

# Reforming and Resisting Criminal Law: Criminal Justice and the Tragically Hip

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## ABSTRACT

This paper examines two Tragically Hip songs, *38 Years Old* and *Wheat Kings*, with a view to understanding how they can be interpreted as a call both to reform and resist criminal law. In a reformist spirit, *38 Years Old* can be interpreted as an imaginary hypothetical that suggests that judges should be able to devise exemptions from all mandatory sentences, including life imprisonment for murder. The song can also be interpreted as a demonstration that imprisonment must be resisted and endured by offenders and their families because it will always be violent and destructive. *Wheat Kings* similarly can be interpreted as a call to reform remedies for the wrongly convicted and to make legal determinations of innocence. At the same time, *Wheat Kings* exonerated David Milgaard in 1992 long before the Canadian legal system did. In doing so, it illustrates how art, like media and science, can resist the coercive conclusions of the criminal law and can make normative conclusions that can be seen as a form of law.

**Keywords:** *Mandatory Sentences, Wrongful Convictions, Innocence Hearings, Prosecutorial Stays, David Milgaard, Law Reform, Critical Legal Pluralism.*

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## I. INTRODUCTION

Popular culture can reveal truths about the criminal law that are rarely seen in learned legal judgments or treatises. Such outsider or external perspectives can be dismissed as uninformed populist threats to the criminal law. At the same time, popular art can provide insights and criticisms that criminal justice professionals might otherwise miss and ignore at the peril of criminal justice losing public support and legitimacy.

Depictions of law in popular culture can also be seen as a form of legal pluralism that resists state law in a manner that itself constitutes a form of law. For example, Paul Butler has argued that hip-hop reveals much about American criminal justice because it “takes punishment personally” and because it refuses to view “all criminals with the disgust that the law seeks to attach to them.”<sup>1</sup> He has argued that hip-hop has its own theory of justice.<sup>2</sup>

As a teacher and criminal law writer of a certain age, it is not a coincidence that my two favourite bands are Bruce Springsteen and the E Street Band and The Tragically Hip. Both groups are “proletarian...with an intellectual sensibility”.<sup>3</sup> The summer of 2016 was for many Canadians tinged with bittersweet feelings as the Tragically Hip did a tour of Canada after announcing that their lead singer and songwriter Gord Downie had terminal brain cancer. The tour ended with a nationally televised concert in the Hip’s hometown of Kingston, Ontario. It had a reported viewership of 4 million with as many as 12 million, a third of Canada’s population, tuning in at some point.<sup>4</sup> The influence of popular artists such as the Hip or

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<sup>1</sup> Paul Butler, “Toward a Hip-Hop Theory of Punishment” (2004) 56:5 *Stan L Rev* 983 at 984-85.

<sup>2</sup> Paul Butler, *Let’s Get Free: A Hip-Hop Theory of Justice* (New York: New Press, 2009).

<sup>3</sup> Stephen Marche, “Watching Canada’s Biggest Rock Band Say a Dramatic Good-bye”, *The New Yorker* (20 August 2016), online: <[www.newyorker.com/culture/culture-desk/watching-canadas-biggest-rock-band-say-a-dramatic-goodbye](http://www.newyorker.com/culture/culture-desk/watching-canadas-biggest-rock-band-say-a-dramatic-goodbye)>.

<sup>4</sup> “Millions watch Tragically Hip Live on CBC” *CBC News* (21 August 2016), online: <<http://www.cbc.ca/news/canada/tragically-hip-cbc-broadcast-ratings-1.3730276>>.

Springsteen on the way that people think about criminal justice should not be under-estimated.

The Tragically Hip is a rock band influenced by blues, folk, and country. It was formed in Kingston, Ontario in 1983. Kingston is best known for its penitentiaries. Until recently, it was the home to six federal prisons. The oldest was Kingston Penitentiary that opened in 1835 and closed in 2013. Kingston's infamous Prison for Women across the road from Kingston Penitentiary opened in 1934 and closed in 2000. The father of one the Hip's members, Rob Baker, is a provincial court judge. Given this context, it is not surprising that some of the Hip's songs dealt with criminal justice.

This article will examine two of the Hip's songs.<sup>5</sup> *38 Years Old* recounts a 1972 prison escape from Millhaven Penitentiary just outside Kingston. It tells a story about Mike who at twenty years of age is imprisoned for killing the man who raped his sister. Mike as a thirty eight year old escapes only to be re-captured at his parents' home and returned to his other "home", Millhaven, a prison that was infamous for its violence towards prisoners.

*Wheat Kings* explores the long process, including the apparent intervention of Prime Minister Brian Mulroney, to correct David Milgaard's 1970 wrongful conviction for the murder of Saskatoon nurse Gail Miller. The song was released in 1992, the same year as the Supreme Court held that new evidence implicating another man in the murder meant that Milgaard's conviction was a miscarriage of justice. At the same time, the Court also concluded that Milgaard had not established his innocence either beyond a reasonable doubt or on a balance of probabilities.<sup>6</sup> Milgaard was only compensated in 1997 after DNA testing revealed that the other man, Larry Fisher, was the real killer of Gail Miller.

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<sup>5</sup> My review of the Hip's work relies on the helpful online repository of its work found at [www.hipmuseum.com/hiplyrics.html](http://www.hipmuseum.com/hiplyrics.html). There are a few other Hip songs that deal with criminal justice. The unreleased song *Montreal* deals with the massacre at École Polytechnique and *Locked in the Trunk of a Car* also examines crime and its aftermath and is interpreted by some as making reference to the murder of Pierre Laporte in October 1970. At the same time, Bruce Springsteen's work deals much more extensively with the criminal justice system perhaps reflecting the much greater use of imprisonment in the United States than Canada. For example, the 1984 album *Born in the USA* features a majority of its characters either being imprisoned or going to jail.

<sup>6</sup> *Re Milgaard*, [1992] 1 SCR 866, [1992] 90 DLR (4th) 1 [*Re Milgaard*].

There is a growing literature on law and popular culture. Much of this work has focused on film and television<sup>7</sup> and almost all of it is American. Some of it has focused on the two primary topics examined in this article: prisons and wrongful convictions. For example, there is a large literature on how prisons have been portrayed in films and television.<sup>8</sup> There is a smaller literature on popular culture and wrongful convictions.<sup>9</sup> For example, Brandon Garrett has examined the role that images have played in wrongful convictions.<sup>10</sup> More recently, the law and popular culture literature has engaged with the literature on critical legal pluralism.<sup>11</sup> This literature examines the narratives of popular culture as a form of law that can resist the dominant understandings promoted by state law.

The article engages with the law and popular culture and critical legal pluralism literature in a number of ways. First, it focuses on the prose of the lyrics as opposed to the analysis of images that dominates the literature. This article, like the Hip, also makes no apology for being Canadian. In doing so, it contributes to an examination of Canadian law in the light of Canadian popular culture.

This article also interprets the two Hip songs in light of the rich historical record<sup>12</sup> about the Millhaven prison break and David Milgaard's

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<sup>7</sup> Austin Sarat, ed., *Imagining Legality: Where Law Meets Popular Culture* (Tuscaloosa: University of Alabama Press, 2011); Richard Sherwin, "Nomos and Cinema" (2001) 48:6 *UCLA L Rev* 1519; Austin Sarat, Lawrence Douglas & Martha Umphrey, eds., *Law on the Screen* (Stanford: Stanford University Press, 2005); Amar Khoday, "Visualizing Interrogative Injustice: Challenging Law Enforcement Narratives of Mr. Big Operations Through Documentary Film" (2016) *Annual Rev of Interdisciplinary Justice Research* 152 at 156.

<sup>8</sup> Dawn Cecil, *Prison life in Popular Culture: From the Big House to Orange is the New Black* (Boulder: Lynne Rienner Publishers, 2015); Paul Mason, ed, *Captured by the Media: Prison Discourse in Popular Culture* (Cullompton: Willan, 2006).

<sup>9</sup> Stephen Mexal, "The Roots of 'Wilding': Black Literary Naturalism, the Language of Wilderness and Hip Hop in the Central Park Jogger Rape Case" (2013) 46:1 *African American Rev* 101.

<sup>10</sup> Brandon Garrett, "Images of Injustice" in Charles Ogletree Jr. & Austin Sara, eds, *Punishment in Popular Culture* (New York: New York University Press, 2015).

<sup>11</sup> Wendy Adams, *Popular Culture and Legal Pluralism* (New York: Routledge, 2017). Professor Adams builds on the critical legal pluralism work of the late Robert Cover and the late Rod Macdonald. See, for example, Robert Cover, "Nomos and Narrative" (1983) 97 *Harv L Rev* 4 [Cover]; and Rod Macdonald, "Custom-Made-For a Non-Chirographic Critical Legal Pluralism" (2011) 26:2 *CJLS* 301.

<sup>12</sup> See, for example, Willard Oliver & Nancy Marion, *Crime, History and Hollywood:*

wrongful conviction. The use of history and popular culture promotes critical distance from state law. This distance can be used to advocate for significant reform of the criminal law to respond to the injustices revealed in the two songs as amplified by the historical record.

Consistent with the critical legal pluralism literature, the two songs can also be seen as a form of law that declared Mike's punishment in Millhaven to be unjust and that declared David Milgaard to be innocent when the Canadian criminal justice system was not willing to do so. Critical legal pluralism, especially when joined with popular culture and history, can provide a vehicle both to advocate for reforming state law by revealing injustices but also for resisting the injustices imposed by state law.

This article contains two main sections: the first is devoted to *38 Years Old* and the insights it provides into punishment and prisons. The second is devoted to *Wheat Kings* and the perspectives it provides on wrongful convictions.

There are three parts to the two main sections. The first part examines the song in historical context, drawing from David Garland's "history of the present" approach. Garland uses Michel Foucault's genealogical mode of inquiry: namely the use of historical material to engage critically with the present. Genealogical analysis traces how "contemporary practices and institutions" emerge out of "specific struggles, conflicts, alliances and exercises of power, many of which are nowadays forgotten."<sup>13</sup>

The songs reveal the Hip as a band that knows and uses Canadian history as a resource to understand and critique Canada.

In the second part of each section, I examine how various legal reforms might respond to the injustices that the songs reveal. The songs, of course, do not call for specific reforms, but Gord Downie's inspiring work on Indigenous and other issues suggest that he has an interest in making Canada better. In particular, I examine the case for allowing exemptions from all mandatory sentences including for murder and for improving the processes to exonerate the wrongfully convicted.

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*Learning Criminal Justice History Through Motion Pictures* (Durham: Carolina Academic Press, 2013).

<sup>13</sup> David Garland, "What is a History of the Present? On Foucault's Genealogies and Their Critical Preconditions" (2014) 16:4 *Punishment & Society* 365 at 372. See also David Garland, *The Culture of Control* (Chicago: University of Chicago Press, 2001) at ch 1. I am indebted to Lisa Kerr for discussions on this point.

Each section concludes by examining the song as a form of resistance to state law and the creation of an alternative belief system<sup>14</sup> or as a form of “critical legal pluralism.”<sup>15</sup> These final sections demonstrate the normative potential of narrative to resist criminal law, even a reformed criminal law. *Wheat Kings* in particular is “juris-generative”<sup>16</sup> because it reveals how the Hip, along with the Milgaard family and other supporters, pronounced David Milgaard to be innocent when the Canadian legal system refused to do so. Viewed through the lens of critical legal pluralism, the two songs are not simply calls to reform and correct injustices in Canadian criminal law: they are themselves forms of law that deserve our attention and respect.

The internal reformist part of this article reflects and builds on some of my own modest efforts to reform Canadian law including with respect to mandatory sentences and the correction of wrongful convictions.<sup>17</sup> At the same time, the more external and legally pluralist parts of this article that resist aspects of state law reflect my growing appreciation that Canadian law,

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<sup>14</sup> Here I am influenced by Cover, *supra* note 11 (collective cultural production of meaning without relying on the state). A complementary but somewhat different approach that draws on autopoietic systems theory is used by David Schiff and Richard Nobles to illustrate how both science and the media discourse provide alternative understandings of reality that can be used to challenge wrongful convictions. See Richard Nobles & David Schiff, *Understanding Miscarriages of Justice* (Oxford: Oxford University Press, 2000) [Nobles & Schiff]; examining how science and media discourse challenge and resist the finality of criminal convictions.

<sup>15</sup> Martha-Marie Kleinhans & Roderick A Macdonald, “What is Critical Legal Pluralism?” (1997) 12:2 CJLS 25 at 40 & 46 [Kleinhans & Macdonald]; proposing a “critical legal pluralism” that rejects “authoritative interpretation” by experts or state law and celebrates and legitimates the normative conclusions drawn by other systems of meaning. I am indebted to an anonymous referee for bringing this article to my attention.

<sup>16</sup> Cover, *supra* note 11 at 25 (reference to cultural, creative and social process of meaning not limited to state law).

<sup>17</sup> I acted as counsel for the Canadian Civil Liberties Association that unsuccessfully argued in *R v Latimer*, 2001 SCC 1, [2001] 1 SCR 3; that mandatory life imprisonment violated s.12 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. I prepared a report for the Driskell Inquiry on reforming prosecutorial uses of stays of proceedings in wrongful conviction cases. See Manitoba, Department of Justice, *Report of the Commission of Inquiry into Certain Aspects of the Trial and Conviction of James Driskell*, (Winnipeg: Queens Printer, 2007) at Appendix F.

perhaps even reformed law, remains an alien and coercive force in the lives of some of the most disadvantaged.

## II. 38 YEARS OLD AND PUNISHMENT

### A. Historical Perspective: The 1972 Millhaven Prison Break

*38 Years Old* is a song about an escape of 14 inmates from Millhaven Penitentiary in July 1972. The song was released in 1989 as part of the Tragically Hip's second album *Up to Here*. Gord Downie, the lead singer and chief lyricist of the Hip, was 7 years old at the time of the escape. This and poetic license may explain why he described the escape as occurring in 1973 and involving 12 men. The Hip may have gotten the dates and the numbers wrong, but the song accurately notes that the pictures of the escapees were "lined up across the front page"<sup>18</sup> of the newspapers.

