

**Youth Leaders in Law:** How can restorative justice improve the criminal justice system and access to justice and/or benefit Canadian society as a whole?

In October 2018, the IRPP published a report on a roundtable discussion issued by the Canadian Department of Justice that took place in Halifax, Montreal, Toronto, and Edmonton. The report discussed the problems surrounding the Canadian criminal justice system and what policies lawmakers should pursue to address those issues. The majority of the participants of the roundtable discussion agreed on two main points: The values and principles upheld by the current criminal justice system is seriously outdated and it has a negative impact on individuals who come into contact with it; and the current criminal justice system and it has a tendency to disproportionately target marginalized groups and populations that struggle to access adequate legal resources.<sup>1</sup> In other words, the Canadian criminal justice system needs to adopt a more modern doctrine that pursues rehabilitation over punishment in order to effectively rehabilitate, reform, and reintegrate offenders, as productive members, back into society. Furthermore, access to justice is a vital component of fairness in the legal system, a concept guaranteed by the Charter to all Canadians; ergo, the Canadian criminal justice system needs to allow greater accessibility to its legal services and resources by removing barriers that inhibits the public's ability to access those services in order to achieve greater fairness and equality within the Canadian legal system.

Section 15 of the *Canadian Charter of Rights and Freedoms* is particularly famous because of what it guarantees, "every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination".<sup>2</sup> Before any reforms can take place with the Canadian criminal justice system, it needs to allow the public greater access to its resources in order to attain greater equality and fairer outcomes in the legal system. Denying individuals adequate access to legal services, mainly through financial barriers, would also mean violating the Charter. Individuals who do not have the financial resources to access legal services have several disadvantages in the Canadian criminal justice system, which often leads to unfair verdicts such as longer and/or harsher punishments. This problem of inequality in the legal system is an issue of both upholding the Charter and human rights. Denying individuals access to justice, or sufficient access to justice, suggests that some individuals are more worthy of justice than others. In order for the Canadian criminal justice system to adequately uphold the Charter, it must attempt to tackle the issues surrounding the barriers to justice. However, before any benefit should be mentioned, some key issues surrounding the criminal justice system need to be discussed first, in order to understand what those benefits are and the importance of its impact on Canadian society.

Access to justice refers to an individual's ability to get legal counsel and representation when necessary, being informed as to what their rights are, how the legal system works when their liberties are at stake, and having adequate access to legal resources available to the individual. The Canadian criminal justice system's inability to adequately provide legal services

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<sup>1</sup> (*Rethinking Criminal Justice in Canada* 2018)

<sup>2</sup> (*Section 15 – equality rights* 2021)

to its citizens is a clear human rights issue; denying legal services to individuals, especially to marginalized populations, denies those individuals the right to equal protection and benefit of the law. Individuals who stand trial without legal counsel are more likely to plead guilty than those who have access to legal services.<sup>3</sup> Without proper knowledge of what the consequences are when declaring themselves as guilty, as well as an adequate defense that can mitigate the severity of their punishment, will have a profound impact on an individual's life as they are likely to serve longer sentences, become subject to unreasonable bail, or even become wrongfully convicted. Individuals cannot be seen or treated equally in the eyes of the law if they are unable to represent themselves properly, thereby undermining the Charter and the vital concept of equality in a legal setting. The severity of the consequences because of inadequate access to legal resources is quantifiable when analyzing the demographics of Canada's prison population, and the expenses involved when hiring legal counsel if the individual is ineligible for legal aid. In Alberta, individuals earning over \$20,000 annually are ineligible for legal aid, and must therefore hire a private firm when in legal trouble.<sup>4</sup> According to Ian Savage, a Calgarian defense attorney, the average fee of an attorney ranges from \$1,500 to \$10,000, depending on the attorney's experience; in addition to this, Balfour Der, another Calgarian defense attorney, stated that many people who come into contact with the criminal justice system make enough money annually to become ineligible for legal aid, but not enough to live on.<sup>5</sup> To put this to perspective, the median salary of First Nations Canadians is \$23,000 annually, therefore barring many First Nations from accessing affordable legal services.<sup>6</sup> The destitute salaries of many First Nation Canadians combined with the high expenses associated with hiring legal counsel have resulted in higher self representation cases in the criminal justice system, with many pleading guilty in the process. The lack of proper representation in the court of law, and therefore unequal treatment, have led to an overrepresentation of First Nations, Métis, and Inuit individuals in correctional facilities across Canada. Between 2018 and 2019, Indigenous adults accounted for 29% of the population who were admitted to federal custody, despite only making up 4.5% of the Canadian adult population.<sup>7</sup>

