

# Exoneration and Compensation for the Wrongly Convicted: Enhancing Procedural Justice?

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## ABSTRACT

Miscarriages of justice,<sup>1</sup> in the form of wrongful convictions, are evidence of the failings of the criminal justice system. The revolution sparked by the potential of DNA forensic analysis in the 1990s demonstrates on an almost daily basis that errors are frequently made and innocent people are convicted of crimes they did not commit. Furthermore, a growing body of what has been termed innocence scholarship has evinced a discernible number of contributing factors that have influenced wrongful convictions. Despite the fact that this literature has established that those factors routinely cause wrongful convictions, the means to exoneration and compensation are fraught with legal and procedural obstacles. While it has been argued elsewhere that a wrongful conviction, in and of itself ultimately raise questions of legitimacy,<sup>2</sup> the focus of this essay will be on understanding how access to and availability of schemes of post-conviction review and compensation in Canada also raise similar questions.

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<sup>1</sup> There are many different terms used to define what constitutes a miscarriage of justice and for the most part the term will be used interchangeably with wrongful conviction and both refer to situations where an innocent person has been convicted for a crime they did not commit. At the same time, while this broad term covers many eventualities, there are some cases where a trial may be procedurally impeccable but result in a mistaken conviction nonetheless.

<sup>2</sup> Brian Forst, *Errors of Justice: Nature, Sources, and Remedies* (Cambridge: Cambridge University Press, 2004).

**Keywords:** wrongful conviction; exoneration; compensation; legitimacy; post-conviction review

## I. INTRODUCTION

While political philosophers have long grappled with concepts of legitimacy and authority, it has only been recently that researchers in criminal law and criminal justice have begun to question not only how states derive legitimacy from the population, but also what actions serve to foster “de-legitimation.” Early theorizing on legitimacy in political philosophy focused on Weber’s seminal work<sup>3</sup> examining types of political authorities which claim legitimacy, and whose own conceptions of legitimacy are further pre-conditions for subordinate legitimacy.<sup>4</sup> In recent years, criminal justice scholars have focused on legitimacy, in a conceptually different manner, where procedural justice is viewed as constitutive of legitimacy.<sup>5</sup> Procedural justice, in this way, can be understood as occurring when citizens feel they have been treated fairly by law enforcement authorities (reflective of the quality of decision making) and when law enforcement authorities treat citizens with proper respect (reflective of the quality of treatment).<sup>6</sup> These aspects of decision-making and treatment are also evidence of greater or lesser beliefs in the legitimacy of criminal justice actors and institutions.

Post-conviction review, as a means of redressing wrongful convictions, exists in a variety of formats in a number of common law jurisdictions. Occurring outside of the normal court system, it serves as a further level of review substantiated through either legislation or policy for those who believe they have been wrongfully convicted. It has been argued that while such schemes are a necessary part of the criminal justice system in

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<sup>3</sup> Max Weber, *Economy and Society: An Outline of Interpretive Sociology*, ed by Guenther Roth & Claus Wittich (New York: Bedminster, 1922, 1968).

<sup>4</sup> Anthony Bottoms & Justice Tankebe, “Beyond Procedural Justice: A Dialogic Approach to Legitimacy in Criminal Justice” (2012) 102:1 J Crim L & Criminology 119.

<sup>5</sup> Justice Tankebe & Alison Liebling, “Legitimacy and Criminal Justice: An Introduction” in Justice Tankebe & Alison Liebling, eds, *Legitimacy and Criminal Justice: An International Exploration*, (Oxford: Oxford University Press, 2013) 1.

<sup>6</sup> Tom R Tyler, *Why People Obey the Law*, (New Haven: Yale University Press, 1990) [Tyler I].

investigating alleged wrongful convictions, the appropriate scope for such schemes is an open question.<sup>7</sup> At the same time, compensation in the form of monetary indemnification for a wrongful conviction seems an appropriate means of addressing established errors. It represents an acknowledgement of state responsibility for error and serves as an attempt to rectify what was lost, albeit in a very limited manner. In reality, however, such awards often have onerous thresholds attached to them and are far from automatic. Given that a wrongful conviction will naturally call the legitimacy of the criminal justice system into question, it is intuitively logical to question whether such schemes in place to not only overturn a wrongful conviction, but also provide monetary compensation, can serve to re-store lost legitimacy. Towards this end and for the purposes of this analysis, schemes of post conviction review and compensation as they take place in Canada will be examined.

## II. LEGITIMACY

Modern day theorizing on legitimacy can trace its roots to Weber's early writings on authority and its related social dynamics.<sup>8</sup> Legitimacy in this sense is not based on the power wielded by authority, *per se*, but is rather a consequence of people's faith in that power that creates voluntary deference. For Weber the most common form of legitimacy is the "belief in legality."<sup>9</sup> This is related to notions of authorization<sup>10</sup> and the development of moral values through obligations and responsibilities<sup>11</sup> but what is essential is that the development of self-regulation leads to deference to external authorities. Beetham, on the other hand views power as legitimate when it is acquired and exercised according to established rules (legality), it is normatively justifiable as it conforms to expected beliefs about its rightful purpose and exercise and those in positions of power are acknowledged

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<sup>7</sup> Fiona Leverick, Kathryn Campbell & Isla Callendar, "Post-Conviction Review: Questions of Innocence, Independence, and Necessity" (2017) 47:1 *Stetson L Rev* 45.

<sup>8</sup> *Weber, supra* note 3.

<sup>9</sup> *Ibid* at 37.

<sup>10</sup> Herbert C Kelman & Lee V Hamilton, *Crimes of Obedience: Towards a Social Psychology of Authority and Responsibility*, (New Haven: Yale University Press, 1989).

<sup>11</sup> As per Freud and Durkheim, referred to in Martin L Hoffman, "Moral Internalization: Current Theory and Research" (1977) 10 *Advances Experimental Soc Psychology* 85.

through actions by relevant subordinates (legitimation).<sup>12</sup> From this perspective then legitimacy becomes a property of legal authorities that is reinforced when people feel that police and courts act in ways that are appropriate, just and fair and that foster voluntary compliance. People relate to the powerful as both moral agents and self-interested actors.<sup>13</sup> Conversely, deference to authorities that is legitimacy-based and not based on fear of sanctions or promise of rewards will exist outside of the immediate presence of legal authorities.<sup>14</sup>

The focus of the study of legitimacy conforms to one's perspective and as Beetham himself notes, the term legitimacy means different things to the political philosopher and the social scientist:

Legitimate power for the philosopher is power which is *rightful* according to rationally defensible standards or principles. Legitimate power for the social scientist is power which is *acknowledged as rightful* by relevant agents, who include power-holders and their staff, those subject to the power and third parties whose support or recognition may help confirm it.<sup>15</sup>

Thus, for the social scientist, legitimacy is dependent upon a population that accepts and defers to power-holder legitimacy, although it is not reducible to simply a subjective belief in legitimacy. This is essentially perceptual legitimacy, as opposed to normative legitimacy which is more concerned with the status conferred on government agents based on an appropriate use of power by the norms generally accepted by the population. It is of significance that such claims be attached to a "discursive investigation of the grounds or criteria on which a claim to legitimacy is based and of the credibility of those grounds to relevant agents in a given social and historical context."<sup>16</sup> Thus, according to Beetham, for the social science study of legitimacy what is required is an understanding of the context through which the legitimacy claim emerged as well as how such claims have evolved and developed. Understanding how legitimacy is re-established when lost also requires a similar discursive investigation.

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<sup>12</sup> David Beetham, "Revisiting Legitimacy, Twenty Years On" in Justice Tankebe & Alison Lieblich, eds, *Legitimacy and Criminal Justice: An International Exploration*, (Oxford: Oxford University Press, 2013) 19.

<sup>13</sup> Tyler I, *supra* note 6.

<sup>14</sup> Tom Tyler et al, "Legitimacy and Criminal Justice: International Perspectives" in Tyler et al, eds, *Legitimacy and Criminal Justice: An International Perspective*, (New York: Russell Sage Foundation, 2007) 9 [Tyler II].

<sup>15</sup> Beetham, *supra* note 12 at 19 [emphasis in original].

<sup>16</sup> *Ibid* at 20.