The 1972 escape came at a time of growing prisoner unrest and escapes from Canadian prisons. A commission of inquiry into the 1971 Kingston Penitentiary riot concluded that the prisoners who first entered Millhaven when it was prematurely opened during the riot were "required to run 'the gauntlet' formed by 10 to 12 prison guards armed with night sticks."<sup>19</sup> As Professor Michael Jackson notes "with such an induction ceremony, it was hardly surprising" that Millhaven "then the newest jewel in the correctional crown" had 19 major incidents in its first 6 years.<sup>20</sup>

In August 1972, the *Wall Street Journal* reported that prison escapes in Canada had increased 60% over the last year and involved 530 prisoners escaping from federal penitentiaries. It quoted a Conservative Member of Parliament that "law and order in Canada is a mess". It also noted that one escapee, Lucien Rivard, had "become something of a folk hero in Quebec" after escaping from Bordeaux prison by using a garden hose that he was allowed to use to water the prison's outdoor hockey rink.<sup>21</sup>

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<sup>18</sup> *38 Years Old* lyrics found online: [www.hipmuseum.com/uthlb.html](http://www.hipmuseum.com/uthlb.html) [*38 Years Old*].

<sup>19</sup> Solicitor General of Canada, *Report of the Commission of Inquiry into Certain Disturbances at Kingston Penitentiary During April 1971* (Ottawa: Information Canada, 1973) at 34.

<sup>20</sup> Michael Jackson, *Justice Behind the Walls: Human Rights in Canadian Prisons* (Vancouver: Douglas & McIntyre, 2002) at 50-51.

<sup>21</sup> Nick Thomas, "Stone walls do not a prison a make- or not in Canada at any rate", *The Wall Street Journal* (16 August 1972) A1 [Thomas].

Sport also played a key role in the 1972 Millhaven escape. It was widely reported that one of the 14 escapees, Richard Smith, was the star pitcher for the prison softball team. Smith was reported to have “suffered his worst defeat of the season” that night. A player who hit a home run off of Smith told the press that Smith “wasn’t himself. He didn’t move the ball around at all but was rather just throwing straight strikes.” He also recalled that Smith “just grinned” when the other player said he would see him later in the week when another softball game was scheduled at the prison.<sup>22</sup> Smith was removed from the game in the third inning. Prison officials believed this was “just what he wanted” because the team bench was close to the hole in the fence that the escapees used.<sup>23</sup> Sports can be a vehicle to humanize “the other” and make one appreciate their abilities and humanity. In this vein, the report of the Truth and Reconciliation Commission focused quite a bit on how young Indigenous children often turned to sports in the residential schools.<sup>24</sup>

*38 Years Old* also features a police chief telling the public that “they had nothing to fear” because the “last thing they want to do is hang around here”.<sup>25</sup> Most of the escapees were in fact apprehended within miles of the prison. Some, however, made it to Ottawa, Montreal, and Niagara on the Lake before being re-captured.

There were many media reports at the time of fearful and resentful residents in the Kingston area. A Bath resident argued that the escapees should be rounded up “with a machine gun. I think it’s near time they got tougher on those fellows. There’s no point treating them with kid gloves”. Other residents expressed concerns about repeated escapes and speculated that the guards “must have been sleeping when the ball game was on”. Another complained that the inmates had access to a colour television that he himself could “not afford”.<sup>26</sup> When artists such as the Hip and Springsteen write from the perspective of the offender, they place

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<sup>22</sup> “Sabres Lose Pitcher”, *Globe and Mail* (12 July 1972) 8.

<sup>23</sup> Thomas, *supra* note 21.

<sup>24</sup> Truth and Reconciliation Commission, *Canada’s Residential Schools: The History 1939-2000*, vol 1 (Montreal: McGill Queen’s University Press, 2015) at ch 43.

<sup>25</sup> *38 Years Old*, *supra* note 18.

<sup>26</sup> Ron Lowman, “Paul 14 guards his sister as 9 convicts on loose nearby”, *Toronto Star* (12 July 1972) 1 and 15.

themselves in the shoes of those who are unpopular and feared. They provide an important reminder of the humanity of offenders.<sup>27</sup>

The hunt for the escapees involved over 400 police officers and soldiers seconded from a nearby army base.<sup>28</sup> This detail explains the phrase in *38 Years Old* that after the escape “the Mounties had a summer time war to wage”.<sup>29</sup> The war metaphor also hints at the implicit threat of violence from the state while also underlining that the escapees were greatly outnumbered and bound to lose the “war”.

*38 Years Old* tells a story about an important piece of Canadian correctional history. The Millhaven prison break should be understood in the context of the violence among and against prisoners that led to the 1971 Kingston Penitentiary riot and the premature opening of Millhaven. The song alludes to this violence in its reference to “war”. When the fictional Mike is recaptured, his mother says that “the horrors have ceased”. Mike replies for “the time being at least”<sup>30</sup> likely in reference to Millhaven’s reputation for violence. Much of the emotional power of the song is contained in its contrast between Mike’s unsuccessful attempt to escape to his real home and his recapture and return to his violent “home” in Millhaven.

## B. Mike’s Guilt and Mandatory Sentences

The back story of *38 Years Old*, and its implications for the criminal law and sentencing, is found in its explanation of the murder for which Mike has already served 18 years before his escape. It suggests that Mike’s story is not as simple as the “hometown shame” that the media reports in an earlier verse. Rather the song explains that Mike’s “sister got raped so a man got killed. Local boy went to prison, man’s buried on the hill. Folks went back to normal when they closed the case. They still stare at their shoes when they pass our place”.<sup>31</sup> This verse conveys much in four short lines. It demonstrates the inability of the criminal law to distinguish different forms

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<sup>27</sup> On Springsteen’s approach to offenders, see Abbe Smith, “The Dignity and Humanity of Bruce Springsteen’s Criminals” (2005) 14:3 *Widener L J* 787.

<sup>28</sup> “Escapers elude cordon, steal guns”, *Globe and Mail* (15 July 1972) 1.

<sup>29</sup> *38 Years Old*, *supra* note 18.

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*

of moral blameworthiness and the injustice of “one size fits all” mandatory sentences for even the most serious crime of murder.

### *Mike’s Guilt and Murder*

A person like Mike who killed another to avenge a crime against a family member would most likely have subjective knowledge that the death of the victim was likely to occur. It would not matter either to Mike’s guilt or his punishment that he may have been an impulsive and inexperienced 20 year old at the time of the killing who had “never kissed a girl”. Depending on the circumstances, Mike might also have the additional fault requirement of planning and deliberation necessary to establish first degree murder under s.231(2) of the *Criminal Code*.

The inability of *mens rea* to distinguish good from bad motives for crimes is a longstanding feature of the criminal law. It has long inspired artistic critiques such as Jean Valjean in Victor Hugo’s *Les Miserables* who is convicted of stealing a loaf of bread to feed a child. The limits of *mens rea* to gauge moral blameworthiness are also revealed in debates about assisted suicide where until the recent *Carter*<sup>32</sup> decision, the criminal law did not provide relief for those who assisted in the death of another in order to relieve enduring and intolerable suffering.

It thus seems relatively clear that Mike would have the necessary *mens rea* to be convicted of second and perhaps first degree murder even after Charter-based reforms<sup>33</sup> ensured that no one could be convicted of murder in the absence of proof beyond a reasonable doubt of subjective foresight of death. This raises the question of whether Mike would have a valid defence.

Self-defence, including defence of others, would not cover revenge killings such as that committed by Mike. The new provision in s.34 of the *Criminal Code* arguably expands self-defence by placing less emphasis on proportionality. Nevertheless s.34 still requires that a person respond to a force of threat in the future and to have acted reasonably in the circumstances. The defences of necessity or duress would also not apply because the peril faced by Mike’s sister had passed. These criminal law defences support the state’s monopoly on punishment.

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<sup>32</sup> *Carter v Canada* (Attorney General), 2015 SCC 5, [2015] 1 SCR 331 [*Carter*].

<sup>33</sup> *R v Vaillancourt*, [1987] 2 SCR 636, 47 DLR (4th) 399; *R v Martineau*, [1990] 2 SCR 633, 6 WWR 97.

*Provocation?*

Provocation is a unique defence in Canadian criminal law because it is a partial excuse that reduces murder to manslaughter. It is Mike's most likely defence but even that is doubtful. Mike may have been subjectively provoked by his sister's rape. That, however, is not enough because the accused must also respond to provocation "on the sudden and before there was time for their passion to cool".<sup>34</sup> Mike would likely not qualify if he learned about his sister's rape days or perhaps even hours before the killing.

In addition to the requirements of sudden and subjective provocation, there would also have to be an objective basis for provocation in the sense that the conduct of the victim must be of such a nature "as to be sufficient to deprive an ordinary person of the power of self-control".<sup>35</sup> The Supreme Court has long stressed that this objective standard is designed to encourage "reasonable and non-violent behavior"<sup>36</sup> in upholding a conviction of a 16 year boy who killed a man who he claimed made sexual advances. More recently, the Court has upheld the denial of the defence in a case where a man killed a person he found in bed with his estranged wife. The Court stressed that the ordinary person should not be individualized or diluted to the point of defeating its purpose in encouraging proper behaviour.<sup>37</sup> Although sexual assault prosecutions notoriously often fail victims, it is unlikely that courts would even partially excuse Mike's vigilante but understandable violence. Without a basis in law, the jury that convicted Mike might never have been told about the provocation defence, thus preventing them from being an independent source of judgment and law on this matter and one that could potentially resist the law with its narrow focus on fault.<sup>38</sup>

Interestingly, one recent and controversial statutory restriction on the provocation defence might not apply in Mike's case. As part of its oft-criticized *Zero Tolerance for Barbaric Cultural Practices Act*,<sup>39</sup> the Harper government amended s.232(2)<sup>40</sup> to replace the long standing requirement

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<sup>34</sup> *Criminal Code*, RSC 1985, c C46, s 232(2) [*Criminal Code*].

<sup>35</sup> *Ibid.*

<sup>36</sup> *R v Hill*, [1986] 1 SCR 313 at 324, 27 DLR (4th) 187.

<sup>37</sup> *R v Tran*, 2010 SCC 58, [2010] 3 SCR 350.

<sup>38</sup> Benjamin L Berger, "The Abiding Presence of Conscience: Criminal Justice Against the Law and the Modern Constitutional Imagination" (2011) 61:4 UTLJ 579 [Berger].

<sup>39</sup> SC 2015, c 29.

<sup>40</sup> *Criminal Code*, *supra* note 34, s 232(2).

that provocation must be based on the victim's "acts or insults" towards the accused and replaced it with a requirement that the victim's actions must "constitute an indictable offence under this Act that is punishable by five or more years imprisonment". Rape or today sexual assault would qualify as such an offence. Mike's fictional case reveals how the amendment might expand the provocation defence by no longer requiring that the victim engage in an act or insult. For example, the defence might now apply even if a victim who was committing an indictable offence said or did nothing to the killer that could constitute an act or insult.

Mike's case reveals some of the curious logic of the 2015 amendment. On the one hand, the amendment was designed to restrict the defence, especially in the case of so-called honour killings.<sup>41</sup> On the other hand, by singling out those who had committed serious offences as less deserving of the full protection of the murder offence, it could possibly partially excuse vigilante violence against "criminals" deemed less worthy of the law's protections.

### *The Limited Ability of the Criminal Law to Judge Blameworthiness*

The above analysis reveals the limits of substantive criminal law in the form of *mens rea* requirements and defences in distinguishing between the moral blameworthiness of someone like Mike who kills in response to a grievous wrong to a family member and someone who kills for financial gain or sadistic satisfaction.

The failure of the criminal law to excuse or partially excuse Mike's crime may well be appropriate. *38 Years Old* does not attempt to glorify what Mike has done or to suggest that he should not have been punished for killing his sister's rapist. Indeed it affirms that as a result of Mike's action "a man is buried on the hill". At the same time it suggests that even though "they closed the case", there is something troubling about it because people "still stare at their shoes when they pass" Mike's family home.<sup>42</sup> This may suggest that the 18 years punishment that Mike has already endured and the punishment he will continue to endure when returned to his Millhaven "home" is disproportionate.

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<sup>41</sup> For my argument that the restrictions that the amendment placed on the provocation defence are arbitrary and violate the *Charter* see Kent Roach, "Vandalizing the Criminal Code with Irrational and Arbitrary Restrictions on Provocation" (2015) 62:4 *Crim LQ* 403.

<sup>42</sup> *38 Years Old*, *supra* note 18.

### ***Capital Punishment and Commutation***

Given the time frame in the song, Mike would have been convicted of murder in the 1950's when all murder in Canada was treated as capital murder subject to hanging. At the same time, this harsh and inflexible mandatory penalty was offset by an unfettered power of the Governor in Council to commute death sentences. The fact that Mike is still alive suggests that his death sentence was commuted. There has already been a departure from a mandatory sentence.

The 1956 Royal Commission on the Insanity Defence explained how the power of executive clemency was exercised after examining "all available sources of information" including "much evidence available for consideration that could not be presented in court under the rules of evidence governing courts in Canada." It quoted with approval a statement by a British minister in 1907 that "numerous considerations" including "the motive", "the amount of provocation", and the "character and antecedents"<sup>43</sup> of the offender would influence the exercise of discretion.

Mike's youth as a young adult who "had never kissed a girl" and who had killed his sister's rapist would have likely resulted in the commutation of his death sentence. The executive's power of commutation, like the power of prosecutorial discretion or jury nullification, can provide a vehicle for mercy and empathy. These qualities provide a source of judgment independent from the more rational and transparent rules that govern criminal liability.<sup>44</sup> To be sure, the executive's unfettered discretion in making commutation decisions could also be a source of arbitrariness and even discrimination, but it was also a vehicle for considering human frailties that are not relevant to the rationalist confines of substantive criminal law.

