVENSON, *supra* note 19, at 194-95.

²⁴ STEVENSON, *supra* note 19, at 200.

²⁵ STEVENSON, *supra* note 19, at 200-01.

²⁶ Jackson, *supra* note 15.

his craft, and (2) it showcases the pain and suffering caused by drug addiction and a society that focuses on punishment instead of healing.²⁷

Finding common ground is key to understanding that offenders are not outsiders but our neighbors, family members, and friends. Storytelling builds toward finding this common ground. Victims, community members, and offenders often have much more in common than initially anticipated. Drug offenders are no different. They have dreams, ambitions, and life goals that drug use and a criminal justice system that imposes harsh sentences prevented them from achieving. Making these connections will help facilitate the next two integral steps of Restorative Justice: working towards healing and taking action.

iii. Working Towards Healing

Restorative Justice takes a unique focus on healing the harm perpetrated by the offender against the victim and community. But, when using Restorative Justice in a drug-offense context, the harm-healing must be broader, including the harm caused by America's history of discriminatory drug laws.

By creating achievement ceilings for offenders, drug laws perpetuate the harm done to communities. Offenders face barriers to jobs, housing, and education. And with nowhere left to turn, offenders go back to the only steady stream of income known to them—selling drugs.²⁸ By not providing avenues to exit this trade, the drug laws continue to harm the communities they intended to protect. While the community must be healed, offenders must be healed too. Working towards healing can naturally start with storytelling. Restorative Justice circles help facilitate storytelling, focusing the conversations on healing the harm caused by the offender *and* the harm the community (and society as a whole) caused to the offender.

²⁷ Jackson, *supra* note 15.

²⁸ Jackson, *supra* note 15.

iv. Taking Action

The previous steps prove to be ineffective if the causes of harm are not addressed. As noted in *Restorative Justice in the Catholic Church*, Restorative Justice allows all participants to “explore, practice, and adjust to a better version of yourself.”²⁹ When it comes to racial injustice and its effects on drug laws in the United States, Restorative Justice not only provides an opportunity for offenders to become a “better version of themselves,” but perhaps more importantly, it provides the opportunity for the betterment of the community.

But complacency prevents any hope in finding this better self. Any Restorative Justice circle that focuses on drug offenses and racial injustice must come away with action points. These can be local, such as police refusing to enforce antiquated drug laws; statewide, such as enacting legislation that instead of punishing drug use helps combat the disease³⁰; or nationwide, by enacting a dramatic change to how America treats drug offenses.³¹

IV. Conclusion

Regardless of the approach, using a Restorative Justice framework to understand history, make connections, heal the harm, and take action can lead to a seismic shift away from the racially discriminatory drug laws of America’s past and present. Even with the official War on Drugs coming to a close³², the disproportionate harm caused will continue to have lasting effects. A

²⁹ Our Lady Of Lourdes Catholic Church Minneapolis, *Restorative Justice in the Catholic Church and Beyond?*, YOUTUBE (Sep. 12, 2020), https://www.youtube.com/watch?v=vrOPTYyCR_8.

³⁰ Eric Westervelt, *Oregon's Pioneering Drug Decriminalization Experiment Is Now Facing The Hard Test*, NPR (June 18, 2021), <https://www.npr.org/2021/06/18/1007022652/oregons-pioneering-drug-decriminalization-experiment-is-now-facing-the-hard-test>.

³¹ The United States could take an approach adopted by Portugal—decriminalizing drug use altogether. See Naina Bajekal, *Want to Win the War on Drugs? Portugal Might Have the Answer*, TIME (Aug. 1, 2018), <https://time.com/longform/portugal-drug-use-decriminalization/>.

³² Gary Fields, *White House Czar Calls for End to 'War on Drugs'*, WALL ST. J. (May 14, 2009), <http://www.wsj.com/articles/SB124225891527617397>.

community-led Restorative Justice effort mitigates these effects and provides a path to a brighter future focused on healing, not hurting.