### A. Wrongful Convictions: Evidence of a Legitimacy Deficit

There are few working in the criminal justice system who now doubt that wrongful convictions can occur and we have moved far from Justice Learned Hand's pronouncement in 1923 that "Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream."<sup>17</sup> Many legal researchers now agree that the estimate rate of wrongful convictions in the United States is approximately half of one percent to one percent of all criminal convictions annually;<sup>18</sup> this number translates into several thousand felony convictions. What is significant about the data collected on these cases is that they represent the ones that have been overturned; there are countless others who do not possess the necessary evidentiary burdens to establish innocence, but may not have committed the crime for which they were found guilty. Regardless of the actual figure, estimates based on data from surveys and successful exonerations demonstrate that errors frequently occur and that the wrong people end up in prison for crimes they did not commit.<sup>19</sup>

When a wrongful conviction does occur, it raises questions about the legitimacy of the criminal justice process. Normative expectations dictate that when a crime happens<sup>20</sup> that the police will seek out evidence that factually supports a charge that the prosecution will seek to ascertain the truth and if a conviction results, it will be safe. Innocence scholarship, however, is replete with many examples as to how the system, at times, fails to convict the "right" suspect. They include, *inter alia*, the following types of errors:

- Eyewitnesses who failed to identify the correct suspect or were coerced in some manner by the police to identify the accused;
- Confessions to the commission of a crime that are false, in response to the psychological pressures involved in a police interrogation;
- Convictions obtained through the use of perjured testimony from a jailhouse informant who receives a benefit;

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<sup>17</sup> *United States v Garsson*, 291 F 646 at 649 (SD NY 1923) (Hand J).

<sup>18</sup> See Marvin Zalman, "Qualitatively Estimating the Incidence of Wrongful Convictions" (2012) 48:2 *Crim L Bull* 221.

<sup>19</sup> See e.g. Kathryn M Campbell, *Miscarriages of Justice in Canada: Causes, Responses, Remedies* (Toronto: University of Toronto Press, 2018) [*Campbell I*].

<sup>20</sup> In some cases a wrongful conviction can result when no crime at all has occurred, for example where an accidental death is construed as a homicide.

- Expert testimony that may be based on faulty forensic science that is used to convince a jury of the defendant's guilt.

When a wrongful conviction results from these types of errors and it is followed by a wrongful imprisonment, it seems natural to lose faith in the credibility of the criminal justice system. This may be manifest in a further “de-legitimation” of the role of the police and courts regarding their capacity to effectively perform their functions and arrest and convict the “true” suspect of a crime; this certainly is the case from the perspective of the wrongly convicted themselves. What is of particular significance to the case of wrongful convictions is that it is only after many years of fighting and campaigning that others, outside of the circle of the wrongly convicted person, become aware of the wrong committed. Further consequences of a lack of legitimacy through a wrongful conviction contribute to mistrust of the criminal justice system overall, which may manifest in a reticence to report crime to the police, a decrease in co-operation from witnesses, and demands for change in the administration of justice.<sup>21</sup>

### **B. For Criminology: Questions of Procedural Justice**

Legitimacy as a concept for philosophical study relates to political theory and especially the sources and limits of government. For social science, and criminal justice, the concept has more to do with public perceptions regarding the system itself. As a result, the sources of legitimacy in this sense are multi-faceted and are influenced by culture, norms and state action, which are not static concepts. Thus, for criminal justice the notion of legitimacy depends on, *inter alia*, public perceptions that the system is just and effective, and on concepts of distributive justice, racial justice, access to justice, celerity, political obligation, accountability, normative (ethical) justice, the extension of legitimate authority of the state, and existence of a system without corruption and public malfeasance.<sup>22</sup>

Packer was one of the first to theorize about types of legitimacy as they related to the norms, controls and breadth of the criminal justice system. His 1968 work, *The Limits of the Criminal Sanction*, stands today as a seminal treatise regarding the nature and limits of the criminal sanction and also about the struggle between opposing views of the purpose of the criminal

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<sup>21</sup> Julian V Roberts, *Public Confidence in Criminal Justice: A Review of Recent Trends 2004-05* (Ottawa: Public Safety and Emergency Preparedness, 2004).

<sup>22</sup> Forst, *supra* note 2.

process.<sup>23</sup> He delineates this conflict as occurring between types of legitimacy: due process legitimacy and crime control legitimacy. Due process legitimacy centres around the legitimacy that the system derives from the protection of rights of individuals against the coercive practices of the state. While crime control legitimacy results from the legitimacy or authority of state practices that focus on law enforcement functions of controlling and preventing crime. These competing models of due process and crime control are apposite for understanding the study of miscarriages of justice. The former is concerned with due process and procedural protections for defendants so that convictions are based on the evidence that will ultimately be considered safe by the courts; whereas the latter focuses on enhancing crime control strategies of the police and prosecutors, and solving crime. While somewhat uni-dimensional, these divergent models emphasize a conflict between on the one hand society's interest in convicting the guilty and on the other, the rights of criminal defendants.<sup>24</sup>

From a public perception perspective, the idea of procedural justice as a barometer for the study of legitimacy began with Tyler<sup>25</sup> who explored why people choose to obey the law and what factors motivated them to comply with authorities, outside of utilitarian benefits.<sup>26</sup> A great majority of the research in the area of legitimacy and procedural justice over the previous two decades has focused on police power and citizen reaction to it,<sup>27</sup> as well as the study of questions of procedural justice in prisons<sup>28</sup> and the courts. More recently the field has broadened to the study of questions of procedural justice linked to the international financial sector<sup>29</sup>; state

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<sup>23</sup> Herbert Packer, *The Limits of the Criminal Sanction*, (Stanford: Stanford University Press, 1968).

<sup>24</sup> *Ibid* at 153-157.

<sup>25</sup> Tyler I, *supra* note 6.

<sup>26</sup> Ian Loader & Richard Sparks, "Unfinished Business: Legitimacy, Crime Control, and Democratic Politics" in Justice Tankebe & Alison Liebling, eds, *Legitimacy and Criminal Justice: An International Exploration*, (Oxford: Oxford University Press, 2013) 105.

<sup>27</sup> Tyler I, *supra* note 6.

<sup>28</sup> Alison Liebling, "Threats to Legitimacy in High Security Prisons" in Justice Tankebe & Alison Liebling, eds, *Legitimacy in Criminal Justice: An International Exploration* (Oxford: Oxford University Press, 2013); Richard Sparks, Anthony Bottoms & Will Hay, *Prisons and the Problem of Order* (Oxford: Clarendon Press, 1996).

<sup>29</sup> Beetham, *supra* note 12 at 32-35.

responses to terrorism<sup>30</sup> and public international law.<sup>31</sup> The interest of criminologists in this area seems to have been more focused on “normative compliance with the law, and especially the concept of legitimacy: that is to say, citizens’ recognition of the rightness of the authority of criminal justice officials, and the consequences of this recognition for behavior.”<sup>32</sup> A great deal of this interest has been specifically focused on the fairness of the procedures employed by legal authorities.

For Tyler, procedural justice can be understood as embodying both the quality of decision-making, whether citizens are treated fairly when law enforcement authorities make decisions about them and the quality of that treatment, whether law enforcement officers treat citizens with proper respect and dignity as human beings.<sup>33</sup> Decision-making is seen as fair if authorities are neutral and unbiased and decisions are based on objective indicators and not their personal views.<sup>34</sup> Similarly, the quality of treatment by the authorities is a further element of procedural fairness and when present, according to Tyler’s model, it is more likely to lead to immediate decision acceptance and an initial ascription of legitimacy to the law enforcement authority. Other authors have underscored the centrality of fair treatment to perceptions of legitimacy.<sup>35</sup> As Beetham further notes, procedural justice can be understood as:

the idea that the behaviour of those subject to authority, whether it be cooperation of the public with the police or obedience of prisoners to prison staff, depends on their being treated fairly and with dignity to their interactions with power-holders. It is the quality of these interactions that determines how far those exercising authority are regarded as legitimate, and the extent to which those subject to authority are prepared to cooperate in turn.<sup>36</sup>

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<sup>30</sup> Jacqueline Hodgson, “Legitimacy and State Responses to Terrorism: The UK and France” in Justice Tankebe & Alison Liebling, eds, *Legitimacy in Criminal Justice: An International Exploration* (Oxford: Oxford University Press, 2013) 178.