Today, the Court will not assume that harsh applications of mandatory sentences will be avoided by the wise use of prosecutorial discretion or executive clemency, but will instead invalidate grossly disproportionate sentences as cruel and unusual punishment contrary to s.12 of the *Charter*. This is largely a good thing, but it should make us pause that it was easier to make exceptions and depart from mandatory sentences for murder in the days of capital punishment than it is today.

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<sup>43</sup> Canada, Privy Council Office, *Report of the Royal Commission on the Defence of Insanity as a Defence in Criminal Cases* (Ottawa: Queens Printer, 1956) at 2.

<sup>44</sup> Berger, *supra* note 38.

*The Charter and the Mandatory Penalty of Life Imprisonment for Murder*

Under the *Charter*, the Supreme Court has emphatically rejected the idea of one off exceptions for sympathetic offenders such as Mike. It has reasoned that such exercises of judicial discretion will harm the rule of law values of “certainty, accessibility, intelligibility, clarity and predictability” and create an uncertain and unpredictable “divergence between the law on the books and the law as applied”.<sup>45</sup> The long history of commutation of death sentences, however, reveals that it was not that long ago that discretionary relief from mandatory punishment was much more readily accepted and used as a vehicle for making the criminal law more merciful and humane.

Mandatory sentences can be challenged not only as applied to the particular offender, but on the basis of reasonably hypothetical offenders. For example, the Court in 1987 struck down a seven year mandatory sentence for importing narcotics on the basis that it was cruel and unusual because it could be applied to a teenager who imported a joint of marijuana.<sup>46</sup> More recently, the Court struck down a one year mandatory minimum sentence for a second offence of possession of narcotics for the purpose of trafficking on the basis that it could be applied to the reasonably hypothetical offender of an addict who twice shared drugs with friends or who sold drugs to support his addiction and had made successful rehabilitation efforts by the time of sentencing.<sup>47</sup> The fictional case of Mike in *38 Years Old* seems no more fictional or unlikely as the reasonable hypotheticals used in the above real cases. Of course, Mike’s crime of murder is more serious than the crimes of importing or trafficking in narcotics.

The Supreme Court has already upheld mandatory life imprisonment for murder under the *Charter*. In *Luxton*,<sup>48</sup> the Court held that the mandatory sentence of life imprisonment with ineligibility for parole for 25 years for first degree murder was not cruel and unusual punishment even though the 25 year period was high and selected in order to win support for the abolition of the death penalty. The Court stressed the fault requirements for any murder conviction and the rationality of the serious

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<sup>45</sup> *R v Ferguson*, 2008 SCC 6 at para 69, [2008] 1 SCR 96 [*Ferguson*].

<sup>46</sup> *R v Smith*, [1987] 1 SCR 1045, [1987] 40 DLR (4th) 435.

<sup>47</sup> *R v Lloyd*, 2016 SCC 13, [2016] 1 SCR 130 [*Lloyd*].

<sup>48</sup> *R v Luxton*, [1990] 2 SCR 711, [1990] 6 WWR 137.

crimes including planned and deliberate killings and the killing of police officers and prison guards that Parliament selected as grounds for first degree murder.

The Court noted that offenders with special circumstances might be eligible “for the royal prerogative of mercy, the availability of escorted absences from custody for humanitarian and rehabilitative purposes and for early parole”.<sup>49</sup> Escorted absences from custody would allow offenders like Mike to see their families in some circumstances. Like commutation decisions, they would be granted by the executive on a discretionary basis. The reference to early parole referred to so-called faint hope hearings that allowed an offender to apply to a jury that could rule that the offender would be entitled to parole earlier than 25 years. Faint hope hearings were, however, subsequently abolished thus depriving juries of the ability to make discretionary decisions influenced by the same human factors that motivated the Hip to display a degree of empathy to Mike, the murderer, who had “never kissed a girl”. In addition, under the *Protecting Canadians by Ending Sentence Discounts for Multiple Murder Act*,<sup>50</sup> it would now be possible for Mike to be ineligible for parole for 50 or even 75 years if he killed more than one person. Such legislation with its punitive focus on ending discounts for second murders ignores the effect of punishment on the offender including issues that relate to motive and personal characteristics.

In *R v Latimer*,<sup>51</sup> the Supreme Court upheld that mandatory sentence of life imprisonment with a minimum of ten years ineligibility of parole for second degree murder. The Court recognized that Robert Latimer’s “good character and standing in the community, his tortured anxiety about Tracy’s well-being, and his laudable perseverance as a caring and involved parent”<sup>52</sup> mitigated punishment, but held that these did not outweigh the need to punish and denounce his intentional decision to take his daughter’s life. It viewed Latimer’s motive to prevent his daughter from suffering another painful surgery through the limited and rationalist lens of *mens rea* doctrine<sup>53</sup> when it commented:

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<sup>49</sup> *Ibid.*

<sup>50</sup> SC 2011, c 5.

<sup>51</sup> *R v Latimer*, 2001 SCC 1, [2001] 1 SCR 3 [*Latimer*].

<sup>52</sup> *Ibid* at para 85.

<sup>53</sup> In the earlier decision of *R v Morrisey*, 2000 SCC 39, [2000] 2 SCR 90; upholding a mandatory four year sentence for manslaughter with a firearm the Court similarly did

In considering the character of Mr. Latimer's actions, we are directed to an assessment of the criminal fault requirement or *mens rea* element of the offence rather than the offender's motive or general state of mind. We attach a greater degree of criminal responsibility or moral blameworthiness to conduct where the accused knowingly broke the law. In this case, the *mens rea* requirement for second degree murder is subjective foresight of death: the most serious level of moral blameworthiness.<sup>54</sup>

This is a thin approach to moral blameworthiness which focuses simply on the *mens rea* requirement of knowledge that the victim would likely die and disregarded why Latimer killed his daughter.<sup>55</sup> In contrast, motive is central to *38 Years Old* and most other artistic understandings of why people kill.

The Court in *Latimer* attempted to distance itself from the decision that Mr. Latimer would be subject to life imprisonment by noting that he could be granted parole earlier and the executive retained jurisdiction to grant him mercy. The Court also released its decision in January 2001 allowing Latimer to spend Christmas with his family.

Robert Latimer was eventually freed, but perhaps not as soon as the Court expected. The executive did not commute his sentence or grant him a pardon. He was initially denied parole in 2007 in part because he told the parole board that he believed he acted correctly in killing his daughter. On judicial review, he was granted day parole, but placed under strict conditions that he reside in a halfway house five days a week. These conditions were overturned in 2010 on judicial review.<sup>56</sup> The parole board denied a subsequent request that he be allowed to travel outside of Canada, but this was overturned on another successful judicial review.<sup>57</sup>

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not give weight to the fact that one accused had no motive for drunkenly killing his friend and was extremely remorseful. Similarly, in *Ferguson*, *supra* note 45; the fact that an accused killed the victim while attempting to exercise his duties as a police officer did not prevent the Court from upholding and applying a similar mandatory four year penalty.

<sup>54</sup> *Latimer*, *supra* note 51 at para 82.

<sup>55</sup> For criticisms of this aspect of the case, see Allan Manson, "Motivation, the Supreme Court and Mandatory Sentencing for Murder" (2001) 39 CR (5th) 65; Kent Roach "Crime and Punishment in the Latimer Case" (2001) 64:2 Sask L Rev 469.

<sup>56</sup> *Latimer*, *supra* note 51.

<sup>57</sup> The reviewing judge determined: "It is quite clear on the facts of this case, as it was at all levels of Court before me, that in considering Mr. Latimer's unique case, the principles of rehabilitation, specific deterrence and societal protection against risk from him do not apply. I cannot discern any basis for the Appeal Board to find that Mr. Latimer poses any risk to any persons inside or outside of Canada, or that an

Robert Latimer's saga underlines how it is dangerous to rely on parole or executive commutation to mitigate punishment. It also suggests that when it comes to murder, courts will give much weight to the fact that accused, like Mike, intentionally killed. They will be less influenced than the executive would have traditionally been in the motive of the killing and the chance of re-occurrence and the character of the offender. Unless the Court was prepared to reconsider *Latimer*, it is likely that Mike would be unsuccessful in challenging what today would be his mandatory sentence of life imprisonment. Punishment for murder in the *Charter* era may be more predictable and rational, but also often more harsh, than in the days of mandatory capital punishment.

***Reforming Mandatory Sentences: The Need for Exemptions from all Mandatory Sentences***

After a period of rejecting *Charter* challenges to mandatory sentences, the Supreme Court has become more active in the last few years and struck a number of them down. In the recent *Lloyd* case, Chief Justice McLachlin for the majority of the Court warned:

If Parliament hopes to sustain mandatory minimum penalties for offences that cast a wide net, it should consider narrowing their reach so that they only catch offenders that merit the mandatory minimum sentences. Another solution would be for Parliament to build a safety valve that would allow judges to exempt outliers for whom the mandatory minimum will constitute cruel and unusual punishment.<sup>58</sup>

The Supreme Court's call in *Lloyd* for Parliament to reform mandatory minimum sentences by creating statutory exemptions is a bit ironic given that such statutory reform is only necessary because the Court itself had refused to use its own remedial powers to create constitutional exemptions from them. In the 2008 decision of *R. v. Ferguson*, the Court expressed concerns about the uncertainty that case-by-case exemptions could cause. When extending the suspended declaration of invalidity in the *Carter* assisted dying case, a majority of the Court softened its position by allowing exemptions from the unconstitutional assisted suicide offence that it

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elimination of reporting requirements for international travel would present any real risk to public safety or adversely affect the protection of society under subsection 101(a) of the CCRA." *Latimer v Canada (Attorney General)*, 2014 FC 886.

<sup>58</sup> *Lloyd*, *supra* note 47 at paras 35-36.

allowed to operate for 4 more months. Even then four judges vigorously dissented on the same concerns about creating uncertainty that had motivated the Court to reject the use of exemptions both in *Ferguson* and in the original *Carter* decision.<sup>59</sup>

The Court's reluctance to use constitutional exemptions may eventually force Parliament to reform most mandatory sentences<sup>60</sup> even though one might have expected independent judges to be more sensitive to exceptional cases, such as that presented in *38 Years Old*, than Parliamentarians. In any event, fictional cases like Mike or the reasonable hypotheticals that feature in s.12 jurisprudence make the case for discretion to depart from mandatory sentences whether exercised by the executive in its commutation decisions, by judges or by Parliament.

Parliament when it enacts mandatory minimum sentences including life imprisonment for murder is institutionally incapable of seeing the most sympathetic offender possible. Parliamentarians cannot be expected to anticipate the Mikes or the Latimers that will be caught by a sentence designed to deter and denounce a specific crime but one stripped of the specificity provided by actual offenders. Cases like *Latimer's* and *Mike's* suggest that any statutory exemption should be extended to murder including first degree murder. This is because a person can kill and even can plan and deliberate about killing under extenuating and unforeseen circumstances that will not be recognized under criminal law defences. Such a statutory exemption scheme does not mean that anyone should be excused for intentional killings. Moreover, it would not result in automatic or indiscriminate leniency. Any exemption would have to be justified by the trial judge and could be challenged by appeal.

Cases like *Mike's* and *Latimer's* also suggest that it would be a mistake for Parliament to take up the Court's other suggestion in *Lloyd* for reform: namely an attempt to tailor offences more narrowly to ensure a better fit between the crime and the mandatory sentence. Such a tailoring would likely focus on elements of the prohibited act and the fault element that have been tightened under Canada's reformed murder offences, but it would not address the questions of motive or personal characteristics that help explain why *Mike's* punishment would strike many as grossly disproportionate and shocking to the conscience.

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<sup>59</sup> *Carter*, *supra* note 32.

<sup>60</sup> As suggested in Benjamin L Berger, "A More Lasting Comfort? The Politics of Minimum Sentences, the Rule of Law and *R. v. Ferguson*" (2009) 47 SCLR (2d) 101.

### *The TRC and Exemptions from Mandatory Sentences*

If Parliament amended the *Criminal Code* to allow trial judges to depart from every mandatory sentence it would follow the Truth and Reconciliation Commission's (TRC's) 32nd call for action. The TRC made this recommendation after documenting how Indigenous overrepresentation has increased in Canada's prisons even in the face of efforts taken by Parliament in s.718.2(e)<sup>61</sup> and the courts to remedy it. It argued that mandatory sentences and offence-based restrictions on conditional sentences were barriers to reducing Indigenous overrepresentation in Canadian prisons.

The TRC's call for action was not worded in a manner that only allows exemptions for Indigenous people and is based on the importance of sentencing discretion. It also contemplates that trial judges would have to justify departures from any mandatory sentence or restriction on a conditional sentence and that there should be both stable funding and evaluation of community sanctions. The TRC was not naïve about crime including the enhanced levels of victimization of Indigenous community, but nevertheless concluded that carefully justified departures from mandatory sentences could increase community safety by facilitating rehabilitation of offenders who in most cases will eventually be released.<sup>62</sup> A song that the Hip released in 1989 about the injustice of a mandatory sentence is consistent with the TRC's 2015 recommendations designed to respond to the legacy of residential schools. Art can inspire law reform proposals, but it remains to be seen if and how the TRC's law reform proposal will be applied to mandatory sentences for murder.

