

Restorative Justice and Race in Vermont

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Restorative Justice practitioners in Vermont share a strong commitment to making the justice system more equitable, fair, and humane. More specifically, many volunteers get involved with Community Justice Centers because of a desire to promote racial equity and to address the glaring racial disparities in the justice system. State level policymakers in Vermont are also grappling with how to address racial bias in policing and disparities in incarceration rates and wondering if Restorative programs may help. This paper explores racial disparities at various decision-points in the criminal justice system, whether Restorative Justice (RJ) programs are currently reducing racial disparities in the adult criminal legal system, and, if not, what could be done to allow them to have this effect.

First, it is important to understand the nature of racial inequality in the justice system and how, when, and why it occurs. Overall in the United States people of color are significantly more likely than white people to be involved with the criminal justice system at all stages. African American and Latinx people make up 59 percent of the prison population but only a quarter of the overall population, and approximately half of young black men in urban areas are under some form of correctional control (Hinton, 2016). One in three black men and one in six Latino men will be imprisoned at some point in their lives compared with one in seventeen white men, and similar disparities exist for women (Ghandnoosh, 2015). In Vermont, African Americans are

incarcerated at a rate over 10 times higher than whites, making the state's rate of racial disparity in incarceration one of the highest nationally (Nellis, 2016).

These dramatic racial inequities in the prison population are the result of the cumulative effects of disparities earlier in the criminal justice system. Before someone ends up in prison, they pass through a number of other decision-making points where explicit, implicit, and structural racial biases may affect their treatment. These disparities amplify for individuals as their cases progress and also for communities over time as more and more people become entangled with the justice system (Nellis, Greene, & Mauer, 2008). In order to show how this plays out, I'll first offer definitions of explicit, implicit, and structural bias, and then explore several key criminal justice decision-making points where they show up: policing, pre-trial processing, and sentencing.

Explicit racial biases are conscious beliefs that a person holds and articulates and on which they may act intentionally. They may include positive ideas about white people or negative ideas about people of color (e.g. "most black people in Vermont are drug dealers.")

Implicit racial biases are unconscious automatic associations that affect our understandings and impressions of people and inform our actions and decisions involuntarily and unintentionally. They may be positive (e.g. the impression that white people are trustworthy) or negative (e.g. the impression that black people are dangerous), and they often contradict our explicitly held values and beliefs. Everyone has implicit racial bias which we learn over a lifetime of exposure to direct

and indirect societal messages about race (Banaji & Greenwald, 2016; Staats, Capatosto, Wright, & Contractor, 2015).¹

Structural bias describes the systematic unequal treatment of people based on race and the accumulation of those inequities across systems and throughout history. Structural biases often operate through seemingly race-neutral (“colorblind”) policies that disproportionately harm people of color. For example, people of color have experienced persistent discrimination in housing for many generations, such as denial of mortgages through redlining policies and exclusion from homeownership opportunities through explicit and implicit racism. Therefore, tax benefits for homeowners are structurally biased because they disproportionately benefit white people who do not and have not faced such discrimination. There are many, many forms of structural bias in the criminal justice system (Alexander, 2010), and a full description of them is beyond the scope of this paper, but the concept of structural racism is important for understanding why dramatic racial disparities can and do persist even in the absence of explicit racism.²

Policing is generally the entry point for people into the criminal justice system. Across the country policing attention and surveillance are disproportionately focused on communities of color; police more heavily patrol non-white neighborhoods, more often stop and search people of color, and are more likely to arrest people of color than white people who have been stopped (Hinton, 2016). In Vermont, data from 2010-2015 show that Black and Hispanic drivers

¹ For a detailed and accessible description of implicit bias see *Blind Spot* by Banaji & Greenwald (2016). You can also take tests to measure a variety of implicit biases through Project Implicit: <https://implicit.harvard.edu/implicit/>

² Much has been written in academic literature and the popular press about structural racism in the criminal justice system, but a good place to start is Michelle Alexander’s 2010 book *The New Jim Crow*.

experience disproportionately harsher treatment by police compared to white drivers. They are stopped at higher rates, receive more citations, are searched more than four times as often, and are arrested at higher rates, despite evidence that they are less likely to possess contraband or to commit crimes than white drivers (Seguino & Brooks, 2016).

Significant racial disparities also exist in the pre-trial phase of the justice system. Using national data on cases in large urban areas between 1990 and 2006 Schlesinger (2013) found that Black defendants are 44% less likely to be offered pretrial diversion compared to White defendants charged with similar offenses. Lee and Richardson (2018) found that white defendants are significantly more likely to avoid going to trial (through pleading guilty, case dismissal, or referral to diversion programs) than are non-white defendants; this usually results in harsher outcomes and/or longer sentences for people of color. During the various pre-trial decision-making points implicit biases (such as beliefs that black and latinx people are more dangerous, less trustworthy, or more inherently criminal) inform the impressions and judgments that prosecutors and other court actors make about defendants. This in turn “may lead prosecutors to seek harsher punishment for minorities, offering less favorable plea deals and remaining more open to trials” compared to whites (Lee & Richardson, 2018, p. 21).