The correlation between the overrepresentation of a marginalized population in Canadian correctional facilities and the barriers that prevent those individuals from accessing adequate legal resources is clear. The financial barriers to justice, along with many other factors, continue to reinforce existing inequalities across Canada; these equalities will continue to prevail for as long as struggling individuals, especially those belonging to marginalized groups, are denied adequate access to legal counsel and resources. The criminal justice system cannot sufficiently enforce the rule of law and equal justice if it cannot provide marginalized communities with proper legal resources to properly, and adequately, present their case in the court of law to

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<sup>3</sup> (*A 'broken' system: Canadians can't afford lawyers but don't qualify for legal aid* 2019)

<sup>4</sup> (*A 'broken' system: Canadians can't afford lawyers but don't qualify for legal aid* 2019)

<sup>5</sup> (*A 'broken' system: Canadians can't afford lawyers but don't qualify for legal aid* 2019)

<sup>6</sup> (*Income* 2015)

<sup>7</sup> (Malakieh, *Adult and youth correctional statistics in Canada, 2018/2019* 2020)

receive a fair verdict. In order to achieve fairer outcomes and greater equality in the court of law, the criminal justice system must provide the public with proper access to legal counsel and resources, especially when their liberties are at stake. The struggling populations of Canada, along with the communities around them, stand to benefit from greater access to justice. Individuals who have access to proper legal counsel are less likely to plead guilty, thereby reducing the possibility of wrongful conviction cases in the criminal justice system, as well as the reduction of overrepresentation of marginalized groups in correctional facilities. Additionally, adequate access to legal counsel will also allow individuals to receive fairer verdicts and more reasonable punishments; ergo, convicted individuals spend less time in correctional facilities and take up less resources from law enforcement, and more time to reintegrate themselves into their communities. Access to justice provides individuals who stand trial with greater equality in the court of law, thereby affording them the right to fair and just punishments. In doing so, the criminal justice system not only enforces the ideas guaranteed by the Charter, but it also moves Canada forward progressively as struggling minorities can enjoy a system of justice that treats its population with greater indifference, regardless of wealth and social status, allowing them to stay, or reintegrate, in society as productive citizens.

In 1974, Russ Kelly and his friend went on a drunken rampage, vandalizing 22 properties in the small town of Elmira, Ontario. By the time Russ and his friend were arrested, the damages of their actions had amounted to more than \$3,000 worth of damages.<sup>8</sup> Instead of serving time in jail, their probation officer suggested a different punishment to the presiding judge, and he agreed. He stated there was “some therapeutic value in us meeting our victims,” and he compelled the two young men to go door-to-door to apologize to the people who were affected by their actions.<sup>9</sup> Canada had officially recorded its first case of restorative justice. On November 2, 2015, Russ Kelly agreed on an interview to discuss his experience with restorative justice and how he saw “the anger in their eyes and the disgust on their face—[Russ] felt very much ashamed” and had he been incarcerated that day, he “probably would have ended up in jail again.”<sup>10</sup> Kelly’s reflection on the events that transpired in 1974 is characterized by shame, gratitude, and sincerity, and it is these characteristics that the doctrine of restorative justice seeks to invoke in an individual to persuade them away from crime.

Unlike other doctrines to deter crime, restorative justice revolves around rehabilitation and repair rather than punishment. This allows the offender to acknowledge, and take responsibility, for the consequences of their actions. Furthermore, it allows the offender to communicate with the victim(s) and discuss viable solutions to reconcile the harm that they have inflicted. Restorative justice succeeded with the Elmira Case and how it allowed Russ Kelly and his friend to return to their communities as reformed individuals, committing no further harm to the people around them after they had received their second chance. The success of restorative

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<sup>8</sup> (*Elmira Case' tells of restorative justice for Russ Kelly's 1974 drunk rampage* 2015)

<sup>9</sup> (*Elmira Case' tells of restorative justice for Russ Kelly's 1974 drunk rampage* 2015)