### *Summary*

In one line- "my sister got raped, a man got killed" - *38 Years Old* establishes a hypothetical that seems as reasonable and as likely to occur as the *Lloyd* hypothetical of a person convicted twice for trafficking for sharing drugs with friends. At the same time, the Hip's hypothetical is far more

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<sup>61</sup> *Criminal Code*, *supra* note 34, s 718.2(e)

<sup>62</sup> Truth and Reconciliation Commission of Canada, *Canada's Residential Schools Final Report: The Legacy*, vol 5 (Montreal: McGill-Queen's University Press, 2015) at 242. This recommendation was also consistent with that made by a jury led by retired Supreme Court Justice Ian Binnie who made the same recommendation with respect to offenders with fetal alcohol spectrum disorders. *Ibid* at 223. I disclose that I acted as the project lead on this volume of the TRC's report and as a member of the Binnie jury.

challenging to the law because it revolves around Mike's motive for committing murder. Like Robert Latimer, Mike might have lost a *Charter* challenge to the mandatory sentence of life imprisonment. As the song suggests, Mike would be returned to his Millhaven "home" despite the fact that the murder was understandable and he had "never kissed a girl". Ironically and contrary to fears that the *Charter* has made us lax towards criminals, Mike was more likely to be treated leniently in the pre-*Charter* era, first by having his mandatory death sentence for murder commuted by the executive and second by being much more likely to be granted parole in the early 1970's than a contemporary offender given the increased reluctance of parole boards to grant parole and our declining faith in rehabilitation.<sup>63</sup>

Unless Parliament allows statutory exemptions from all mandatory sentences, the Mikes of Canada will continue to face "freezing slow time away from the world".<sup>64</sup> Alas the federal government may be reluctant to extend statutory exemptions from mandatory sentences to murder. It might argue that there is no need to allow exemptions because this mandatory sentence has survived *Charter* challenge first in *Luxton* in 1990 and then in *Latimer* in 2001. The above analysis has suggested that *Luxton* may no longer be good law because of the abolition of faint hope hearings and the stacking of 25 years of parole ineligibility. In addition, the outcome of *Latimer* may not have been what the Court expected and is a reminder that it is dangerous to rely on the executive to provide relief against mandatory sentences. At the same time, there is a danger that these precedents will loom large in policy-making about the scope of any exemption from mandatory sentences. If so and assuming (contrary to the above argument) that *Luxton* and *Latimer* remain good law, this would be another example of the minimal standards of the *Charter* becoming de facto maximum standards of the fairness that can be expected from the state towards offenders.<sup>65</sup> This would be regrettable given that the hypothetical of Mike

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<sup>63</sup> Anthony Doob, Cheryl Webster & Allan Manson, "Zombie Parole: The Withering of Conditional Release in Canada" (2014) 61 *Crim LQ* 301 at 309. See generally Garland, *supra* note 13.

<sup>64</sup> *38 Years Old*, *supra* note 18.

<sup>65</sup> On the dangers of the minimum standards of the *Charter* becoming maximum standards when crafting criminal laws see Kent Roach, "The Dangers of a Charter-proof and Crime-based Response to Terrorism" in Ronald Daniels, Patrick Macklem & Kent Roach eds, *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001); Kent Roach, "Reforming Criminal Justice and

in *38 Years Old* and the historical record suggests that “mercy for murderers” was routine in pre-*Charter* Canada.<sup>66</sup>

### C. Resisting and Enduring Punishment

The above interpretation of *38 Years Old* as a reasonable and compelling hypothetical that supports the ability of judges to craft exemptions from all mandatory sentences undoubtedly reflects my own policy preferences and pre-occupations. Moreover, it could reasonably be criticized as an over reading or even overt politicalization of a good song. *38 Years Old* does not advocate exemptions from all mandatory sentences. That is not the job of the artist.

#### *Mike’s Resistance to the Violence of the Criminal Law*

By using the familiar cultural motif of a prison break, the song can be seen as a celebration of human agency in resisting punishment. This fits into a long tradition of rock being associated with rebels and outlaws. Such a reading of *38 Years Old* sits uneasily with Canadian myths which have traditionally stressed the importance of order. To be sure, Canada’s national symbol, the Mounties, makes an appearance in the song. The Mounties appear not as a benevolent force bringing law and order, but as an army who is at “war” with Mike and his small band of escapees. In appealing to Mike as an outlaw underdog and by making him human, Gord Downie is working in a similar tradition as Bruce Springsteen,<sup>67</sup> an artist who makes more than one favourable appearance in Downie’s work. The focus on the prison break suggests that criminal law should simply be resisted rather than reformed.

Despite its rock and roll or rebel account of a prison escape, there is a somber tone in the music and words of *38 Years Old*. From the start, it seems clear that Mike is going to lose his “war”. The Mounties will get their man, Mike will have a pathetically short time to be re-united with his family before

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National Security in an Age of Populism” (2017) 64 *Crim LQ* 286 at 309-314.

<sup>66</sup> Carolyn Strange, “Mercy for Murderers: An Historical Perspective on the Royal Prerogative of Mercy” (2001) 64:2 *Sask L Rev* 559.

<sup>67</sup> Bruce Springsteen’s recent autobiography joyfully recounts an incident early in his career when a member of his band, the late Danny Federici, was wanted by the police, but avoided capture when Springsteen invited the crowd onto the stage in order to allow Federici to make his escape. See Bruce Springsteen, *Born to Run* (New York: Simon and Schuster, 2016) at 144.

being forcibly returned to his prison “home”. This could be seen as a triumph of a Canadian preference for order over liberty, but in a way that surely critiques Canadian practices. This also accords with the Downie’s uneasy acceptance that the Hip has become an icon of Canadian identity. He used the last Hip’s concert in Kingston and his subsequent album about residential schools as a plea for Canadians to not simply recognize their history, but to improve on it.

### *The Resistance by Mike and his Family*

The idea that *38 Years Old* is about resisting the law raises the question of who is imposing state law and who is resisting it. As discussed above, the “Mounties” and in reality a combination of policing, military and prison officials were the ones who tracked down and re-captured the Millhaven escapees.

But who is Mike? He is possibly a composite of two of the escapees. One, Robert Clark, was indeed 38 years old at the time of the escape. He was captured the morning after the escape when he was flushed by tracker dogs. He was serving a sentence of life imprisonment for escaping prison,<sup>68</sup> suggesting that he was a recidivist resister or escapee. Another of the escapees, 25 year old Rudolph Nuss, was like Mike, re-captured at his parent’s home. Press reports suggest that Nuss, who was serving a sentence for robbery and was arrested at his parents’ Niagara home was planning to cross the border to the United States. *38 Years Old*, however, reveals another possibility. Nuss may have wanted to see his family and receive help from them. The emotional heart of *38 Years Old* is a twice repeated verse that describes the family home as “same pattern on the table, same clock on the wall. Been one seat empty eighteen years in all”.<sup>69</sup>

Artists can humanize offenders in a way that not only invokes our compassion but provides an alternative and more complex verdict than that produced by state law. A family’s love and acceptance of an offender underlines that he or she is not the sum of the worst or most stupid thing they have ever done in their lives. Theories of restorative and Indigenous justice also suggest that families and others close to offenders have the potential to assist offenders in changing their behavior in a way that prison

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<sup>68</sup> “The Millhaven break out: 10 down, 4 to go”, *Toronto Star* (22 July 1972).

<sup>69</sup> *38 Years Old*, *supra* note 18.

officials cannot.<sup>70</sup> *38 Years Old* affirms the importance of keeping a place at the family table even when offenders cannot be present. The importance of family is an important connection between *38 Years Old* and *Wheat Kings*. Both songs are uplifting to the extent that they show families supporting sons who are being punished for murder and providing alternative verdicts about both the offence and the offender.

*38 Years Old* depicts Mike's family reacting to the escape in various ways. The father tells the police that he "will tell him if he saw anything", but it is unclear that he did. Mike is captured so perhaps his father told the police, but such an action would be a shocking betrayal given that Mike's family has kept a place at their table for him for 18 years. In this way, the song juxtaposes the punishment and separation of Mike from the community under state law with his family's continued acceptance of Mike as symbolized by keeping a place for him at the table. This focus on Mike's inclusion in his family rather than his separation from society when viewed through the lens of critical legal pluralism resemble more communitarian responses to crime including that promoted by Indigenous law or restorative justice.

Perhaps fearing for her son's safety from the armed police, Mike's mother appears to express relief at his capture when she cries "The horror has finally ceased". This represents the ability of mothers to place the safety of their children above all else. It also suggests that Mike's mother is naïve about what awaits Mike after his capture. Mike, who unlike his mother, knows what it is like to be in Millhaven replies that "Yeah, for the time being at least".<sup>71</sup> Mike was returning to a violent prison "home"<sup>72</sup> that was the antithesis of his family's home.

Mike's younger brother clearly assists in the escape by holding "back the curtains" after hearing "the tap on my window in the middle of the night". This a powerful depiction of brotherly support and love. It also evokes the possibility of happier and more successful adventures. This is likely not the first time that Mike's brother assisted him in sneaking into the family home, albeit after an adventure that apparently did not include kissing a girl.

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<sup>70</sup> See generally John Braithwaite, *Crime, Shame and Re-Integration* (Cambridge: Cambridge University Press, 1989); Kent Roach, *Due Process and Victims Rights* (Toronto: University of Toronto Press, 1999) at chs 8 & 9 (exploring differences and similarities between restorative and Aboriginal forms of justice).

<sup>71</sup> *38 Years Old*, *supra* note 18.

<sup>72</sup> *Ibid.*

*Empathy and its Limits*

The protagonist of *38 Years Old* is named Mike which is also the name of Gord Downie's older brother. This form of personalization of the story resulted in many people erroneously thinking that the song was autobiographical. This confusion eventually led the Hip not to play the song at their concerts. Although the song may have created some problems for Downie and his family, these problems are a testament to the power of its narrative and the ability of good art to allow people to stand in another's shoes. Feminist commentators such as Martha Minow<sup>73</sup> have suggested that this method can be extended to judging. Minow urges that judges should attempt to understand the unique perspectives of the litigants that appear before them. *38 Years Old* provides some of the raw and emotional material that could allow the listener and perhaps even a judge to attempt to stand in the shoes of offenders.

At the same time, there is a real limit to the ability of judges fully to stand in an offender's shoes. As the late Robert Cover reminded us, punishment will always be experienced by offenders as a form of violence.<sup>74</sup> Even a judge who empathized with Mike would likely send him away for a time. This, combined with my pessimistic analysis about Mike's legal chances of being acquitted or escaping a mandatory sentence of life imprisonment suggests that Mike will have to endure continued punishment when returned to his Millhaven "home". The empathy that even the most sympathetic and sensitive judge can display will have real and hard limits. Mike will have to draw on his internal resources and the empathy of his family to endure the punishment including the increased punishment for the escape that he will face. Mike must hope that his family continues to support him by keeping an empty seat at the dinner table and that one day the horrors will truly have ceased and he can return to his real home.

The above interpretation of *38 Years Old* reminds us that sometimes the criminal law simply must be resisted and when, as in the song, resistance is defeated by capture and conviction, punishment must be endured. The criminal law has a limited ability to understand offenders (and victims) or

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<sup>73</sup> Martha Minow, *Making All the Difference* (Ithaca: Cornell University Press, 1990).

<sup>74</sup> Robert Cover, "Violence and the Word" (1986) 95:8 Yale LJ 1601. For a recognition of the difficulty of a man imagining the experiences of a woman, however, see Justice Wilson's statement in *R v Morgentaler*, [1988] 1 SCR 30 at 171-172, [1988] 44 DLR (4th) 385.

to see how many offenders may also be victims. Judges may attempt to place themselves in the shoes of those affected by the criminal law, but ultimately the coercive and hierarchical reality of the criminal law creates and maintains barriers.

### *38 Years Old as a Declaration that Mike's Sentence is Unjust*

Consistent with the critical legal pluralism literature,<sup>75</sup> it is also possible to interpret *38 Years Old* as a form of law itself that pronounces Mike's punishment to be unjust and disproportionate, regardless of whatever conclusion might be drawn by state law. The Hip and their listeners might simply conclude that it is unjust or that it shocks the conscience to imprison a young man who had "never kissed a girl"<sup>76</sup> because he killed his sister's rapist. This presents an alternative sense of justice to state law where fault is not measured exclusively by the rules of criminal liability or even discretion in enforcement of the law.

To the extent that the test for cruel and unusual punishment seeks to rely on community standards, the legal system should not ignore that many ordinary people would have found Mike's or Latimer's punishment to be excessive. To be sure, such conclusions can be dismissed as populist or uninformed, but the criminal law will lose legitimacy if there are too many cases where there is a wide divergence from the public's verdict and those produced by state law. In addition, there is the real possibility that the criminal justice system has already lost legitimacy among those who are the objects of state law and those, like the Hip, who identify with them.

### *Summary*

*38 Years Old* operates on many levels. The 1972 Millhaven prison escape was, as the song suggests, front page news that did not end well for the escapees. Mike's ultimately futile escape to his real home and his return to his Millhaven "home" is poignant. Interpreted in historical context, *38 Years Old* recalls a time of particular violence and unrest in Canada's prisons.

The backstory to *38 Years Old* reveals how the criminal law would impose a severe mandatory sentence (death, at the time referred to in the song and life imprisonment today) on a 20 year old who killed someone who had raped his sister. This speaks to the limited ability of the criminal

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<sup>75</sup> See for example Kleinhans & Macdonald, *supra* note 15.

<sup>76</sup> *38 Years Old*, *supra* note 18.

law to differentiate different forms of moral blameworthiness and the limited scope of criminal defences that largely seek to maintain the state's monopoly on legitimate violence. It also reveals mandatory sentences as blunt and harmful instruments that will inevitably punish those offenders who commit a crime under the most extenuating and sympathetic conditions. The reasonable hypothetical of Mike suggests that Parliament should respond to the Supreme Court's call in *Lloyd* and the Truth and Reconciliation Commission's 32<sup>nd</sup> call for action by empowering trial judges to justify departures from all mandatory sentences, including murder even though the Supreme Court has upheld such sentences from *Charter* challenges.