Pre-trial decision-making has not been studied in Vermont to determine whether racial disparities exist at this stage. The various departments responsible for pre-trial or pre-charge decisions (local police, State’s Attorneys offices, and courts) either do not collect racial demographic data or do not report these data to any statewide entity. As a result, we need more and better data collection in order to say for sure whether racial disparities exist at this stage in Vermont’s criminal justice system. Nevertheless, it is possible to make some guesses based on the national

studies described above. In their study of trial-avoidance Lee and Richardson (2018) determined that racial disparities occur consistently across majority-white and majority-minority counties, so Vermont's small population of people of color doesn't likely change these dynamics. Stereotypes that ascribe criminality, dangerousness, and outsider status to non-whites are strongly present in Vermont (Jones, 2017) and are amplified by Vermonters' sometimes negative perceptions of "out-of-staters." If these explicit and implicit biases function similarly in Vermont to how they do nationally, then we would expect to find that state actors are more likely to offer diversion, referrals to restorative programs, plea deals, or dismissal to white defendants compared with non-white defendants.

Another key issue is the use of prior convictions as a factor in pre-trial case processing. In general, people who have a prior record are less likely to be offered diversion out of the criminal legal system based on the assumption that they have a longer history of criminality and are less likely to benefit from alternative programs. However, because people of color are much more likely to have convictions than white people, prior records may be more a measure of previously experienced racial bias and structural inequalities than they are of past criminal behavior or ability to change future behavior (Schlesinger, 2015). A number of scholars have argued against using prior records in criminal processing decisions because doing so amplifies racial disparities and doesn't necessarily provide useful information about the defendant's likelihood of reoffending (Schlesinger, 2015). These arguments raise questions about Vermont's use of prior records in case processing decisions and point to the possibility that doing so amplifies racial disparities.

Sentencing is another stage where race significantly influences outcomes. National research shows that judges are more likely to sentence people of color to incarceration and to assign them longer sentences compared to whites for similar crimes (Ghandnoosh, 2015). Furthermore, numerous seemingly race-neutral sentencing laws (e.g. three strikes, mandatory minimums, heightened penalties for crimes committed in school zone, etc.) disproportionately affect people of color (Ghandnoosh, 2015). Weber (2014) found that a defendant's race does not appear to directly affect sentencing decisions or length of incarceration in Vermont; however, the same study found that outcomes *are* strongly dependent on whether a defendant has a prior record, particularly of out-of-state convictions. As described above, prior record is widely seen as a proxy for race, and in Vermont, it is likely that non-white people are disproportionately represented among those with out-of-state convictions due to the state's small population of people of color relative to nearby states. Therefore, despite the appearance of race-neutral sentencing in Weber's study the reality may be more complicated; it is probable that structural biases further amplify racial inequalities at the sentencing stage in Vermont, as they do nationally.

Taken together, these various forms of differential treatment of white and non-white people throughout the justice system result in the glaring racial disparities that we see in Vermont's incarcerated population. So how does Restorative Justice fit into this picture, and what role can it play in decreasing racial disparities? In Vermont, RJ programs offer one option that police, State's Attorneys, courts, and judges can use to divert cases away from more punitive options, based in part on the kinds of professional discretionary case processing described above. Given the racial bias embedded in this decision-making, it is likely that people referred to RJ programs

have already been sorted by race to some degree, and that RJ Programs in Vermont are serving a disproportionately white client population compared to the broader population of people involved in the justice system. If this is true, RJ may actually be exacerbating racial disparity by allowing white people to avoid harsher penalties more often than people of color, even though this results from decisions elsewhere in the system over which RJ practitioners have little control.

In addition to these broader systemic issues, it is also important to explore the experience that people of color have when they do participate in Reparative panels or conferences. Very little research exists in the academic literature about racial identity within RJ programs in the adult criminal legal system (Gavrielides, 2014; Wood & Suzuki, 2016); what has been written mostly points to unanswered questions. I will explore some of the issues I believe RJ practitioners should consider – at both theoretical and practical levels – in order to begin to answer these questions.