<sup>31</sup> Lukas H Meyer, *Legitimacy, Justice and Public International Law* (Cambridge: Cambridge University Press, 2009).

<sup>32</sup> Tankebe & Liebling, *supra* note 5 at 1.

<sup>33</sup> Tyler I, *supra* note 6.

<sup>34</sup> Tyler II, *supra* note 14 at 283.

<sup>35</sup> Beetham, *supra* note 12; Tyler I, *supra* note 6.

<sup>36</sup> Beetham, *supra* note 12 at 23.

Tyler has consistently argued that it is the procedural justice (as opposed to distributive justice) aspect of personal experience that most strongly influences legitimacy.<sup>37</sup>

Although the concept of legitimacy within the context of the study of miscarriages of justice has been raised to a limited degree in the past,<sup>38</sup> there has been no systematic study of the role of state responses to these state created errors. Clearly, the question of legitimacy of the criminal justice system extends beyond errors of justice *per se*,<sup>39</sup> and it will be argued that it is through the state actions of rectifying errors of justice that the system attempts to regain its legitimacy. Thus, the focus of the next part of the paper will be on understanding how the practices of post-conviction review and compensation, while recognized as attempts to re-establish the legitimacy of the criminal justice system that was lost through a wrongful conviction, in fact fail in this endeavour.

It seems prudent to make an important distinction regarding legitimacy. Given that a mistaken conviction can occur in cases where the trial procedure is flawless, and the defendant is treated with respect, this in itself does not undermine legitimacy and thus not every mistaken conviction will challenge or threaten legitimacy. Arguably, legitimacy in the criminal justice system is affronted by erroneous convictions that flow from some procedural injustice or impropriety, but that a merely mistaken conviction does not by itself threaten legitimacy. The real threat to legitimacy will be outlined below: which is essentially failing to take adequate steps or make sufficient provisions to address such mistakes when they do inevitably occur.<sup>40</sup> Furthermore, given that the foundation of legitimacy in the criminal justice system is based on public perceptions about procedural fairness as evidenced through fair and equal treatment by law enforcement personnel, at the same time beliefs in legitimacy in this instance go beyond simple subjectivity. Legitimacy will certainly be undermined if police, courts and state officials act in ways inconsistent with such criteria, and even in cases where the public is unaware that the criteria for legitimacy are not

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<sup>37</sup> See also Tom Tyler, et al, "Maintaining allegiance toward political authorities: The Role of Prior Attitudes and the Use of Fair Procedures" (1989) 33:3 *American J Political Science*, 629.

<sup>38</sup> C Ronald Huff, Arye Rattner & Edward Sagarin, *Convicted But Innocent: Wrongful Conviction and Public Policy* (Thousand Oaks: Sage Publications, 1996).

<sup>39</sup> Forst, *supra* note 2.

<sup>40</sup> Thanks to Antony Duff for clarifying this distinction.

satisfied (i.e. unfairness). A procedurally improper or unjust conviction undermines legitimacy even when it has not been detected; if what mattered was whether or not people were aware of the injustice then legitimacy might be preserved by concealing the injustice, which is clearly not the case.

### III. POST-CONVICTION REVIEW<sup>41</sup>

In Canada post-conviction review or Ministerial review represents the power to revisit a conviction at the post appeal stage and can occur through either the Royal Prerogative of Mercy<sup>42</sup> which allows for the granting of pardons or conviction review by the Minister of Justice. Prior to the establishment of the Criminal Conviction Review Group (CCRG) in 1992, the Minister of Justice had the power to investigate cases, order new trials and refer cases or points to the Court of Appeal for its opinion.<sup>43</sup> While he or she retains that power,<sup>44</sup> investigations are now done by attorneys working for the CCRG who make recommendations to the Minister on individual cases.<sup>45</sup> The opportunity for conviction review is available to those who have been convicted of an offence under criminal law, whether on indictment or on a summary conviction; moreover, sentence review is

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<sup>41</sup> Some of the ideas discussed regarding the conviction review process in this section can also be found in Kathryn M Campbell, “The Fallibility of Justice in Canada: A Critical Examination of Conviction Review” in C Ronald Huff & Martin Kiliyas, eds, *Wrongful Convictions: International Perspectives on Miscarriages of Justice* (Philadelphia: Temple University Press, 2008) 117 [Campbell II].

<sup>42</sup> *Criminal Code* RSC 1985, c C-46, ss 748, 748.1 authorizes the Governor in Council to grant the following types of clemency: 1. Free Pardon: based on innocence, it recognizes that the conviction was in error and erases the consequences and records of the conviction. 2. Conditional Pardon: criminal record is kept separate and apart from other criminal records prior to pardon eligibility under the *Criminal Records Act*, RSC 1985, c C-47 (five years for a summary offence, ten years for an indictable offence); or parole in advance of eligibility date under the *Corrections and Conditional Release Act*, SC 1992, c 20 for offenders serving life and indeterminate sentences who are ineligible for parole by exception. 3. Remission of fine, forfeiture and pecuniary penalty: erases all, or part of the monetary penalty that was imposed.

Canada, Department of Justice, Addressing Miscarriages of Justice: Reform Possibilities for Section 690 of the *Criminal Code*, A consultation paper (Ottawa: DOJ, 1998) [Department of Justice, “Addressing Miscarriages of Justice”].

<sup>44</sup> *Criminal Code*, *supra* note 42, ss 696.1-696.6

<sup>45</sup> The power to make decisions whether to refer a case to the court of appeal or dismiss it remains with the Minister, based on investigations carried out by the CCRG lawyers, and their subsequent recommendations.

available for those who have been designated as dangerous or long-term offenders. In all cases review does not occur until all avenues of appeal have been exhausted (provincial Court of Appeal and, in some cases, the Supreme Court of Canada<sup>46</sup>), and must be based on new and significant information that was not previously considered by the courts or that occurred or arose after the conventional avenues of appeal had been exhausted.

The Minister has the prerogative, if he or she is “satisfied that there is a reasonable basis to conclude that a miscarriage of justice likely occurred,”<sup>47</sup> to: 1. order a new trial; 2. order a new hearing in the case of dangerous or long-term offender; 3. refer the matter to the Court of Appeal of a province or territory as if it were an appeal by the convicted person, dangerous or long-term offender. In cases where a new trial has been ordered, a number of alternative remedies are available to Crown Counsel of the originating province, including: the conduct of a new trial, entering a stay of proceedings, the withdrawal of charges and the offering of no evidence by the prosecution, resulting in a not guilty verdict.<sup>48</sup> Further, the conviction review process has a relatively inquisitorial function that differs greatly from the post-review process in which the courts are engaged; differing actors, differing levels of court involvement and differing procedures, bind each level of review. In order to be viewed by the public as legitimate, such a system of review must necessarily be independent from government and accessible to all – two key criteria for claims of legitimacy.

### **A. Lack of Independence/Externality<sup>49</sup>:**

As noted, the CCRG defers to the Minister of Justice, and decisions regarding granting an application for review are made by the Minister based

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<sup>46</sup> A recent case has established that the Minister has the power to decide when an applicant has exhausted all of his or her rights of judicial review or appeal (*McArthur v Ontario* (AG), 2013 ONCA 668 at para 4), which may open the door for review earlier on in the process.

<sup>47</sup> *Criminal Code*, *supra* note 42, s 696.3

<sup>48</sup> Kent Roach, *Report Relating to Paragraph 1(f) of the Order in Council for the Commission of Inquiry into Certain Aspects of the Trial and Conviction of James Driskell* (2006), online (pdf): Driskell Inquiry <[www.driskellinquiry.ca/pdf/roachreport.pdf](http://www.driskellinquiry.ca/pdf/roachreport.pdf)> [perma.cc/U8EP-Y2HB].