Finally, *38 Years Old* reminds us of the limits of even a reformed criminal law. Mike may not receive a merciful exemption even if one was now available. Even if he does, he will still serve time in prison. The song reminds us that those most directly affected by the criminal law will need the assistance and love of their families and the keeping of place at the dinner table to endure both the harms that the criminal law responds to and the harms that it imposes. It provides an alternative legal verdict that does not reduce Mike to the abstract category of being a murderer but sees him as a son and a brother: in other words, as a person.

### III. *WHEAT KINGS* AND WRONGFUL CONVICTIONS

#### A. Historical Perspective: David Milgaard's Long Struggle To Be Exonerated

*Wheat Kings* is one of the Hip's most popular songs. Like Springsteen's *Born in the USA*, however, it can be misinterpreted by casual listeners. It is vitally important to understand that *Wheat Kings* was released in 1992. It exonerated David Milgaard as innocent in the same year that the Supreme Court refused to do so. It also recognized that wrongful convictions were "nothing new" at a time when the Canadian criminal justice system was still very reluctant to admit it made mistakes.

*Wheat Kings* can be interpreted as a call to reform criminal law to better remedy wrongful convictions and to allow for determinations of innocence, but its historical context suggests that it could be dangerous to rely on the legal system as the sole remedy for wrongful convictions. This leads to an external perspective that stresses the ability of art, like science, and the

media,<sup>77</sup> to resist the conclusions of state law. In declaring David Milgaard to be innocent, *Wheat Kings* also suggests that art can produce its own form of law.

***“Our Parent’s Prime Ministers”<sup>78</sup> and Ministerial Review of Miscarriages of Justice***

The Milgaard case was consistently in the news in the late 1980’s and early 1990’s as Milgaard’s mother, Joyce, led a very public campaign to persuade Minister of Justice Kim Campbell to exercise the powers of the royal prerogative of mercy under what was then s.690 of the *Criminal Code*<sup>79</sup> to re-open Milgaard’s 1969 conviction for murdering Saskatoon nurse Gail Miller. This was the only way to re-open the case because Milgaard’s appeal in the courts had been exhausted. As one of Milgaard’s lawyers, David Asper has written: “In Canada, lawyers must try cases in the courts and not in the media. The problem in the Milgaard case was that we couldn’t get to court”.<sup>80</sup> Like Mike in *38 Years Old* who must have had his mandatory death penalty for murder commuted by the Cabinet, Milgaard’s fate depended on the actions of elected politicians and not judges.

Joyce Milgaard was rebuffed when she tried directly to speak to Campbell who as Minister of Justice was the ultimate decision-maker.<sup>81</sup> After Campbell eventually denied the first application in 1988, supporters started an “an overt political campaign” against her and the “Department of Justice”. As Asper explained, “we had nothing to lose, and we held nothing back”.<sup>82</sup>

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<sup>77</sup> Nobles & Schiff, *supra* note 14.

<sup>78</sup> *Wheat Kings* lyrics found online: <[www.hipmuseum.com/fullylb.html](http://www.hipmuseum.com/fullylb.html)>.

<sup>79</sup> *Criminal Code*, *supra* note 34, s 690 as it appeared in 1988.

<sup>80</sup> David Asper, “No One’s Interested in Something You Didn’t Do’: Freeing David Milgaard the Ugly Way” in Adam Dodek & Alice Wooley, eds, *In Search of the Ethical Lawyer* (Vancouver: University of British Columbia Press, 2016) at 71.

<sup>81</sup> Joyce Milgaard wrote her own song in response to this rebuff. It started with the following verse: “Please, Madame Minister, listen to me. Please, Madame Minister, set David free. He is not guilty, you have the proof. How can you stand there so cold and aloof?” See Joyce Milgaard with Peter Edwards, *A Mother’s Story* (Toronto: Doubleday Canada, 1999) at 154. Like *Wheat Kings*, this song declares David Milgaard to be innocent.

<sup>82</sup> *Ibid* at 73.

The campaign included an unscheduled but famous discussion between Prime Minister Mulroney and Joyce Milgaard in September 1991 in front of a Winnipeg hotel. With his characteristic flair, Mulroney later recalled that there was “just something so forlorn but very loving about a woman standing alone on a very cold night in Manitoba on behalf of her son”. He added that “it was a question of our system being able to respond to the need for justice... and as Prime Minister, well to make suggestions, let me put it that way”.<sup>83</sup> The second petition was granted a few months later, much more quickly than the first application had been denied.

The different treatment of the two applications remains a matter of controversy to this day. Mulroney in his memoirs claims he intervened on Milgaard’s behalf while Campbell in her memoirs claims that no such intervention took place.<sup>84</sup> Thus two of our “parent’s Prime Ministers” do not agree on what happened. A Commission of Inquiry into Milgaard’s wrongful conviction could not get to the bottom of what happened because the federal government successfully restrained the provincial inquiry from examining the matter.<sup>85</sup> This perhaps explains why the Ministerial review process for many who work for the wrongfully convicted remains “dark, yellow and sinister hung with the pictures of our parents’ prime ministers”. The hard work in finding the new evidence that is necessary to re-open wrongful convictions also forces the wrongly convicted to work in “a museum” while those they attempt to exonerate are “locked up in it after dark”.<sup>86</sup>

### *The Supreme Court Reference*

A few months after Joyce Milgaard spoke with Prime Minister Mulroney, Minister of Justice Campbell referred the second application directly to the Supreme Court of Canada. This was an unusual procedure likely taken because Milgaard’s former defence lawyer was a member of the Saskatchewan Court of Appeal which would have normally heard the fresh

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<sup>83</sup> “Mulroney describes role in freeing Milgaard”, *Globe and Mail* (30 July 1997) A3.

<sup>84</sup> Saskatchewan, Edward P MacCallum, Commission of the Inquiry into the Wrongful Conviction of David Milgaard, *Report of the Commission of Inquiry into the Wrongful Conviction of David Milgaard* vol 1 (Saskatoon: Ministry of Justice, 2008) at 376 [Milgaard Inquiry].

<sup>85</sup> *Canada (Attorney General) v Saskatchewan (Milgaard Inquiry Commission)*, 2006 SKQB 385, [2006] 50 Admin LR (4th) 165.

<sup>86</sup> *Wheat Kings*, *supra* note 78.

appeal. It also responded to the intense public pressure and campaigning for Milgaard.

The Supreme Court heard the case at a time when it was preoccupied with issues of trial delays. Chief Justice Lamer and four other Justices devoted 16 days to hearing witnesses including David Milgaard and Larry Fisher from a witness box specially constructed in the Ottawa court-room for the Reference.<sup>87</sup> Both Milgaard and Fisher testified that they did not kill Gail Miller, creating an uncertainty that is also reflected in *Wheat Kings'* lyrics which refer both to "the killer" and "someone standing in the killer's place".<sup>88</sup>

### *The Milgaard Guidelines to Prove Innocence*

The Supreme Court issued guidelines during the reference that indicated that it was prepared to determine and declare whether Milgaard was innocent. This is exceptional for a criminal justice system that traditionally has limited itself to verdicts of guilty or not guilty, the latter including everything from innocence to failure to establish guilt beyond a reasonable doubt. The Court's guidelines responded to Milgaard's claims of innocence, but also perhaps a growing sense, as indicated in *Wheat Kings*, that wrongful convictions of the innocent were "nothing new".<sup>89</sup>

The Court's guidelines, however, assigned considerable weight to the finality of Milgaard's 1970 murder conviction. They placed the onus on Milgaard to prove his innocence either on a civil standard of the preponderance of the evidence or beyond a reasonable doubt. The latter standard was extraordinary given that it is normally only the state with its powers and resources that is expected to prove anything beyond a reasonable doubt.

### *The Court's Ambiguous Judgment*

In the end, the Supreme Court issued a short and ambiguous judgment that found that Milgaard had not proven his innocence on either standard, but that given the new evidence implicating Larry Fisher that Milgaard's continued conviction would constitute a miscarriage of justice. This finding

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<sup>87</sup> Stephen Bindman, "Antonio Lamer and Wrongful Convictions: A Journey from Confidence to Contrition" in Adam Dodek & Daniel Jutras, eds, *The Sacred Fire: The Legacy of Antonio Lamer* (Toronto: LexisNexis, 2009) [Bindman].

<sup>88</sup> *Wheat Kings*, *supra* note 78.

<sup>89</sup> *Ibid.*

reflects that the long recognized ground of allowing appeals on the basis of a miscarriage of justice. A miscarriage of justice under the *Criminal Code* is a broader concept than the concept of wrongful conviction of the factually innocent that is often used by Innocence Projects and the media and is sometimes used by the legal system as a basis for deciding whether to compensate the wrongfully convicted. It includes a broad range of procedural or substantive errors that places either the fairness of the trial or the reliability of the conviction in serious doubt.<sup>90</sup>

The Court's judgment resulted in Milgaard's release a few days later, but it fell far short of the exoneration that Milgaard wanted. The short judgment was published in full in many newspapers at the time. The judgment went out of its way to conclude that Milgaard had been convicted after a fair trial, thus seemingly absolving the justice system of any responsibility for the miscarriage of justice. The Court also concluded that Milgaard had failed to establish his innocence either beyond a reasonable doubt or on a balance of probabilities. This was a huge defeat for Milgaard who had consistently and correctly claimed that he was innocent.

At the same time, the Court advised the government that in light of new evidence regarding Larry Fisher's similar acts of violence towards women in downtown Saskatoon that Milgaard's continued conviction would be a miscarriage of justice. In addition, the Court indicated that even if Milgaard was convicted at a new trial, he should be pardoned by the executive. The Court seemed to recognize that Milgaard who had already served 23 years in prison and was in a fragile mental state, had had enough.

The concluding paragraphs of the 1992 Reference are a study in ambiguity that should be quoted in full in order to appreciate the significance of *Wheat Kings*:

While there is some evidence which implicates Milgaard in the murder of Gail Miller, the fresh evidence presented to us, particularly as to the locations and the pattern of the sexual assaults committed by Fisher, could well affect a jury's assessment of the guilt or innocence of Milgaard. The continued conviction of Milgaard would amount to a miscarriage of justice if an opportunity was not provided for a jury to consider the fresh evidence.

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<sup>90</sup> For a discussion and defence of the breadth of the concept of a miscarriage of justice see Bibi Sangha, Kent Roach & Robert Moles, *Forensic Investigations and Miscarriages of Justice* (Toronto: Irwin Law, 2010) at 2-3, 105-106.

It is therefore appropriate to recommend to the Minister of Justice that she set aside the conviction and direct that a new trial be held.

It would be open to the Attorney General for Saskatchewan under the *Criminal Code*<sup>91</sup> to enter a stay if that course were deemed appropriate in light of all the circumstances.

However, if a stay is not entered, a new trial proceeds and a verdict of guilty is returned, then we would recommend that the Minister of Justice consider granting a conditional pardon to David Milgaard with respect to any sentence imposed.<sup>92</sup>

### ***Media Reactions to the Court's Judgment***

The media, like popular culture, can provide valuable insights into the law that legal professionals should not ignore. Although generally sympathetic to Milgaard's release, the media was quite critical of the Supreme Court's judgment and the difficult position it left Milgaard in. For example, the *Toronto Star* argued that "the court's reasoning is, at best, tortuous....the court said Milgaard deserves a new trial. But it urged the Saskatchewan government not to proceed. But should the province go ahead, and a jury find him guilty, the court recommended that Justice Minister Kim Campbell pardon him." It summed up the Court's decision as giving Milgaard "the freedom he needs but not the exoneration he sought."<sup>93</sup>

Geoffrey Stevens was even more critical. He argued "now, 23 years later, the system grudgingly releases Milgaard, a huge cloud over his head, penniless and unemployable". He added if Joyce Milgaard "had not button-holed Mulroney, there would have been no Supreme Court review, Milgaard would be staying in prison and Campbell would be insisting, of course, that her precious system works".<sup>94</sup> The Court's failure to be persuaded of Milgaard's innocence could be related to the high burden of proof it placed on Milgaard and the lack of a DNA exclusion at the time, but it is also a reminder that the legal system may be less generous in deciding whether to exonerate people than social, media, and artistic processes.

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<sup>91</sup> *Criminal Code*, *supra* note 34, s 579.

<sup>92</sup> *Re Milgaard*, *supra* note 6 at 873-874.

<sup>93</sup> "A Second Trial for David Milgaard", *Toronto Star* (15 April 1992) A22.

<sup>94</sup> Geoffrey Stevens, "Credit PM, not the system, for Milgaard Outcome", *Toronto Star* (19 April 1992) B3.

*Saskatchewan's Stay of Proceedings*

The Saskatchewan government was even less sympathetic to Milgaard than the Supreme Court. Serge Kujawa, an NDP backbencher, who had represented the Attorney General of Saskatchewan in Milgaard's unsuccessful appeal to the Saskatchewan Court of Appeal, criticized "the media circus" surrounding the case. He argued that the Supreme Court had made its decision "on a mercy basis that Milgaard has put enough time in the penitentiary. That's not its purpose, and that's why I object to all this going on this way".<sup>95</sup> His approach suggested that mercy had no place in the law and indicated a desire to keep the law autonomous and superior to the "media circus". Similar defences of the autonomy and supremacy of the legal system would re-surface many years later in the Milgaard Inquiry report.

Saskatchewan Attorney General Robert Mitchell told a news conference: "We will not be offering any compensation to David Milgaard...The bottom line is that there was nothing that was brought before the Supreme Court which convinced even one justice that Mr. Milgaard is either innocent or a victim of a miscarriage of justice."<sup>96</sup> Mitchell elaborated, "The Supreme Court couldn't find him innocent, so it's difficult for me where I am to make a pronouncement on that subject. All I can do is decide whether or not to proceed with a trial. There's nothing I can do to dispel (the cloud over Milgaard)".<sup>97</sup> This statement assumed that only the Supreme Court could declare Milgaard to be innocent.