Restorative Justice is grounded in several key principles, including open, inclusive, non-hierarchical process and involvement of the community. RJ aims to create spaces in conferences, panels, or circles where everyone can share freely and openly, everyone's input is heard and valued, and participants collaborate equally to negotiate solutions. In addition, RJ works to address harm in the community where it took place, create opportunities for repairing harm to the community, and reintegrate participants into the community. A number of scholars question whether these values can be achieved without RJ practitioners engaging much more

deeply with race, racial identity, and social power within our programs (Furnell, 2017; Gavrielides, 2014; Karp & Frank, 2016; Wood & Suzuki, 2016).

Restorative Justice programs operate within a broader social and cultural context where people's beliefs, experiences, and identities are deeply shaped by race. Most people of color in the U.S. experience racist discrimination in their daily interactions with white people and white-dominated institutions as well as structural marginalization in the broader economy and society. Most white people in the U.S. enjoy significant unearned privilege due to their racial identity, while also remaining oblivious about the salience of race in society and deeply uncomfortable discussing racial dynamics (DiAngelo, 2018; McIntosh, 1989). These disparate experiences and positions for white people and people of color contribute to unequal social power. Social power related to race manifests in daily interactions (interpersonal, small groups, professional, informal, etc.) through silencing, fear of speaking up, feeling unsafe, deferring to more powerful speakers, assumptions or statements rooted in implicit biases, gaslighting, microaggressions, and other practices of exclusion.³

Several studies have documented these types of social power dynamics with regard to race, class, age, and gender within RJ programs and mediation conferences (Charkoudian & Wayne, 2010; Cook, 2006; Furnell, 2017). Scholars observe that styles of communication, ways of expressing emotion, and understandings of concepts such as justice, accountability, and repair vary across cultures and racial groups; they also note that social identity shapes how communications are

³ If these ideas are unfamiliar to you, I strongly encourage you to read *White Fragility* by Robin DiAngelo (2018) which explains very clearly many important and often invisible aspects of racial identity for white people.

interpreted and whether people are seen to be acting and expressing themselves in socially acceptable ways within RJ interactions (Cook, 2006; Willis, 2018; Wood & Suzuki, 2016).

In Vermont, RJ programs do not systematically gather racial demographic data about volunteers (or clients), but based on anecdotal evidence and personal observation it seems that most RJ volunteers are white presenting, older or retired, and middle-class. Given these demographics, and the dynamics of social power and exclusion described above, we need to consider whether it is possible for people of color (as well as people experiencing poverty, young people, or those from other marginalized or oppressed groups) to experience truly restorative processes within our programs. Whose community is represented by panel volunteers? Is it actually the same community where the harm took place? Does everyone actually feel free to speak within a panel or circle, and what sorts of social power imbalances are present? Whose perspective is privileged, and whose is silenced? What styles of expression, communication, behavior, or dress, and understandings of key concepts such as justice, remorse, or accountability are normalized? These are all questions that remain under-explored in the scholarly literature on RJ and within RJ practice in Vermont.

What can Restorative Justice programs in Vermont do to better align our practice with the goal of promoting racial justice? RJ practices are well documented to decrease racial disparities in school discipline, which in the long term helps young people of color increase educational attainment and avoid later involvement with the legal system (Kline, 2016; Simson, 2012). I believe RJ programs have the potential to promote racial justice and to counteract racial

disparities in the adult criminal justice system as well, but only if we are attentive to the structural forces and relational dynamics I've outlined above.

In order to reach this goal, I think RJ practitioners in VT should undertake the following:

- Use our relationships with other justice system actors (police, States Attorneys, courts, Legislators, Department of Corrections, etc.) to advocate for systemic change to address racial disparity and bias. In particular, we should advocate for:
 - Ending the use of prior record and other such factors that reflect structural bias in case processing decisions;
 - Training in how to counteract implicit bias and structural racism for all justice system professionals;
 - Collecting data to enable documentation of racial disparities in all stages of criminal justice decision making;
 - Creating requirements that hold justice system professionals accountable for addressing documented racial disparities.
- Commit to deeper learning and training for RJ practitioners (including staff and volunteers) around racial identity, privilege, and oppression and how these dynamics appear within Restorative practice. For a curriculum addressing these topics see the graduate thesis by Matthew Furnell (2017).
- Work to recruit volunteers and staff within RJ programs who more broadly represent the demographics of our communities, and in particular the populations of people who tend to be involved with the criminal legal system in Vermont.