<sup>49</sup> Thanks to Sandra Marshall for pointing out the distinction between independence and externality.

on recommendations from the CCRG lawyers. The CCRG is effectively part of the Department of Justice and its own policy, procedures and practices are dictated both by statute and also by departmental policy; its connection to the state is self-evident. While legislative changes occurred in 2002 that enhanced guidelines for review, non-legislative changes also took place that included movement of the CCRG to a building separate from the Department of Justice and the assignment of a special advisor to oversee review in high profile cases. The idea of creating a system of review, separate from government and similar to the United Kingdom's Criminal Cases Review Commission (CCRC), was considered at that time, but rejected. This was based on the argument that the provinces were satisfied that the review process should remain in the hands of the Minister of Justice, and that the Canadian prosecutorial system was too dissimilar to that of the UK for such a commission to work in Canada.<sup>50</sup>

Furthermore, the Department of Justice has argued that a review mechanism similar to the CCRC would detract from the notion of judicial finality by creating another level of appeal, would be too costly, and would result in many more requests. It also stated that as it stands, the review process is considered independent from the prosecutions conducted by the provincial Attorneys General and in its view, satisfies the requirement for independence.<sup>51</sup> The review process, however, is clearly not independent as an elected official, who may have a vested interest in the outcome, ultimately makes review decisions. While in some sense the CCRG is external to the Department of Justice, it is no way independent and does not function as a separate entity. Furthermore, the principal of finality is not meant to foster injustice; errors made at an earlier point in the process must and should be later acknowledged and rectified. Given that a wrongful conviction should no longer be considered as an infrequent matter,<sup>52</sup> it makes sense that measures to address this problem are no longer out of the ordinary, but accessible to those who believe they have been wrongly convicted.

A number of ad hoc commissions of inquiry have taken place in Canada over the years that have addressed the unique circumstances of individual

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<sup>50</sup> *Regulations Respecting Applications for Ministerial Review – Miscarriages of Justice* (2002) C Gaz I, 2977.

<sup>51</sup> Department of Justice, "Addressing Miscarriages of Justice", *supra* note 43.

<sup>52</sup> Given Zalman's estimate rate of wrongful convictions in the United States as approximately 0.5 to 1 percent (half of one percent to one percent) of all criminal convictions annually, as discussed earlier, *supra* note 18.

cases of wrongful conviction and have sought to investigate why these errors occurred, as well as making policy recommendations. While commissions of inquiry help to re-establish the legitimacy of the criminal justice system by examining the sources of error, ascribing responsibility and making sweeping recommendations for change, the extent to which their recommendations are implemented is somewhat deficient.<sup>53</sup> Since 1986 there have been six Commissions of Inquiry<sup>54</sup> examining the circumstances of the wrongful conviction of eight individuals in Canada and all six endorsed the creation of a new body to undertake conviction review that would be independent from government intervention. Subsequent governments have ignored these recommendations. Advantages to a separate, independent, non-executive based review commission are evident.<sup>55</sup> Primarily, and for the purposes of legitimacy, such a commission would likely secure greater symbolic significance to the public at large and to those who claim to be wrongly convicted. Given that the current Canadian system of review is attached, however peripherally, to the criminal justice system that made the original conviction in error it raises questions about whether such a commission will ever be able to impartially police errors.

### 1. *An Example of System Failure*<sup>56</sup>

David Milgaard's wrongful conviction for the murder of Gail Miller in 1970 and his subsequent wrongful conviction stands as a stark example of how the system is unable to police its own errors. Milgaard, a 16-year-old youth, was driving through the town of Saskatoon, Saskatchewan at the time of Gail Miller's murder. He was ultimately convicted of sexual assault and murder largely based on testimony from juvenile witnesses that had been coerced by the police; he was sentenced to life imprisonment. Milgaard attempted to overturn his conviction on several occasions through the

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<sup>53</sup> See Gary Botting, *Wrongful Conviction in Canadian Law* (Toronto: Lexis Nexis Canada, 2010).

<sup>54</sup> These Commissions of Inquiry examined the wrongful convictions of: Donald Marshall Jr, Guy Paul Morin, Thomas Sophonow, James Driskell, Ronald Dalton, Randy Druken, Gregory Parsons and David Milgaard.

<sup>55</sup> Clive Walker & Kathryn Campbell, "The CCRC as an Option for Canada: Forwards or Backwards?" in Michael Naughton, ed, *The Criminal Cases Review Commission: Hope for the Innocent?* (London: Palgrave MacMillan, 2010) 191.

<sup>56</sup> This example is discussed in greater detail in *Campbell II*, *supra* note 41.

system of appeals during the 1970s but was unsuccessful. In 1988, having exhausted all of his appeals, Milgaard applied for ministerial review based on new evidence that a serial rapist was in the area at the time of the murder and the recantation of witness testimony. In consideration of his application at that time, the Minister of Justice found the evidence to be insufficient and Milgaard was denied review in February 1991; a second similar application was also denied in August 1991. Due to unrelenting media coverage of Milgaard's case and lobbying by his mother, the Minister of Justice reversed her original opinion months later and directed the Supreme Court<sup>57</sup> to review Milgaard's conviction and consider whether a miscarriage of justice had occurred and what remedial action was advisable.<sup>58</sup>

In 1992, Milgaard's conviction was set aside by the Supreme Court and a new trial ordered based on fresh evidence that "could reasonably be expected to have affected the verdict of the jury" at the original trial.<sup>59</sup> The charges against Milgaard were stayed when the Attorney General for the province of Saskatchewan declined to pursue another trial; Milgaard was freed in 1992, after almost 23 years in prison. He was only formerly acquitted five years later when DNA identification evidence provided unequivocally that he was innocent. In 1999, the Saskatchewan government issued a formal apology to Milgaard and his family and distributed a payment of \$10 million dollars, which was the largest compensation settlement for a case of wrongful conviction at that time in Canada. Regardless of or in spite of his innocence, Milgaard's experience demonstrates how the process initially failed to prove that a miscarriage of justice occurred. He was forced to apply to the Minister on two occasions and it was only after much public lobbying and media pressure<sup>60</sup> that his

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<sup>57</sup> This request was considered to be unprecedented at that time, as in essence the Minister of Justice was asking the Supreme Court, which normally interprets law, to interpret fact. See Neil Boyd & Kim Rossmo, "David Milgaard, the Supreme Court and Section 690: A Wrongful Conviction Revisited" (1994) *Can Lawyer* 28. This reference was made as one of Milgaard's original lawyers, Calvin Tallis, had since been appointed to the Saskatchewan Court of Appeal and thus could not hear the review.

<sup>58</sup> *Reference re Milgaard*, [1992] 1 SCR 866, [1992] SCJ No 35 (QL).

<sup>59</sup> *Ibid* at 871.

<sup>60</sup> In 1990, the media covered Joyce Milgaard (David's mother) attempting to physically hand a forensic pathologist's report to then federal Justice Minister, Kim Campbell, which outlined details and evidence that would exonerate her son. Headlines that followed this incident amidst a growing popular sentiment that Milgaard was in fact innocent, such as "Joyce Milgaard snubbed by Kim Campbell" were indicative that the popular press conveyed this behavior as appalling. *Campbell I*, *supra* note 19 at 443.

case was reconsidered and he was finally exonerated.<sup>61</sup> The difficulties he and his family encountered in attempting to rectify this wrongful conviction after so many years illustrate the problems inherent to the current system of post-conviction review. The consequences for legitimacy are evident: Milgaard's experience is an example of unfair decision making as well as evidence of procedural unfairness.<sup>62</sup> This blatant lack of procedural justice around the application of a measure that is meant to effectively restore the legitimacy the system detracts from public perceptions regarding the system's overall efficacy.

## B. Inaccessibility

A further argument as to why the conviction-review process fails to restore the legitimacy lost through a wrongful conviction relates to its relative inaccessibility. While ostensibly available to any person convicted of a summary or indictable offence (or given a long-term sentence or dangerous offender designation) the number of applicants contradict such claims. Although the number of applications received by the CCRG in a given year remains relatively stable at approximately twenty-one received annually, the actual number of applications completed in the same year is relatively small. This is in part due to the complexity of the process, the amount of information needed to assess the merits of a claim, and the protracted nature of the investigation. Furthermore, the number of applications received for conviction review in a year is clearly not indicative of the virtual numbers of convictions in error occurring in a jurisdiction. In fact, over a thirteen-year period, from 2002-2015 the CCRG received 272 applications, however only sixteen cases were granted review by the Minister of Justice and of those fifteen convictions were overturned. Given that the annual number of applicants received in a year remains stable at twenty applications, this represents only a small fraction of all convictions, since the annual application rate translates to approximately 0.00005 per cent of the population of Canada, or 0.008 per cent of convicted persons.<sup>63</sup> While

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<sup>61</sup> Larry Fisher was convicted of the rape and murder of Gail Miller in 1999 and in 2004, the Supreme Court of Canada refused to hear Fisher's appeal, thus allowing for an inquiry to proceed on Milgaard's case in 2005. The mandate of the Commission of Inquiry was to examine the investigation into the death of Gail Miller and the criminal proceedings against David Milgaard, chaired by Justice Edward P MacCallum.