<sup>10</sup> (*Elmira Case' tells of restorative justice for Russ Kelly's 1974 drunk rampage* 2015)

justice isn't unique to the Elmira Case; a report published by the government of Canada assessing the effectiveness of restorative justice in terms of recidivism showed that there was a 3% decrease, on average, in repeat offenses with individuals who underwent restorative programs.<sup>11</sup> When assessing the demographics of the study, it showed that there was an 8% reduction in recidivism among adults, and a 2% reduction among the youth population.<sup>12</sup> In contrast to the current correction doctrine that the Canadian criminal justice system subscribes to, denunciation and deterrence, shows that longer and harsher sentences neither reduces nor deters crime; rather, the opposite effect occurs. In a study involving over 300,000 offenders serving time in correctional facilities, research shows that there is a 3% increase in recidivism rates; in fact, the study revealed that longer sentences have a strong correlation with the increase in recidivism rates<sup>13</sup> The reduction, or increase, in recidivism becomes more significant when the cost of maintenance of correctional facilities and the offenders quartered there are considered. In 2016, the Canadian government spent over \$4.6 billion on adult correctional facilities, allocating roughly \$116,000 annually to one offender residing in any federal correctional facility.<sup>14</sup> This, therefore, raises the concern of the effectiveness of Canada's correctional facilities and its role in society. The doctrine of denunciation and deterrence, have time and again demonstrated the increase of recidivism, and sending the same offenders back to facilities paid for by taxpayers that produces little to no results while increasing the cost of maintenance through higher rates of recidivism and crime. Whereas restorative justice, practiced at a much smaller scale, has proved to be a far more effective doctrine in reducing crime; the consequences it produces are far more beneficial than that of denunciation and deterrence as it allows offenders to reform and reintegrate themselves back into society. In addition to reduction of recidivism, it successfully saves taxpayers money as less funding would be required to maintain correctional facilities, instead allowing that money to be allocated towards other programs that are beneficial to Canadians and/or reduces crime, such as welfare programs to the economically disadvantaged and greater accessibility to legal resources to the general public.

When analyzing the effects of restorative justice and access to justice, it can be concluded that the two work hand in hand to benefit Canadian society as a whole. The rehabilitation over punishment principle of restorative justice allows the Canadian criminal justice system to reduce recidivism rates by allowing the offender and the victim(s) to work out a viable solution that satisfies both sides. A reduction in repeat offenses, therefore, reduces the burden placed on correctional facilities and the funding necessary to maintain those facilities, allowing the criminal justice system more freedom to allocate its resources more effectively that is beneficial to the public. Additionally, restorative justice provides those who are willing to take the opportunity a second chance in their communities to return as reformed individuals who work to benefit the community around them. The funding up from reduced recidivism and money that

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<sup>11</sup> (*Restorative Justice and Recidivism* 2015)

<sup>12</sup> (*Restorative Justice and Recidivism* 2015)

<sup>13</sup> (*The Effect of Prison on Criminal Behavior* 2015)

<sup>14</sup> (*Cost of Incarceration*)

would normally be allotted to correctional facilities could go to legal aid and allowing the public, especially struggling populations, access to vital legal services, especially when their liberties are at stake. Eroding the financial barrier to access to justice goes a long way to ensure equality and fairness in the legal system. Individuals receiving fairer verdicts and reasonable lengths of punishments (although rehabilitation is preferred), reduces the amount of money needed to maintain offenders in federal facilities, once again allowing the criminal justice system to allocate its resources towards other more productive programs where many Canadians stand to benefit. Greater access to justice and allowing greater fairness in the legal system allows the criminal justice system to further fulfill its duty to the Charter and the equality it guarantees to all Canadians, for individuals that have adequate access to legal resources are more likely to receive fairer punishment, and access to justice guarantees access to those resources, regardless of social and economic factors. Additionally, adequate access to legal services will allow marginalized populations to better represent themselves in the court of law, a step in the right direction to reduce marginalization and overrepresentation in facilities designed to punish rather than rehabilitate. The combination of greater access to justice and restorative justice allows Canadian society to benefit from this progressive system in several ways spanning from saving taxpayers money and better quality public services, to upholding the values and principles of the Charter while reducing the inequalities that has marginalized many minority groups across the country, to providing individuals with another chance to redeem themselves and return to their communities as productive citizens rather than prisoners of an infinite cycle of recidivism.

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