Sources

- Alexander, M. (2010). *The new Jim Crow: mass incarceration in the age of colorblindness*. New York: New Press.
- Banaji, M. R., & Greenwald, A. G. (2016). *Blindspot: hidden biases of good people*. New York: Bantam books.
- Charkoudian, L., & Wayne, E. K. (2010). Fairness, understanding, and satisfaction: Impact of mediator and participant race and gender on participants' perception of mediation. *Conflict Resolution Quarterly*, 28(1), 23–52. <https://doi.org/10.1002/crq.20011>
- Cook, K. J. (2006). Doing difference and accountability in restorative justice conferences. *Theoretical Criminology*, 10(1), 107–124. <https://doi.org/10.1177/1362480606059987>
- DiAngelo, R. J. (2018). *White fragility: why it's so hard to talk to white people about racism*. Boston: Beacon Press.
- Furnell, M. (2017). *Is Restorative Justice Doing Enough To Address The Power Imbalances Caused By Systems of Privilege and Oppression*. SIT Graduate Institute.
- Gavrielides, T. (2014). Bringing Race Relations Into the Restorative Justice Debate: An Alternative and Personalized Vision of “the Other.” *Journal of Black Studies*, 45(3), 216–246. <https://doi.org/10.1177/0021934714526042>
- Ghandnoosh, N. (2015). *Black Lives Matter: Eliminating Racial Inequity in the Criminal Justice System*. The Sentencing Project.
- Hinton, E. (2016). *From the War on Poverty to the War on Crime: The Making of Mass Incarceration in America* (1st edition). Cambridge, Massachusetts: Harvard University Press.
- Jones, R. E. (2017, February 9). “I Am Vermont Too” Exhibition Opens at the Statehouse. *Seven Days*. Retrieved from <https://www.sevendaysvt.com/LiveCulture/archives/2017/02/09/i-am-vermont-too-exhibition-opens-at-the-statehouse>
- Karp, D. R., & Frank, O. (2016). Anxiously Awaiting the Future of Restorative Justice in the United States. *Victims & Offenders*, 11(1), 50–70. <https://doi.org/10.1080/15564886.2015.1107796>
- Kline, D. M. S. (2016). Can Restorative Practices Help to Reduce Disparities in School Discipline Data? A Review of the Literature. *Multicultural Perspectives*, 18(2), 97–102. <https://doi.org/10.1080/15210960.2016.1159099>
- Lee, J. G., & Richardson, R. L. (2018). Race, Ethnicity, and Trial Avoidance: A Multilevel Analysis. *Criminal Justice Policy Review*, 088740341881299. <https://doi.org/10.1177/0887403418812998>
- McIntosh, P. (1989). White privilege: Unpacking the invisible knapsack. *Peace and Freedom, July/August*, 10–12.
- Nellis, A. (2016). *THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS*. Retrieved from The Sentencing Project website:

<https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/>

- Nellis, A., Greene, J., & Mauer, M. (2008). *Reducing Racial Disparity in the Criminal Justice System: A Manual for Practitioners and Policymakers*. Washington, D.C: The Sentencing Project.
- Schlesinger, T. (2013). Racial Disparities in Pretrial Diversion: An Analysis of Outcomes Among Men Charged With Felonies and Processed in State Courts. *Race and Justice*, 3(3), 210–238. <https://doi.org/10.1177/2153368713483320>
- Schlesinger, T. (2015). Attenuating Disparities Through Four Areas of Change: Universal Release, Reimagined Policing, Eliminated Prior Records, and Funded Public Defenders. *Criminology & Public Policy*, 14(2), 233–246. <https://doi.org/10.1111/1745-9133.12130>
- Seguino, S., & Brooks, N. (2016). *RACIAL/ETHNIC DISPARITIES IN TRAFFIC STOPS: ANALYSIS OF VERMONT STATE POLICE DATA, 2010-15*. Retrieved from http://stephanieseguino.weebly.com/uploads/2/3/2/7/23270372/brooks_and_seguino_vsp_2010-15_final.pdf
- Simson, D. (2012). Restorative Justice and its Effects on (Racially Disparate) Punitive School Discipline. *SSRN Electronic Journal*. <https://doi.org/10.2139/ssrn.2107240>
- Staats, C., Capatosto, K., Wright, R. A., & Contractor, D. (2015). *STATE OF THE SCIENCE: IMPLICIT BIAS REVIEW 2015*. Retrieved from The Kirwan Institute for the Study of Race and Ethnicity website: <http://kirwaninstitute.osu.edu/research/understanding-implicit-bias/>
- Weber, R. (2014). *RACE AND SENTENCING IN VERMONT* (p. 32). The Vermont Legislature and The Vermont Commission on Human Rights.
- Willis, R. (2018). ‘Let’s talk about it’: Why social class matters to restorative justice. *Criminology & Criminal Justice*, 174889581880430. <https://doi.org/10.1177/1748895818804307>
- Wood, W. R., & Suzuki, M. (2016). Four Challenges in the Future of Restorative Justice. *Victims & Offenders*, 11(1), 149–172. <https://doi.org/10.1080/15564886.2016.1145610>