<sup>62</sup> Tyler I, *supra* note 6.

<sup>63</sup> Ashley Maxwell, "Adult Criminal Court Statistics, 2013/2014" (2015) 35:1 Juristat 1.

the success rate of referrals made back to provincial courts of appeal is quite high (93 per cent) the actual referral rate of cases is quite low at 5.8 per cent.<sup>64</sup>

Other oft-cited criticisms<sup>65</sup> of the conviction-review process also relate to procedural issues around time delays in processing applications and costs involved with procedures.<sup>66</sup> The thorough, detailed, application requires many hours of legal research and investigation and unless a lobby group or innocence project takes on a case, the costs for private counsel are likely to be prohibitive. Other difficulties surround the fact that there is little clarity regarding what is required in terms of the evidentiary burden of proof, the criteria for review, and the overall relative secrecy attached to the application process. Amendments to the *Criminal Code* in 2002 served to clarify aspects of the review process, including specifying that the remedy itself is extraordinary and should not be considered as a fourth level of appeal. In terms of evidence, in order for a case to be eligible for conviction review it must be “based on new matters of significance that either were not considered by the courts or occurred or arose after the conventional avenues of appeal had been exhausted.”<sup>67</sup> The Department of Justice<sup>68</sup> specifies that information is significant if it is reasonably capable of belief, relevant to the issue of guilt and could have affected the verdict if it had been presented at trial.<sup>69</sup> The assessment of

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<sup>64</sup> Leverick, Campbell & Callendar, *supra* note 7.

<sup>65</sup> Many of these criticisms are also discussed in Walker & Campbell, *supra* note 55.

<sup>66</sup> Patricia Braiden & Joan Brockman, “Remedying Wrongful Convictions Through Applications to the Minister of Justice Under Section 690 of the *Criminal Code*” (1999) 17 Windsor YB Access Just 3. The Department of Justice justifies the inordinate delays that occur through a conviction review as simply part of the thorough nature of the process; however, this is likely exacerbated given the considerable time it takes to exhaust all appeals in order to be considered for review at all (see Boyd & Rossmo, *supra* note 57).

<sup>67</sup> Department of Justice, *Applications for Ministerial Review – Miscarriages of Justice: Annual Report 2013 Minister of Justice* (Ottawa: DOJ, 2013) at 6 [DOJ, “Applications for Ministerial Review”].

<sup>68</sup> Department of Justice, *Applying for a Conviction Review*, (Ottawa: DOJ, 2003) at 2, online (pdf): <[justice.gc.ca/eng/cj-jp/ccr-rc/rev.pdf](http://justice.gc.ca/eng/cj-jp/ccr-rc/rev.pdf)> [perma.cc/238E-QTHN] [Department of Justice, “Conviction Review”].

<sup>69</sup> Furthermore, information that would support a conviction review application as both new and significant would include information which: establishes or confirms an alibi; includes another person’s confession; identifies another person at the scene of the crime; provides scientific evidence that points to innocence or another’s guilt; proves that important evidence was not disclosed; shows a witness gave false testimony; or

whether information is “new and significant” is similar to the test applied by the courts in determining the admissibility of new or “fresh” evidence on appeal.<sup>70</sup>

Furthermore, applicants need not convince the Minister of their innocence, *per se*, but rather that “there is a reasonable basis to conclude that a miscarriage of justice likely occurred.”<sup>71</sup> The test created by the Minister of Justice to get a court hearing through conviction review is thus considered higher than the test that will be applied at a court hearing.<sup>72</sup> Also considered problematic is that the Minister’s opinion on a file remains a discretionary matter, as there is no statutory test to specify what remedy should be ordered once the Minister is satisfied that a remedy is required.<sup>73</sup> While the 2002 amendments may have clarified aspects of the review, it still remains a process cloaked in secrecy, as recommendations made to the Minister by CCRC lawyers are considered protected due to solicitor-client privilege. At the same time, the language of exceptionality further perpetuates myths about the infallibility of the judicial process.

It is conceivable that the standard of presenting new and significant information in order for a conviction to be reviewed may in fact contribute to the very low number of applicants and to its overall inaccessibility. For some cases, it is old and not new information that caused the original wrongful conviction that requires further re-examination, however, this is not permitted under this process, as issues raised earlier on appeal cannot be re-litigated at this stage. For those claiming that incompetent counsel contributed to their wrongful conviction, this claim would not meet the standard unless they could establish that counsel had blatantly ignored important evidence. For those who have been wrongly convicted due to erroneous eyewitness identification, the most frequent cause of wrongful convictions, they would be required to establish that these original witnesses had lied. Finally, those claiming to have falsely confessed to the crime for which they have been wrongly convicted due to psychologically based police

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substantially contradicts testimony at trial (*Campbell II*, *supra* note 41 at 368-369).

<sup>70</sup> As found in *R v Palmer* [1980] 1 SCR 759.

<sup>71</sup> Department of Justice, “Conviction Review”, *supra* note 68 at 4.

<sup>72</sup> Hersh Wolch & Joan McLean, “In the Matter of the Commission of Inquiry into the Wrongful Conviction of David Edgar Milgaard: Submissions” online (pdf): *Milgaard Inquiry* <[www.publications.gov.sk.ca/freelaw/Publications\\_Centre/Justice/Milgaard/FinalSubmissions/341421.pdf](http://www.publications.gov.sk.ca/freelaw/Publications_Centre/Justice/Milgaard/FinalSubmissions/341421.pdf)> [perma.cc/MBZ8-G84Q] at 65.

<sup>73</sup> Department of Justice, “Conviction Review”, *supra* note 68.

interrogation tactics must re-investigate and eventually solve the crimes for which they have been convicted. Clearly, the requirement to present new and significant information in order to establish their innocence is a difficult standard for many wrongly convicted persons to meet.

As discussed, reticence on the part of the Minister of Justice in revisiting older cases presenting for conviction review may also be influenced by the principle of finality, which requires that courts cannot re-litigate the same issues, *ad nauseum*. The principle of finality seems at odds with the conviction review procedure, given that in and of itself, conviction review requires revisiting some of the same issues from these cases.<sup>74</sup> In fact, it is often through revisiting some of the same evidence, in a different light, that mistakes may be revealed. If those same mistakes were not caught on appeal, however, the legal parameters of evidentiary procedure preclude them from being raised at conviction review. Appellate courts are also reticent to disturb early convictions, as they have been found to take a restrictive approach.<sup>75</sup> Also problematic is the fact that the conviction review procedure does not require proof of innocence, nor that a miscarriage of justice has actually occurred, but rather that it likely occurred.

Importantly, this notion of the likelihood of occurrence of a miscarriage of justice is not a legislative standard, *per se*, but rather a matter of policy for the exercise of the powers of the Minister under section 696.1 of the *Criminal Code*. Consequently, this ‘satisfaction’ is inherently a subjective matter to which precedent cannot be followed. Each case is thus decided on its own merit, with little guidance as to what exactly constitutes ‘satisfying’ proof to the Minister.<sup>76</sup>

#### IV. COMPENSATION – RATIONALE

Compensating the wrongly convicted for the losses they have suffered due to errors on the part of government officials is a reasonable expectation.<sup>77</sup> It has long been established that a wrongful conviction and

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<sup>74</sup> The issue of finality is a complex one, particularly with respect to wrongful conviction cases— as the system demands some type of finality in criminal cases. At what juncture that would best be determined, however, is difficult to discern.

<sup>75</sup> Braiden & Brockman, *supra* note 66 at 21.

<sup>76</sup> *Campbell II*, *supra* note 41 at 126.