Attorney General Mitchell had the last word in denying Milgaard a new trial, but his decision to enter a stay was widely criticized in the media. The *Globe and Mail* argued that Milgaard should face a new trial because the Court's decision left him in a "kind of legal limbo" in which he will be a "free citizen" but one with "no apology, no compensation, no acquittal". Milgaard's 23 years in prison constituted "exceptional circumstances" that merited a new trial as a way of removing some of "the tarnish on his reputation" and ensuring that he was "innocent without question marks".<sup>98</sup> Milgaard never received a new trial and, as will be seen, he failed in other attempts to have the legal system recognize his innocence.

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<sup>95</sup> "Supreme Court ruling on Milgaard has Saskatchewan abuzz", *Ottawa Citizen* (16 April 1992) A11.

<sup>96</sup> "Free at last, prisoner mulls plans", *Vancouver Sun* (18 April 1992) A10.

<sup>97</sup> Stephen Bindman, "Out but not really free", *Ottawa Citizen* (18 April 1992) A3.

<sup>98</sup> "A new trial for David Milgaard", *Globe and Mail* (22 April 1992) A14.

### *Public Reactions to Milgaard's Legal Limbo*

A dark legal cloud still hung over Milgaard in 1992 when *Wheat Kings* was released. The song, however, can be seen as part of a social process of exonerating Milgaard by referring to him serving “for something that he didn’t do”. The song’s reference to “a nation whispers we always knew he would go free” also refers to wide-spread but far from unanimous public support for Milgaard in 1992.

A public opinion poll in May 1992 found that 75% of respondents believed that a public inquiry should have been held into Milgaard’s conviction and 60% believed that Milgaard should receive compensation, something which seems consistent with a belief in his innocence. At the same time, support for compensating Milgaard was lower in Manitoba and Saskatchewan where less than a majority of respondents (46%) believed that Milgaard should be compensated.<sup>99</sup> This divergence of opinion puts a bit of an edge on an Ontario-based band calling Saskatoon “the Paris of the Prairies”.<sup>100</sup>

It was five years after both Milgaard and *Wheat Kings* were released that DNA found at the scene of the murder was identified as Larry Fisher’s with the benefits of new testing procedures. Fisher was a serial rapist who had attacked other women in Saskatoon. He was subsequently convicted of Miller’s murder. It was only after this new definitive evidence that the legal system recognized Milgaard as an innocent person. The Saskatchewan government apologized to him and agreed to \$10 million in compensation.<sup>101</sup> This remains the largest settlement for a Canadian

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<sup>99</sup> Stephen Bindman, “Most Canadians support Milgaard’s call for an inquiry”, *Canwest News* (4 May 1992).

<sup>100</sup> There has been competition over the famous “Paris of the Prairies” remark with Winnipeg and Chicago both claiming the mantle. There is also dispute over whether it relates to the river running through Saskatoon or its vibrant artistic community. In 2009, Montmartre, Saskatchewan (population 500) even constructed a 1/38 scale model of the Eiffel Tower in an attempt to establish its claim to the label. See Patrick White, “We will always have Paris, even in Saskatchewan”, *Globe and Mail* (3 July 2009), online: <<https://www.theglobeandmail.com/news/national/well-always-have-paris-even-in-saskatchewan/article4278307/>>.

<sup>101</sup> “Milgaard will get \$10 million compensation”, *CBC News* (17 May 1999) online: <<http://www.cbc.ca/news/canada/milgaard-will-get-10-million-compensation-1.174896>>.

wrongful conviction, but one that averages to slightly over \$40,000 for each year David Milgaard spent in prison.

*Wrongful Convictions as “Nothing New”*

The Hip’s recognition in *Wheat Kings* that wrongful convictions were “nothing new” in 1992 was ahead of the times. Interestingly in light of Gord Downie’s subsequent role in championing Indigenous issues, two of Canada’s wrongful convictions at the time involved Indigenous accused.<sup>102</sup>

In 1989, the Royal Commission on Donald Marshall’s Jr.’s prosecution exonerated the Mi’kmaq man who, like Milgaard, had been convicted as a teenager by a jury for a murder he did not commit. Like Milgaard, the legal system had not exonerated Marshall even while it reversed his conviction.<sup>103</sup> Both Milgaard and Marshall had long hair at the time of their trials and looked very different from the juries that convicted them. The reference in *Wheat Kings* to “Our parent’s prime ministers” underlines that the Hip identified with and had more in common with the teenagers charged in both cases than with those older adults who charged and convicted them.

In 1992, the Alberta Court of Appeal on another reference from the Minister of Justice overturned the murder conviction of Wilson Neepose, a Samson Cree man.<sup>104</sup> Marshall, Milgaard, and Neepose were the three contemporary wrongful convictions that in 1992 justified the Hip’s conclusion that wrongful convictions were “nothing new”.<sup>105</sup>

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<sup>102</sup> See generally, Kent Roach, “The Wrongful Conviction of Indigenous Persons in Australia and Canada” (2015) 17:2 Flinders LJ 203.

<sup>103</sup> Nova Scotia, *Royal Commission on the Donald Marshall Jr. Prosecution* (Halifax: Queens Printer, 1989) at 7 (concluding that the Nova Scotia Court of Appeal had in reversing Marshall’s murder conviction in 1983 erroneously suggested he was guilty of robbery and perjury and had mounted “a defence of the criminal justice system at the expense of Donald Marshall Jr. in spite of overwhelming evidence that the system itself had failed.”).

<sup>104</sup> *R v Neepose*, [1992] ABCA 77, [1992] 12 CR (4th) 296.

<sup>105</sup> Historically astute Canadians (which Downie and the Hip have proven to be) would also have recognized both the Wilbert Coffin and Stephen Truscott cases as possible wrongful convictions even though the Supreme Court allowed Coffin to hang and upheld Truscott’s conviction. In *R v Coffin*, [1956] SCR 191, 114 CCC 1; the Supreme Court initially declined to even hear Coffin’s appeal, but on a reference to the Court held that the jury was entitled to presume Coffin’s guilt of murder because he was found in possession of goods stolen from the victims and that he had a fair trial even if some of the jurors could not speak his language and the jurors attended a movie during the trial with some of the police officers who testified for the Crown. Two of the seven

The Canadian legal system was more reluctant in 1992 than the Hip to accept the reality of wrongful convictions. The Supreme Court still allowed fugitives to be extradited to face the death penalty. It was only in 2001 that the Court prohibited the practice in light of the growing recognition of the reality of wrongful convictions.<sup>106</sup> Stephen Bindman has documented how Chief Justice Lamer's approach to wrongful convictions evolved considerably from 1992 when as the lead on the Milgaard panel he practically invited Saskatchewan to enter a discretionary stay to when in 2006 as the author of a public inquiry on three wrongful convictions in Newfoundland, Lamer criticized such prosecutorial stays for leaving the wrongfully convicted in legal limbo. In 2006, Lamer was also prepared to apologize to the wrongfully convicted, something that neither the Court nor the Saskatchewan government did in 1992 for David Milgaard.<sup>107</sup>

## B. Correcting Wrongful Convictions and Determining Innocence

*Wheat Kings* raises a number of legal issues that over a quarter of a century later remain controversial. The first is the process used to correct wrongful convictions once appeals have been exhausted. Should elected politicians or "Our parents Prime Ministers" make such decisions about re-opening convictions? Should the law be more interested "In something you didn't do" by making determinations and declarations of innocence?

### *Reforming the Correction Process for Wrongful Convictions*

David Milgaard's two applications to Minister of Justice Kim Campbell to re-open his conviction were made under what was then s.690 of the *Criminal Code*. The Inquiry into Milgaard's wrongful conviction concluded that this remedy: "Presented a number of challenges for the Milgaards. The

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judges who heard the case dissented and would have ordered a new trial. In Reference *Re Truscott*, [1967] SCR 309, [1967] 2 CCC 285; the Supreme Court over one dissent affirmed Stephen Truscott's murder conviction after hearing new evidence. It was only in 2007 after the introduction of additional new scientific evidence that the Ontario Court of Appeal indicated that Truscott was not guilty, though even then the Court did not declare him innocent. See Reference *Re Truscott*, 2007 ONCA 575, [2007] 225 CCC (3d) 321 [*Re Truscott*].

<sup>106</sup> *United States v Burns*, 2001 SCC 7, [2001] 1 SCR 283.

<sup>107</sup> Bindman, *supra* note 87.

remedy was in the absolute discretion of the Minister and a definitive test was not stated nor did one exist”.<sup>108</sup> The Minister of Justice was advised by former Supreme Court Justice William McIntyre, but the Milgaards’ did not have access to his opinion in the course of their appeal for the mercy of the Crown. At the same time it was this type of procedural flexibility that perhaps allowed Prime Minister Mulroney to influence the process that eventually culminated in Milgaard’s release from prison.

In 2002, the s.690 process was replaced with the current process contained in ss.696.1-6 of the *Code*. It now provides a more defined and procedurally regular process, but one in which the Minister of Justice still has the exclusive power to re-open a case by ordering a new trial or a new appeal.<sup>109</sup> Section 696.3(3) (a) of the *Code* provides that the Minister may provide a remedy if he or she “is satisfied that there is a reasonable basis to conclude that a miscarriage of justice likely occurred”<sup>110</sup> and s.696.4 affirms that the provision is not intended to serve as an additional appeal. It only provides “an extraordinary remedy” often on the basis of “new matters of significance”.<sup>111</sup>

Just as the historical context of *38 Years Old* reveals that exemptions for mandatory sentences used to be routine, a historical perspective on wrongful conviction review suggests that the 2002 reforms may not be as favourable to the accused as older law. The present s. 696.3 sets a higher standard for Ministerial intervention than applied from 1892 to 1955 when a predecessor provision had provided that as part of the commutation process the Minister of Justice could direct a new trial or refer the case in whole or part to the Court of Appeal “If he entertains a doubt whether such person ought to have been convicted...”.<sup>112</sup> This is an important reminder that procedural transparency and regularity may not necessarily be a guarantee of justice and that it can be a mistake to think that the *Charter* era has ushered in a new era of progress and fairness. Concerns about delays and bias in the Ministerial review process persist under the 2002 reforms

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<sup>108</sup> Milgaard Inquiry, *supra* note 84 at 101.

<sup>109</sup> *Criminal Code*, *supra* note 34, s 696.1-6.

<sup>110</sup> *Ibid*, s 696.6(3) (a).

<sup>111</sup> *Ibid*, s 696.4.

<sup>112</sup> *Criminal Code*, RSC 1927, c 36, s 1022(2). It is also a higher standard than used by the Criminal Cases Review Commission in England and Wales which refers cases back to the Court of Appeal if there is “a real possibility” that a conviction will not be sustained. See *Criminal Appeal Act*, 1995 c 35, s 13; see also *R v CCRC ex parte Pearson*, [1999] 3 All ER 498, [1999] Crim L Rev 732.

and a number of people who have been wrongfully convicted have found creative ways to avoid the process.

*The Milgaard Inquiry: Its Reform Proposal and Criticism of the Milgaard Campaign*

The inquiry into Milgaard's wrongful conviction recommended that Ministerial involvement be replaced by the creation of an independent agency such as the Criminal Cases Review Commission that has made similar decisions in England and Wales since 1997. The Commission's recommendation in this regard was in large part driven by the Commissioner's decidedly negative views about the publicity campaign that accompanied Milgaard's two applications for Ministerial review. For example Commissioner MacCallum wrote:

The involvement of a federal politician in the review of individual cases of alleged wrongful conviction invites public advocacy in a media campaign, a war in which the truth is likely to be the first casualty. Although it can be said that the Milgaard case was unprecedented in the intensity of its media campaign, other wrongful conviction advocates have also relied upon public support to put pressure on the federal Minister.<sup>113</sup>

He contemplated that a commission would be a neutral agency "independent of the government of the day" that would be immune from accusations of "political favoritism, or of having succumbed to political pressure".<sup>114</sup>

The Milgaard inquiry's recommendation for an independent agency echoes those made by other commissions of inquiry. I have argued in support of such a reform in the past as have many others.<sup>115</sup> At the same time, however, the Milgaard inquiry was controversial and lost the support of many in Canada's small innocence community in no small part because Commissioner McCallum was so determined to criticize the lobbying that took place for David Milgaard during the two s.690 applications and to

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<sup>113</sup> Milgaard Inquiry, *supra* note 84 at 377.

<sup>114</sup> *Ibid.*

<sup>115</sup> See Bibi Sangha, Kent Roach & Robert Moles, *Forensic Investigations and Miscarriages of Justice* (Toronto: Irwin Law, 2010) at ch 12. For a recent article that demonstrates how the Canadian Ministerial review process since 2002 has produced far fewer corrections of miscarriages of justice on a per capita basis than the CCRC or its Scottish equivalent and concludes that a CCRC should be formulated in Canada see Emma Cunliffe & Gary Edmond, "Reviewing Wrongful Convictions in Canada" (2017) 64 Crim LQ 475.

eliminate any repeat performance. For example, the Commissioner concluded:

A repetition of the sort of media campaign launched in the Milgaard case would not be a desirable thing. Members of the Milgaard group themselves admitted that it was unfortunate, but necessary. Without agreeing with that, I can say that without limiting freedom of expression, some way should be found to at least lessen recourse to sensational publicity as a means of getting a remedy under s. 690 of the *Criminal Code*. One solution which holds promise is the replacement of the federal Minister in such applications with an independent review commission, of which more will be said later. [One witness]...said that the media campaign gave a black eye to the whole administration of justice. I accept that.<sup>116</sup>

The Milgaard Commission's criticism of those who successfully campaigned for Milgaard's innocence (implicitly including the Hip) is very harsh. They engaged in a "media campaign" that revolved around "sensational publicity" and even "a war in which the truth is likely to be the first casualty." It almost seems as if the real mischief being addressed is the danger of negative publicity that gives a "black eye to the whole administration of justice" as opposed to the actual miscarriage of justice.