<sup>77</sup> Some of these ideas have been previously discussed in Kathryn M Campbell, “Policy Responses to Wrongful Conviction in Canada: The Role of Conviction Review, Public Inquiries and Compensation” (2005) 41:2 *Crim L Bull* 145 [*Campbell III*].

imprisonment likely causes destructive and long-term consequences. Grounds has found evidence for enduring personality change in the many wrongly convicted individuals he has interviewed, thought to be brought about by years of suffering, countless losses, pain and humiliation, often occurring several years following exoneration and release.<sup>78</sup> Monetary compensation, as an attempt to redress the wrongs suffered, acknowledges accountability. This rationale for compensation exists not only on the societal level, whereby society is expected to assume responsibility for the miscarriage of justice, but compensation must also address the devastating effects on the individual.<sup>79</sup>

While a wrongful conviction is always accompanied by a number of specific losses, some can be enumerated, others not. In attempting to assess the many losses suffered by Thomas Sophonow, who had been wrongly convicted and considered a murderer for fifteen years, Justice Peter Cory, formerly of the Supreme Court of Canada examined a number of factors in ascertaining damages. These factors included:<sup>80</sup> the many deprivations of prison, foregone developmental experiences, humiliation and disgrace, pain and suffering, accepting and adjusting to prison life, effects on the claimant's future, and effects of post-acquittal statements made by public figures, police officers and the media.<sup>81</sup> As these factors indicate, all aspects of an individual's life are affected through the victimization of a wrongful conviction. While a monetary award cannot restore lost years, lost livelihoods, lost opportunities and lost relationships, there is symbolic importance attached to societal acknowledgement of responsibility for the suffering caused by a wrongful conviction.<sup>82</sup> Kaiser further outlines the

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<sup>78</sup> Adrian Grounds "Psychological Consequences of Wrongful Conviction and Imprisonment" (2004) 46:2 Can J Corr at 165.

<sup>79</sup> H Archibald Kaiser, "Wrongful Conviction and Imprisonment: Towards an End to the Compensatory Obstacle Course" (1989) 9 Windsor YB Access Just, at 100.

<sup>80</sup> These factors were borrowed from Mr. Justice Evans, in the Commission of Inquiry Concerning Adequacy of the Compensation Paid to Donald Marshall, Jr, Report of the Commissioner (Nova Scotia, 1990), which included suggestions from Professor H.A. Kaiser.

<sup>81</sup> The last point was added by Justice Cory in specific reference to Thomas Sophonow's experience (Peter Cory, *The Inquiry Regarding Thomas Sophonow*, Manitoba Justice, (2001) online: <digitalcollection.gov.mb.ca/awweb/pdfopener?smd=1&did=12713&md=1> [perma.cc/LAG7-KJEP].

<sup>82</sup> Kathryn Campbell & Myriam Denov, "The Burden of Innocence: Coping With a Wrongful Imprisonment" (2004) 46:2 Can J Corr, 139.

benefits said to accrue from compensation, which include: minimizing social stigma, contributing to a feeling of vindication, helping to integrate the accused in mainstream society, assisting in future planning, and contributing to sustaining dependents.<sup>83</sup> In essence, the payment of compensation represents a partial fulfillment of the obligations of the state in the face of its injustice, as well as restoring public respect by assuming responsibility.<sup>84</sup>

### A. State Obligations

State governments that are signatories to the *International Covenant on Civil and Political Rights* (ICCPR)<sup>85</sup> have an obligation to provide compensation to the wrongly convicted. Two articles in this Covenant specifically address the issue of compensation:

- Article 9(5) - Anyone who has been a victim of unlawful arrest or detention shall have an enforceable right to compensation.
- Article 14(6) - When a person has by a final decision been convicted of a criminal offense and when subsequently his conviction has been reversed or he has been pardoned on the grounds that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time was wholly or partly attributable to him.<sup>86</sup>

In essence, signatories to this covenant have an obligation to create a statutory or regulatory provision to meet these obligations.

Canada ratified the ICCPR in 1976, but there is no current existing statute in Canadian law that dictates federal, provincial or territorial obligations for compensation to the wrongly convicted. In recognition that the state bears (some) responsibility for the actions of its agents, in 1988, the Canadian government adopted a set of guidelines which assign the necessary conditions for compensation to be awarded to persons wrongfully convicted and imprisoned in Canada. These Federal-Provincial-Territorial Guidelines address the rationale for compensation, the conditions of eligibility for compensation, and the criteria for quantum of compensation. The guidelines developed to address compensation have been referred to as

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<sup>83</sup> Kaiser, *supra* note 79 at 102.

<sup>84</sup> *Ibid*

<sup>85</sup> *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976, accession by Canada 19 May 1976).

<sup>86</sup> *Ibid*, arts 9(5), 14(6).

a “discretionary oversight system” and have “been criticised as ad hoc, unjust, and manifestly inadequate”<sup>87</sup>; whereby the right to compensation is recognized and exists but the decision to grant the award is left to an administrative body.<sup>88</sup> The conditions of eligibility for compensation include the fact that not only should a wrongful conviction have resulted in an imprisonment, but also if compensation<sup>89</sup> is awarded, it must only be available to the actual person who has been wrongfully convicted<sup>90</sup> and imprisoned as a result of a *Criminal Code* or other federal penal offense. Furthermore, eligibility requires either a free pardon or a verdict of acquittal through s. 696 of the *Criminal Code*, all appeals exhausted and new information now demonstrates that there has been a miscarriage of justice.<sup>91</sup>

Despite the fact that the entitlement criteria under the guidelines are broader than under the ICCPR, there are other measures attached to them that are essentially limiting. They include the fact that there must have been a wrongful imprisonment as well as a wrongful conviction and that compensation is only available to the wrongly convicted person, him or herself. By including only those who have been wrongly imprisoned, this in fact unfairly excludes those who have suffered the stigma attached to a

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<sup>87</sup> Christine E Sheehy, “Compensation for Wrongful Conviction in New Zealand” (1999) 8 Auckland UL Rev 977 at 980. Given that any payment made in compensation of a wrongful conviction is done in a discretionary manner, such payments are considered *ex gratia*. Further, such awards may be considered arbitrary as they are done in secret. See Myles Frederick McLellan, “Innocence Compensation: The Private, Public and Prerogative Remedies” (2012) 45:1 Ottawa L Rev 84.

<sup>88</sup> Jason Costa, “Alone in the World: The United States’ Failure to Observe the International Human Right to Compensation for Wrongful Conviction” (2005) 19 Emory Intl L Rev 1615.

<sup>89</sup> The Attorneys General of each province and territory have the right to recommend compensation awards outside of this reference and have done so through other *ex gratia* payments.

<sup>90</sup> As compensation should only be granted to those persons who did not commit the crime for which they were convicted (as opposed to persons who are found not guilty), further criteria would require either a pardon (under s 749 of the *Criminal Code*) or reference made by the Minister of Justice that the person did not commit the offence (under s 696.1(b)(c)).

<sup>91</sup> “Guidelines: Compensation for Wrongfully Convicted and Imprisoned Persons” (last visited 26 July 2019), online (pdf): <[www.justice.gouv.qc.ca/fileadmin/user\\_upload/contenu/documents/En\\_\\_Anglais\\_/centredoc/publications/programmes-services/ej\\_lignes\\_directrices-a.pdf](http://www.justice.gouv.qc.ca/fileadmin/user_upload/contenu/documents/En__Anglais_/centredoc/publications/programmes-services/ej_lignes_directrices-a.pdf)> [perma.cc/D2WU-WWQQ] [Compensation Guidelines].

wrongful accusation or conviction, but narrowly avoid imprisonment. Clearly these individuals also suffer some of the losses enumerated above, such as deprivations attached to reputation, humiliation and disgrace, but remain ineligible for compensation for these experiences. Further, relatives of the wrongly convicted have their own set of deprivations and humiliations to contend with. Not only do they lose an important source of support in some cases, but they are also stigmatized by having a family member imprisoned, however unjustified. They may spend countless time, effort and finances working towards exoneration of their loved ones, however, under these guidelines their losses are neither recognized nor compensated.<sup>92</sup>

Due to the fact that to receive compensation, one must either receive a pardon or have been successful at conviction review, both criteria narrow the numbers of eligible applicants considerably. What is even further limiting is that the guidelines require that the Court of Appeal make a finding that “the individual did not commit the offence” in order to be considered eligible for compensation.<sup>93</sup> The normal mandate of the court is limited to the binary guilty/not guilty and the guidelines effectively require the courts to make a statement or finding to the effect that the person is technically “innocent.” Given the narrow nature of this designation, the courts appear reticent to make this finding and it seems that they rarely if ever do so.<sup>94</sup> To obtain compensation, a wrongly convicted person must convince politicians to support their application for relief, and in turn that person must convince their provincial or federal counterparts that a claim is meritorious. Following this initial support, a judicial or administrative inquiry must take place to examine a claimant’s request; if compensation does follow it is considered a discretionary matter and represents solely a moral responsibility and not a legal one.<sup>95</sup> Also problematic is that when a compensation award is granted, the guidelines fail to delineate how it should be divided between municipal, provincial and federal governments;

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<sup>92</sup> Nevertheless, in a number of cases compensation has also been awarded to family members, particular the mother of the accused, e.g. the mothers of David Milgaard, Guy Paul Morin, and Donald Marshall Jr. all received some limited compensation.

<sup>93</sup> Compensation Guidelines, *supra* note 91 at 1.

<sup>94</sup> Graeme Hamilton, “Fighting ‘distinct society of injustice’”, *National Post* (5 October 2005).

<sup>95</sup> Myles McLellan, “Innocence Compensation: A Comparative Look at the American and Canadian Approaches” 2013 49:2 *Crim L Bull* 1218.

this has proved challenging in some cases.<sup>96</sup> Furthermore, a particular type of case has been barred from compensation through these guidelines, where the evidence is questionable and the case has been overturned by the courts on special appeal or special leave that results in the ordering of a new trial, but where the state decides not to prosecute again.<sup>97</sup> In such instances, refusal of compensation seems blatantly unfair, given that the person has been wrongly convicted but ineligible for compensation due to a legal technicality.<sup>98</sup> Another rationale for denying compensation is based on the idea that legislators are reticent to risk doling out taxpayer's money to someone who is exonerated on a legal technicality, but may in fact be guilty.<sup>99</sup>

The courts' and governments' reticence to visit these wrongful convictions for the purposes of compensation is highly problematic. Data from known cases of wrongly convicted persons in Canada who have received compensation to date clearly reflects this disparity: from seventy known/proven wrongful convictions in Canada,<sup>100</sup> only thirty-three have received compensation, which is approximately 47 per cent. The time period the wrongly convicted had to wait following an exoneration ranged from three years to forty-nine years, while the average time period was 16.2 years from date of the original conviction. Further, the amount of

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<sup>96</sup> In Thomas Sophonow's case, as discussed above, Commissioner Cory apportioned blame and responsibility and ordered that the total of \$2.6 million dollars compensation was to be divided as follows: 50% from the city of Winnipeg, 40% from the province of Manitoba and 10% from the government of Canada. Regardless, Sophonow experienced substantial delays in collecting this compensation. "Sophonow to receive full compensation", *CBC News* (16 June 2002), online: <[www.cbc.ca/news/canada/sophonow-to-receive-full-compensation-1.321655](http://www.cbc.ca/news/canada/sophonow-to-receive-full-compensation-1.321655)> [perma.cc/NY36-N7MJ].

<sup>97</sup> *Costa*, *supra* note 88 at 1625.

<sup>98</sup> Robert Baltovich was convicted in 1992 for the murder of his girlfriend; her body has never been found. He served eight years in jail, and in 2004 a conviction review of his case found that the trial judge's orders to the jury were prejudicial and his conviction was set aside and a new trial was ordered. Baltovich was acquitted moments before the new trial was to take place, as the Crown had no evidence to support a conviction. He has never been compensated, nor is he considered eligible for compensation, but is technically not guilty of the murder for which he was imprisoned for eight years.

<sup>99</sup> Karen Brown, "Life after wrongful conviction", *New York Times* (28 May 2016), online: <[www.nytimes.com/2016/05/29/opinion/sunday/life-after-wrongful-conviction.html](http://www.nytimes.com/2016/05/29/opinion/sunday/life-after-wrongful-conviction.html)> [perma.cc/5VT3-63ZK].

<sup>100</sup> See *Campbell I*, *supra* note 19.

compensation ranged from \$36,000 to \$13.1 million, and appears to be largely based on the number of years an individual has spent in prison and the amount of time he or she has waited for compensation. The guidelines present very narrow avenues for obtaining compensation at present. What these low numbers reveal is that, similar to post-conviction review, compensation as a measure to address the legitimacy deficit left by a wrongful conviction is relatively unattainable.

### *1. An Example of System Failure – Compensation*

One case example, particularly illustrative of the inherent contradictions evident in the compensation process in Canada, is that of Michel Dumont. Dumont was wrongly convicted of sexual assault in June 1991 in the province of Québec and served 34 months in prison before he was released; his conviction was quashed in February 2001 by the Québec Court of Appeal and he was acquitted. Dumont has unsuccessfully sought compensation since that time from various authorities (including from the Attorneys General of Québec and Canada). In 2010, Dumont brought a claim to the United Nations Human Rights Committee accusing Canada of being in violation of its obligation to compensate him under art. 14, para. 6 of the ICCPR, as per the Federal/Provincial/Territorial Guidelines.<sup>101</sup>

Essentially, Dumont brought the claim against the Canadian government through the Optional Protocol, which functions as a complaint mechanism allowing individuals to bring allegations that a party has violated the ICCPR directly to the Human Rights Committee. The State party (Canada) had a number of arguments against Dumont's claim – principle among them the fact that he had never been proven innocent of the crime in question and was thus not eligible for compensation (an acquittal without more in this case was not seen as indicative of a finding of innocence). Rather, the victim claimed to have some doubts as to whether or not Dumont was the perpetrator and the Court of Appeal concluded that the victim's statements gave rise to a reasonable doubt as to Dumont's guilt – hence he was acquitted, but the court did not rule on his innocence. While finding in Dumont's favour, the committee required the State party (Canada) to provide an effective remedy to Dumont in the form of adequate compensation – as well as ensuring that “similar violations do not occur in

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<sup>101</sup> UNHRC, Communication No 1467/2006, *Michel Dumont c Canada*, UN Doc CCPR/C/98/D/1467/2006, online (pdf): <[www.worldcourts.com/hrc/eng/decisions/2010.03.16\\_Dumont\\_v\\_Canada.pdf](http://www.worldcourts.com/hrc/eng/decisions/2010.03.16_Dumont_v_Canada.pdf)> [perma.cc/SM4F-UZX].

the future.”<sup>102</sup> Similarly, the committee required that the State party provide evidence about the measures taken within 180 days<sup>103</sup>; however, no action has been taken since the decision.

## B. Questions of State Accountability/Legitimacy

Compensating the wrongly convicted monetarily for their suffering represents a moral and legal obligation on the part of the state towards its members who have fallen victim to errors of the criminal justice system. As it stands in Canada the current compensation scheme is difficult to access, arbitrarily applied and in need of overhaul. The thirty-three cases that have received compensation thus far reflect the fact that few individuals are ever compensated for a wrongful conviction, and when they are they must wait many years and the amounts awarded vary considerably. The number of people who receive compensation is far below the actual number who have been wrongly convicted. What it does reveal is that being compensated for a wrongful conviction is a legal long shot, dependent on media influence, individual perseverance and political will. Admittedly, while it is acceptable that state governments establish particular criteria for eligibility for compensation, at present it is unclear who exactly is eligible, under what circumstances and for how much. The restrictive nature of how successive governments have interpreted the compensation Guidelines in Canada reveals a great deal about the government’s perception of its obligation to citizens whom it has dealt with in an unfair manner.

When considering the role of the state with respect to wrongful convictions, questions of moral responsibility<sup>104</sup> are fundamental and concern the nature of the state and the relationship of the individual to the state and by extension, to the law.<sup>105</sup> Kaiser invokes Dworkin’s concept of moral harm in attempting to situate the issue of wrongful convictions within a larger framework.<sup>106</sup> In this instance, bare harm that is said to result from the loss of liberty *per se*, is differentiated from the iniquity of moral harm

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<sup>102</sup> *Ibid* at para 25.

<sup>103</sup> *Ibid* at para 26.

<sup>104</sup> See *Campbell III*, *supra* note 77.

<sup>105</sup> Stanley Cohen, *Visions of Social Control: Crime, Punishment and Classification*, (Cambridge: Polity Press, 1985) at 22.