The Milgaard's commission's criticism of the publicity campaign sits uneasily with its candid and important finding that the ultimate decision on the second application "was based on the need to air the issues, given the public outcry, and not on a reasonable basis for finding that justice had miscarried".<sup>117</sup> Taken to the logical conclusion, this suggests that the second application should not have been allowed with Milgaard remaining in jail at least for five more years before more definitive DNA evidence was available.

The Milgaard Inquiry seems to be proposing a type of exchange: an independent body should be created so that wrongful conviction cases no longer have to be argued in the media. Acceptance of such a bargain seems to me to be unwise because any independent commission could make errors. In addition, the legal system does not normally make determinations of innocence and when it did in the Milgaard reference, it got it wrong. Unless one believes that the legal system does not make mistakes or is above criticism, the option of arguing your case in the court of public opinion should never be foreclosed.

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<sup>116</sup> Milgaard Inquiry, *supra* note 84 at 720.

<sup>117</sup> *Ibid* at 749.

As a matter of constitutional principle and institutional design, it is difficult to dispute the idea that an independent commission would be better suited to review cases than the federal Minister of Justice even assisted by independent advisors and investigators such as retired judges. At the same time, it should be acknowledged that some who have had applications rejected by the independent CCRC have expressed dissatisfaction with the commission and argued that it is not concerned enough with whether applicants are innocent.<sup>118</sup>

The Milgaard inquiry argued that an independent commission would act in an inquisitorial manner, but over 95% of applicants to the CCRC in England and Wales have their applications rejected, often on a preliminary basis. There is some evidence that applicants to the CCRC who are legally represented are more likely to receive a new appeal from the Commission.<sup>119</sup> In addition, the CCRC has shown little interest in studying the systemic causes of wrongful convictions, much less advocating for reforms to address them.<sup>120</sup>

The Milgaard Inquiry may have painted too rosy a picture of the CCRC in its attempt to prevent the type of lobbying that led to Milgaard's 1992 reference. In doing so, it may have placed too much faith in legal reforms and ignored the continued importance of campaigning on behalf of the wrongfully convicted: campaigning that was essential to obtaining Milgaard's release and exonerated him when the Supreme Court was not prepared to do so. Campaigning challenges state law's assertion of a monopoly on questions of guilt and innocence. As such, campaigning constitutes a form of legal pluralism as well as a form of democratic engagement.

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<sup>118</sup> For a collection of essays critical of CCRC and in particular with its focus on appellate doctrine on reversing convictions as opposed to concerns about factual innocence, see Michael MacNaughton, ed, *The Criminal Case Review Commission: Hope for the Innocent?* (London: Palgrave, 2010). See also the various articles in (2012) 58:2 Crim LQ 135-302 for a special issue examining the merits of the present Canadian system and the comparative experience with commissions.

<sup>119</sup> Jacqueline Hodgson & Juliet Horne, *The extent and impact of legal representation on applications to the Criminal Cases Review Commission* (Coventry: CCRC, 2009), online: <papers.ssrn.com/sol3/papers.cfm?abstract\_id=1483721>.

<sup>120</sup> Kent Roach, "The Role of Innocence Commissions: Error Correction, Systemic Reform or Both?" (2010) 85:1 Chicago-Kent L Rev 89.

An alternative to a CCRC, one now used in some Australian states, is to allow a person like Milgaard to apply for a second appeal without any executive intervention if appellate courts determine that there is “fresh and compelling evidence”.<sup>121</sup> As a matter of constitutional principle it may be better to place responsibility for correcting wrongful convictions on the judiciary than even an independent executive agency. That said, a weakness of the new Australian approach is that it depends on the wrongfully convicted to gather new evidence often while they are still imprisoned in their “museum”.<sup>122</sup>

An independent commission that can re-open convictions may still be the optimal reform, but one must still carefully consider the possibility that even an independent commission could make errors, not have resources fully to investigate most cases it considers, and that it will likely reject the vast majority of applications it considers. Even when a commission refers a case back to the courts, it is unlikely because of its quasi-judicial role to champion an applicant’s innocence or systemic reforms that may better protect the innocent from wrongful convictions. As will be seen, the legal system will not generally make determinations of innocence. The sort of campaigning for exoneration seen in *Wheat Kings* will always have an important role to play. It may be discomfoting to legal professionals concerned with the repute of the justice system, but campaigning does not deserve the harsh criticism it received from the Milgaard Inquiry. Moreover, campaigning should not be abandoned even if the process of correcting miscarriages of justice is reformed.

### *Reforming Prosecutorial Uses of Stays of Proceedings*

As discussed above, the decision of the Saskatchewan Attorney General to stay proceedings after the reference played a key role in depriving David Milgaard of a hearing that could have resulted in him receiving a not guilty (but not an innocent) verdict. The Milgaard Inquiry found no misconduct in the prosecutorial decision given the Supreme Court’s “broad hint”<sup>123</sup> in the 1992 reference that a stay should be used. Nevertheless, it agreed with

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<sup>121</sup> See generally, Bibi Sangha & Robert Moles, *Miscarriages of Justice: Criminal Appeals and the Rule of Law in Australia* (Sydney: Butterworths, 2015). See also generally (2015) 17:2 Flinders LJ 155-537 for a symposium on the recent Australian experience with some comparisons to Canada.

<sup>122</sup> *Wheat Kings*, *supra* note 78.

<sup>123</sup> Milgaard Inquiry, *supra* note 84 at 337.

both the Lamer Inquiry in 2006 and the Driskell Inquiry in 2008 that prosecutorial stays should be used more sparingly in wrongful conviction cases because they promoted and prolonged the stigma and suspicions engendered by the original conviction. If there was no genuine and foreseeable prospect of a new trial, all three inquiries recommended that prosecutors use alternatives to stays of proceedings such as withdrawing charges or calling no evidence so that people like Milgaard had an opportunity at least to receive a not guilty verdict.

Such legal reforms may not, however, be enough. The late Romeo Phillion had his conviction quashed in 2009 as a result of a Ministerial reference. Ontario prosecutors withdrew charges instead of staying proceedings. Phillion, like Milgaard, wanted an exoneration. A court rejected Phillion's challenge of the prosecutorial decision.<sup>124</sup> This is not surprising given that courts defer to the exercise of prosecutorial discretion in the absence of a clear abuse of process.<sup>125</sup> This underlines the continued and pervasive role of discretion in our justice system. This means that the wrongfully convicted, those who have been most harmed by prosecutorial decisions, often remain dependent on prosecutorial discretion. Even if such discretion is exercised to provide the wrongfully convicted with an acquittal, this may not result in exoneration. The presumption of innocence that applies in law once a conviction has been reversed may be more fictional than real for those who have been wrongfully convicted of murder.

### *Milgaard's Continued and Failed Search for a Legal Exoneration*

Once the prosecutorial stay was entered in his case, David Milgaard was denied access to a criminal trial to make the case that he was innocent. Like others who have been wrongfully convicted, including Romeo Phillion,<sup>126</sup> Milgaard turned to the civil courts in an attempt to establish his innocence. In a little noticed episode, Milgaard once again did not find what he was looking for from the legal system.

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<sup>124</sup> *R v Phillion*, 2010 ONSC 1604, [2010] 214 CRR (2d) 284.

<sup>125</sup> *R v Anderson*, 2014 SCC 41, [2014] 2 SCR 167.

<sup>126</sup> After his challenge to the Crown withdrawal of charges was unsuccessful, Mr. Phillion commenced civil litigation. His claim was struck out as an abuse of process, but this was reversed in *Phillion v Ontario (Attorney General)*, 2014 ONCA 567, 121 OR (3d) 289.

Milgaard sued police and prosecutors involved in the case, alleging a wide ranging conspiracy. His conspiracy claim was not struck out,<sup>127</sup> but the trial judge went out of his way to suggest that Milgaard could not bring a malicious prosecution lawsuit because he had not been declared innocent.<sup>128</sup> This underlines the “Catch 22” that the wrongfully convicted can find themselves in: the criminal justice system generally does not make determination of innocence but proof of innocence is often a prerequisite for compensation and exoneration.

Milgaard next brought a \$1.3 million defamation claim against the Saskatchewan Attorney General. The Attorney General defended this lawsuit claiming that it was an abuse of process. Preliminary litigation did not go well for Milgaard with a judge refusing to strike out the Attorney General’s claim of qualified privilege for making the remarks or his claim that Milgaard was an abuse of process. Justice Barclay stated:

It can be argued that as Milgaard was convicted of the murder of Gail Miller, the conviction, which was upheld by the Saskatchewan Court of Appeal, is at a minimum, prima facie proof that the person committed the offence.... It must be emphasized that Milgaard had his opportunity to establish his innocence on a balance of probabilities before the Supreme Court of Canada. The court exhaustively reviewed all of the evidence that could be called on the question of Milgaard’s guilt or innocence which included the testimony of Milgaard that he had nothing to do with the murder of Gail Miller.<sup>129</sup>

Given these discouraging results, as well as his limited resources, it is not surprising that Milgaard’s two civil lawsuits designed to establish his innocence never proceeded to trial. Milgaard failed to persuade either the Supreme Court or the civil courts to recognize his innocence. This suggests that the wrongfully convicted must often look outside of state law for determinations and declarations of innocence.

### *“Nobody’s Interested in Something You Didn’t Do”:<sup>130</sup> Legal Determinations of Innocence*

The declaration of David Milgaard’s innocence in *Wheat Kings* raises the question of whether the legal system should make determinations of innocence that could contribute to exonerations.

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<sup>127</sup> *Milgaard v Saskatchewan*, [1994] 118 DLR (4th) 653, [1994] 9 WWR 305 (SK CA).

<sup>128</sup> *Milgaard v Kujawa*, [1994] 1 WWR 338 at paras 17-19, 112 Sask R 241 (SK QB).

<sup>129</sup> *Milgaard v Mitchell* (1996), [1997] 3 WWR 82, 151 Sask R 100 (SK QB).

<sup>130</sup> *Wheat Kings*, *supra* note 78.

The criminal justice system does not provide for determinations and declarations of innocence, something noted by the Ontario Court of Appeal when it decided that it could not make a declaration that William Mullins Johnson was innocent after his conviction for murdering and sexually assaulting his niece was overturned after the Indigenous man had served 12 years in prison. Mullins-Johnson was one of the many persons who were wrongly convicted as a result of Charles Smith's flawed pathology evidence. The Court of Appeal raised policy concerns that determinations of innocence would create two classes of not guilty verdicts and that they may be difficult to make without definitive evidence such as DNA.<sup>131</sup>

Christopher Sherrin has argued that the legal system should be reformed to include innocence hearings and determinations. He stresses that innocence is often treated by governments as a prerequisite to compensation and that the question of innocence often matters greatly for society and the wrongfully convicted person.<sup>132</sup> I agree with Professor Sherrin that if used, innocence hearings should only be conducted at the request of the previously convicted and they should not be based on the high standard of proof beyond a reasonable doubt employed by the Supreme Court in the Milgaard Reference.<sup>133</sup>

At the same time, the Supreme Court's failure to find that Milgaard had established his innocence on a balance of probabilities should sound a cautionary tale about legal determinations of innocence. The UK system has in recent years moved towards requiring the wrongfully convicted to establish innocence as part of the compensation process. Concerns, however, have been raised that the legal standards are too demanding in cases where there is no definitive evidence of innocence.<sup>134</sup> Even if the legal system was reformed to include innocence hearings, *Wheat Kings* reminds

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<sup>131</sup> *R v Mullins-Johnson*, 2007 ONCA 720, [2007] 228 CCC (3d) 505. See also *Re Truscott* (2007), *supra* note 105 at para 264, noting that Mr. Truscott "has not demonstrated his factual innocence. To do so would be a most daunting task absent definitive forensic evidence such as DNA. Despite the appellant's best efforts, that kind of evidence is not available."

<sup>132</sup> Christopher Sherrin, "Declarations of Innocence" (2010) 35:2 Queen's LJ 437.

<sup>133</sup> Kent Roach, "Exonerating the Wrongfully Convicted: Do We Need Innocence Hearings" in Margaret Beare, ed, *Honouring Social Justice: Honouring Dianne Martin* (Toronto: University of Toronto Press, 2008) [Roach, "Exonerating the Wrongfully Convicted"].

<sup>134</sup> Hannah Quirk & Marny Requa, "The Supreme Court on Compensation for Miscarriages of Justice" (2012) 75:3 Mod L Rev 387.

us that the legal system should not have a monopoly on declarations of innocence, a matter to be examined in greater depth in the next section.

### *Summary*

*Wheat Kings* can be interpreted as a criticism of a justice system that relies on the decision of elected officials to correct wrongful convictions; that is very slow in correcting or admitting its errors and that does not make determinations about innocence.

The 2002 changes to the Ministerial review process add some procedural regularity, but still allow the Minister of Justice as an elected official and one who bears some responsibility for the criminal justice system to make decisions whether convictions should be re-opened. The Milgaard Inquiry, like many other inquiries, recommended that the decision be transferred to an independent commission, but successive governments have been unwilling to embrace such a major reform or even more minor reforms such as giving the accused a second right of appeal on the basis of fresh and compelling new evidence.

*Wheat Kings* identifies the legal system's lack of interest in innocence as a problem. Prosecutors who follow the advice of three inquiries into wrongful convictions should be less willing to use prosecutorial stays that place a previously convicted person in the same kind of legal limbo that David Milgaard found himself in 1992 and that prolonged the stigma arising from his original and erroneous murder conviction. Nevertheless, the alternatives of withdrawing charges or calling no evidence remain matters of prosecutorial discretion. Moreover, the best they can provide is a not guilty verdict that may not truly exonerate the wrongfully convicted. Such persons may seek compensation only to find that it can be denied because they have not established their innocence. The legal system continues its Catch 22 of refusing to determine innocence, but making proof of innocence a prerequisite for the wrongly convicted to be compensated or exonerated. Twenty five years after *Wheat Kings*, the legal system for the wrongfully convicted remains "dark...yellow, grey and sinister".<sup>135</sup>

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<sup>135</sup> *Wheat Kings supra* note 78.

### C. “Let’s See What Tomorrow Brings”: Alternative Interpretations of Resistance and Innocence

Just as *38 Years Old* does not call for legal reforms such as exemptions from mandatory sentences, *Wheat Kings* does not call for the creation of an independent agency such as the CCRC or for the creation of innocence hearings. Again, it is not the job of artists to make concrete reform proposals. Perhaps even more than *38 Years Old*, *Wheat Kings* can be interpreted as a cautionary tale about relying on legal reforms and a recognition of the ability of culture and art to both resist legal conclusions and provide alternative verdicts that are themselves a form of law.

#### *Critical Legal Pluralism*

As discussed above, the Milgaard Commission’s call for the creation of an independent agency to replace the Minister of Justice’s role seems in part motivated by a desire to remove media and civil society campaigning from wrongful convictions. Innocence groups even seem prepared to accept such a bargain suggesting that the creation of a Canadian version of the CCRC could put them out of business.<sup>136</sup> Such an approach, however, would come with many risks. It would nourish a legal orthodoxy that accepts the state law, including reformed state law, as the exclusive source of authority about wrongful convictions.

Critical legal pluralism accepts that non-state systems of ordering can make legal conclusions that are independent and sometimes in contradiction to those reached by state laws. Martha-Marie Kleinhans and the late Rod Macdonald have defended critical legal pluralism<sup>137</sup> in part on the basis of the normative significance of narrative. Robert Cover stressed the ability of small communities to create their own normative and legal systems and the ability of the state law to de-legitimate or even kill the sometimes redemptive understandings promoted by those small communities.<sup>138</sup> Cover was referring to the understandings created by small

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<sup>136</sup> Wendy Gillis, “Innocence Canada becoming a shadow of its former self”, *Toronto Star* (21 October 2016), online: <[www.thestar.com/news/gta/2016/10/21/innocence-canada-becoming-shadow-of-its-former-self.html](http://www.thestar.com/news/gta/2016/10/21/innocence-canada-becoming-shadow-of-its-former-self.html)>. An official of Innocence Canada (formerly the Association in Defence of the Wrongly Convicted), suggests that a CCRC would replace its work.

<sup>137</sup> *Supra* note 15 at 40 & 46.

<sup>138</sup> Cover, *supra* note 11.

religious communities, but his critical legal pluralism approach could also be applied to the work of Innocence Projects when their claim that some of their clients are innocent. More recently, Wendy Adams has applied a critical legal pluralist approach inspired by the work of both Cover and Macdonald to popular culture with particular attention to the ability of literature to produce its own nomos or moral ordering that includes narrative of resistance on issues such as the rights of animals.<sup>139</sup> In a critical legal pluralist framework, there would be greater acceptance of alternative sources of meaning that when necessary could contradict and challenge the conclusions reached by even a reformed legal system including by a Canadian CCRC or a court hearing new evidence at new innocence hearings.

Exoneration is a normative and a redemptive process that goes beyond the legal reversal of a guilty verdict or even the legal construction of an innocence finding. State law can play a role in exoneration, but so too can civil society, the media, science, and art. Those who accept critical legal pluralism or even those who have a sense of humility about state law should be sensitive to the complexity and plurality of our moral and legal worlds. Declarations of innocence in popular culture such as *Wheat Kings* make legal and normative claims that can resist conclusions of guilt or non-innocence reached by state law. They can provide a critical role in the process of exoneration. They can also provide comfort and support to those who suffer and must endure wrongful convictions.

### *The Role of the Media*

The often central role of the media in exoneration is recognized in the reference in *Wheat Kings* to the “late breaking story on the CBC” about Milgaard’s case. There are some concerns that since the CCRC has been created in England and Wales that the media has taken less of an interest in alleged wrongful convictions because of an assumption that the CCRC can be relied upon to discover and correct wrongful convictions.<sup>140</sup> If innocence hearings were held under state law, constructions of innocence in the media or civil society may play less of a role.

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<sup>139</sup> Wendy A Adams, *Popular Culture and Legal Pluralism* (New York: Routledge, 2017) [Adams].

<sup>140</sup> Paul Mason, “Press and Release” in Michael Naughton, ed, *The Criminal Cases Review Commission: Hope for the Innocent?* (New York: Palgrave Macmillan, 2010).

The media, like art, provides a means to challenge or resist the perhaps erroneous conclusions that the legal system makes. It accords with what David Nobles and Richard Schiff have defended as the ability of alternative scientific and media discourses to disturb the finality that the legal system attempts to accord to its fallible verdicts. Professors Nobles and Schiff use autopoietic theory to explain how law, science, and the media each constitute autonomous and self-referential systems of meaning and they explain controversies over miscarriage of justice as a result of collision between these different systems of meaning.<sup>141</sup>

### *The Limits of State Law and the Continued Role for Campaigning*

The Supreme Court's 1992 decision that Milgaard had not established his innocence was what Cover called "jurispathic"<sup>142</sup> to the attempts by the Milgaards and their supporters to declare David to be innocent. At the same time, the media and campaigning pushback to the decision, as well as the Hip's declaration in *Wheat Kings* that Milgaard was innocent, demonstrates that these alternative forms of ordering had resilience even in the face of a considered rejection of innocence by the Supreme Court. In this regard, Robert Cover may have overestimated the success of state law in killing or discrediting alternative normative systems.

Campaigning and social and media declarations of innocence can be powerfully "jurisgenerative" even in the face of conclusions by state law to the contrary. The construction of David Milgaard as innocent by his family, supporters and the Hip ultimately prevailed over the Supreme Court's more formal determination that Milgaard had failed to establish his innocence. In Milgaard's case, first the media and art such as *Wheat Kings* provided the push-back and then science in the form of the 1997 DNA exclusion ensured exoneration. Although societal exonerations do not have the same official status and legal import as a judicial determination of innocence, they do have meaning especially for ordinary people who pay attention.

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<sup>141</sup> Richard Nobles & David Schiff, *Understanding Wrongful Convictions* (Oxford: Oxford University Press, 2000) at 259-60. They write: "Different communities have different conceptions of miscarriage of justice....miscarriage of justice carries widespread abhorrence. However, that abhorrence cannot be simply translated into legal activity or legal reform".

<sup>142</sup> Cover, *supra* note 11 at 40.

*Critical Legal Pluralism and the Construction of Innocence*

*Wheat Kings* goes beyond the autopoietic approach used by Nobles and Schiff which focuses on the alternative and self-contained discourses of the media and science. It does not suggest that the CBC or science determined that David Milgaard was innocent. Rather *Wheat Kings* declares David Milgaard to be innocent. In this respect, *Wheat Kings* engages in critical legal pluralism and can itself be seen as a form of law.

The Milgaard case was extraordinary because the Court declared its willingness to make a determination of innocence, something that courts have subsequently retreated from. The Court made a negative decision that adversely affected Milgaard. As seen above, Milgaard's subsequent attempts to establish his innocence through civil suits also failed. But even when courts refuse to make determinations of innocence, it is a mistake to think that the space left by the legal system is a normative void, devoid of meaning. Rather it is a space that has filled by alternative forms of normative ordering. These forms of ordering have the potential to resist the conclusions drawn by state laws. In short, *Wheat Kings* is its own form of legal verdict, one that turned out to be more correct than that reached by the Supreme Court. A critical legal pluralism approach would suggest that state law does not and should not have a monopoly on determinations of innocence.

By proclaiming Milgaard's innocence when the law did not, *Wheat Kings* can be seen as an exercise of what Robert Cover called "redemptive constitutionalism" that challenged the law.<sup>143</sup> It also reveals what Rod Macdonald recognized as the ability of narratives to generate legal and normative conclusions that can challenge and resist the claims of state law to be the only legitimate law.<sup>144</sup> *Wheat Kings* directly contradicted the Supreme Court's declaration that Milgaard had not proven his innocence. In doing so, the Hip resisted what Benjamin Berger has characterized as the

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<sup>143</sup> Cover, *supra* note 11.

<sup>144</sup> Klainhaus & Macdonald, *supra* note 14; see also Adams, *supra* note 139 at 57. Other forms of critical legal pluralism could also include Indigenous law, which may also rely on the power of narrative to reach normative conclusions that may be at odds with the legal verdicts of state law and that can be used to resist state law. See John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002).

“epistemologically colonial”<sup>145</sup> aspirations of state law or what Robert Cover called its “jurispathic”<sup>146</sup> tendencies.

Milgaard’s supporters including the Hip created an alternative and it turns out a correct interpretation of Milgaard as innocent. In contrast, the Milgaard Inquiry took a legal monist approach that viewed the campaigners’ attempts to construct Milgaard as innocent and illegitimate. The Commission’s report can be seen as an aggressive attempt to reaffirm the monopoly of a reformed state law with respect to questions of guilt or innocence or what Macdonald identifies as the orthodoxy of state law.<sup>147</sup> In contrast, a critical legal pluralist approach would be neither surprised nor offended by alternative legal conclusions of the sort that *Wheat Kings* draws.

As Robert Cover argued jurisdictional redundancy can minimize some of the coercive and jurispathic force of legal determinations.<sup>148</sup> Cover was referring to a jurisdictional redundancy between different courts. Milgaard tried to exploit this redundancy through civil litigation but this ultimately failed to result in his exoneration. Benjamin Berger has similarly stressed the importance of discretion in the system as exercised by prosecutors, juries and the executive as an important counterbalance to the criminal law that may be necessary to bridge the gap between criminal law and criminal justice.<sup>149</sup> Milgaard benefitted from the prosecutorial stay in the sense that he did not face a second prosecution, but it left him in a legal limbo of continued suspicion and stigma that might not have changed had the prosecutor under current reforms gave him the benefit of the not guilty verdict available in state law.

*Wheat Kings* speaks to the need for a more fundamental jurisdictional redundancy that embraces critical legal pluralism. Such critical legal pluralism can be informed and nurtured by alternative sources of meaning found in art, science, and the media, but its claims to make legal conclusions on issues such as guilt, innocence, and exoneration should not be ignored. Cultural actors such as the Hip have considerable influence when they declare someone to be innocent.

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<sup>145</sup> Benjamin Berger, *Law’s Religion* (Toronto: University of Toronto Press, 2015) at 103.

<sup>146</sup> Cover, *supra* note 11 at 40.

<sup>147</sup> Kleinhaus & Macdonald, *supra* note 15 at 309; Adams, *supra* note 139 at 48.

<sup>148</sup> Robert Cover, “The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation” (1981) 22 *Wm & Mary L Rev* 639.

<sup>149</sup> Berger, *supra* note 38.

The ability of popular culture to engage on questions of innocence can fill gaps in the state legal system left by the legal system's reluctance to make formal declarations of innocence.<sup>150</sup> Even when state law attempts, as it did in the Milgaard reference, to occupy the space by making determinations of innocence, *Wheat Kings* provided an alternative and ultimately more persuasive verdict to that rendered by state law.

### *Conclusion*

*38 Years Old* and *Wheat Kings* are two pieces of exceptional song writing that memorialize important incidents in Canadian criminal justice history. Those who escaped from Millhaven in 1972 and David Milgaard who was imprisoned for 23 years for a murder he did not commit and struggled even longer for exoneration all suffered greatly at the hands of the Canadian legal system. The Hip's songs will ensure that they are not forgotten.

The songs should be interpreted in their historical context to appreciate their full critical significance. *38 Years Old* takes on a different significance once the listener understands that prisoners such as Mike were beaten when Millhaven was opened and were forced to live in a violent prison "home". Similarly the Hip's 1992 declaration of David Milgaard's innocence in *Wheat Kings* can only be fully understood when compared to the Supreme Court of Canada's failure in the same year to find that Milgaard was innocent.

The Hip make no apology for being Canadian and they have been embraced as Canadian icons. At the same time, they reject any sense of Canadian supremacy or complacency. Rather they hold a mirror to us because they want Canada to do and be better. They remind us about what the Mikes and Milgaards, as well as Indigenous peoples, have resisted and endured. It is perhaps not surprising that a band from Kingston has reminded us of the humanity of those we imprison.

By effectively using the historical record and tight forceful prose, the two songs can be read as making a case for reform of Canadian criminal law. The case of Mike can serve as a hypothetical example that suggests that that Parliament should provide escape clauses from all mandatory sentences, including the mandatory sentence of life imprisonment for murder. *Wheat Kings* similarly can be interpreted as a basis for reforming

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<sup>150</sup> Roach, "Exonerating the Wrongfully Convicted", *supra* note 133 at 78 ("Even without innocence hearings, exonerations do happen. Apologies get made...civil society and the media have their own processes of exoneration").

Canadian criminal law to make it more attentive to questions of innocence and to allow wrongful convictions to be corrected without the need for intervention by “Our parent’s Prime Ministers”.<sup>151</sup> There are strong arguments that these reforms are necessary and long overdue.

At the same time, the two brilliant songs can be interpreted as a reminder that state law, even reformed law, will not always have all the solutions and that popular culture provides an important alternative source of meaning that can temper and resist the conclusions of state law. Indeed, the songs themselves can be interpreted in a critical legal pluralist framework as a form of law. *38 Years Old* tells us that Mike’s punishment is unjust, disproportionate, and harsh regardless of the conclusions of state law that he was guilty of murder. Similarly *Wheat Kings* tells us that David Milgaard was innocent of murder even when the Supreme Court said he was not.

The two songs should make us want to reform the Canadian criminal justice system by reforming mandatory sentences and the process of correcting wrongful convictions. On another level, however, the two songs remind us of the importance of looking outside of state law to resist the inevitable errors and harms that any legal system, even a reformed one, will impose. These are no small accomplishments, especially for two rock songs that last four minutes each. For this and many other reasons, we are in the debt of Gord Downie and the Tragically Hip.

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<sup>151</sup> *Wheat Kings*, *supra* note 78.