<sup>106</sup> *Kaiser*, *supra* note 79.

occurring from wrongful imprisonment. These harms require differing levels of responses. As Justice Cory notes in the Sophonow Inquiry:

in the case of wrongful conviction, it is the State which has brought all its weight to bear against the individual. It is the State which has conducted the investigation and prosecution on the individual that resulted in the wrongful conviction. It is the State which wrongfully subjected the individual to imprisonment.<sup>107</sup>

What is clear is that in cases of wrongful conviction, the state has improperly exercised its powers. And in such cases, it is not the powerful who become the victims of a wrongful conviction, in fact it is most often the more marginalized individuals of a society who are unable to protect themselves from the system. Such vulnerable individuals include members of racialized groups,<sup>108</sup> those living in poverty, and those who lack access to justice. Consequently, their marginalization may also further hinder their success in seeking exoneration and ultimately compensation. Moreover, the earlier distinction made between a mistaken conviction and a procedurally injustice conviction may matter with respect to compensation. It could be argued that more may be owed to someone who has suffered procedural injustice resulting in a wrongful conviction than to the unlucky victim of a procedurally just but mistaken conviction (particularly if the latter case was properly addressed in a timely fashion). At the same time, the simple provision of a monetary award fails to address the fact that justice is administered within a larger societal context, influenced by a variety of other factors that exist outside of such remedies. What compensation does is demonstrate that the state is capable of error and that it must be held accountable. It is how the state rectifies that error that can serve to restore, enhance or destroy its legitimacy.

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<sup>107</sup> Cory, *supra* note 81 at “Compensation Recommendation”, 3.

<sup>108</sup> See Kent Roach, “The Wrongful Conviction of Indigenous People in Australia and Canada” (2015) 17:2 Flinders LJ 203, for an overview of how Indigenous Canadians are overrepresented in the criminal justice system, relative to their numbers in the general population.

## V. DISCUSSION: DO POST-CONVICTION REVIEW AND COMPENSATION SCHEMES ADDRESS THE LEGITIMACY DEFICIT?

The previous sections have illustrated that as responses to a perceived legitimacy deficit, both post-conviction review through the CCRG and compensation via the guidelines are flawed measures. When a wrongful conviction occurs, and the court and appellate procedures in place are unable to rectify it, then other schemes set up to address such eventualities have a role to play in enhancing legitimacy through procedural justice. What this paper has demonstrated is that both schemes fail to meet these objectives, but for varying reasons. The CCRG lacks independence, which affects its overall credibility as an institution and detracts from its appearance as a body that is impartial and free from political influence. Ultimately it is the Minister, an elected official, who makes the final decision as to whether or not a miscarriage of justice “likely” occurred in a particular case. At the same time, the CCRG process is relatively inaccessible to most individuals; its conspicuously low referral numbers and arduous and lengthy review procedures further reflect its inability to provide post-conviction relief to only but a very select few wrongly convicted persons. In addition, its evidentiary threshold for admission requires the wrongly convicted to demonstrate the existence of “matters of significance that either were not considered by the courts or occurred or arose after the conventional avenues of appeal had been exhausted”<sup>109</sup> which in turn further restrict access to this procedure to only those who are able to meet this high standard. While it could be argued that although few cases are ever referred by the Minister back to the courts of appeal, those that do reach that level of consideration have a greater likelihood of being overturned.<sup>110</sup> This is small comfort to the many wrongly convicted who are unable to meet the admissibility standards required for this process to move forward and it surely does little to enhance procedural justice when the process itself is so inaccessible that it appears to be unfair.

On its face compensation as representing state accountability for the wrong committed via monetary indemnity could ostensibly serve as another

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<sup>109</sup> DOJ, “Applications for Ministerial Review”, *supra* note 67 at 6.

<sup>110</sup> Fifteen of sixteen referrals were overturned by appellate courts from 1999-2015, see also Leverick, Campbell & Callendar, *supra*, note 7.

means of enhancing procedural justice. When a wrongly convicted person is exonerated, awarding them financial assistance is a way of allowing them to partially rebuild their life and at the same time represents an acutely visible instance of state accountability for the errors that occurred. In spite of the fact that the Canadian state is a signatory to the ICCPR and has established guidelines to provide such compensation, in reality such awards are infrequent, only occur following many years of lobbying and in most cases are woefully inadequate. While forty per cent of the known Canadian cases of wrongful conviction have received compensation for their ordeal, the majority have not. Given that the guidelines require more than an acquittal of charges, *per se*, but rather an admission by the court that the person did not in fact commit the offence, this narrows the number of eligible cases considerably and appears unjust; a verdict of not guilty does not in fact “equate to a verdict of innocence.”<sup>111</sup> Tyler<sup>112</sup> and others note that fair treatment is central to notions of procedural justice, as such the compensation procedure itself and the statistics regarding awards are indicative of unfair treatment as those seemingly deserving of compensation for a wrongful conviction are often denied. In a general sense then this practice falls short of restoring legitimacy lost through a wrongful conviction. Michel Dumont’s case discussed earlier is a clear example of a lack of respect for his dignity; even following a UN Committee’s recommendation that he was deserving of compensation through the ICCPR Optional Protocol, the Canadian government failed to give him an award.

What this analysis has demonstrated is that while both post-conviction review and compensation represent policy statements on the part of the Canadian government as strategies to address wrongful convictions, there are clear deficits in their ability to do so. While a wrongful conviction unequivocally demonstrates that errors can occur in the criminal justice system on a number of levels that result in the wrong person being convicted and imprisoned for a crime they did not commit, when uncovered such errors represent glaring flaws in the system, and detract from its legitimacy. In theory, post-conviction review affords governments the opportunity to address these legitimacy deficits by providing a means to rectify errors. Given the inherent limitations to the CCRG in addressing most wrongful

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<sup>111</sup> Myles Frederick McLellan, “Compensation for Wrongful Convictions and the Innocence Continuum” (2016) 52:2 *Crim L Bull* 346 at 367.

<sup>112</sup> *Tyler I*, *supra* note 6.

convictions due to its high evidentiary threshold, it fails to restore legitimacy for errors that occur by government action that result in a wrongful conviction. Further, the relative inaccessibility of monetary indemnity through the guidelines is another example of a failed attempt to enhance procedural justice.

One question to be addressed is whether the deficits identified in these schemes truly contribute to a lack of legitimacy which is constitutive of the criminal justice system overall, or rather simply represent examples of injustice? While individual injustices may result as a consequence of the inability of post-conviction review to rectify wrongful convictions in only but a few select cases, the larger picture is of a scheme that is unable to do so in a systematic and fair manner. The same arguments apply to compensation schemes – their relative inaccessibility related to a high threshold for eligibility appear to occur systemically, to the degree that less than half of the small number of eligible exonerees are ever compensated. Thus, both schemes lose some of their normative justification when they fail to exercise their rightful purpose.<sup>113</sup> Clearly, citizens seeking relief from a wrongful conviction cannot rely on the system in place to rectify such errors or to compensate them once their convictions are overturned. As Tyler<sup>114</sup> and other authors have noted, fair treatment by authorities is a central part to perceptions of legitimacy. When the quality of interactions with power-holders (or state authorities) is such that dignity and respect are disregarded through an inability to re-visit or re-examine those factors that contributed to state errors, such practices influence perceptions of legitimacy as well as the extent to which those subject to authority are willing to cooperate. The criminal justice system is inherently discretionary and as a result will sometimes make decisions that seem unfair or are unfair. While a difficult concept to accept for some, Tyler states that “Legal authorities also seek empowerment from the public...the public must be willing to accept the use of discretion by legal authorities.”<sup>115</sup> While at the same time, both schemes are highly discretionary and such discretion may work against the system’s ability to re-legitimize itself. The discretion that exists at both

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<sup>113</sup> *Beetham, supra* note 12.

<sup>114</sup> *Tyler I, supra* note 6.

<sup>115</sup> Tom R Tyler, “Procedural Justice, Legitimacy, and the Effective Rule of Law” (2003) 30 *Crime & Justice* 283 at 291.

levels in this process has contributed to a perception of a highly inaccessible procedure.

The focus of this paper on questions of legitimacy regarding post-conviction schemes of exoneration and compensation is also an attempt to fill the gap in criminological research and innocence scholarship regarding the so-called “aftermath” of a wrongful conviction, an area of research that could use greater sustained attention. The bulk of innocence research<sup>116</sup> over the previous two or three decades has tended to focus more on examining the many contributing factors to a wrongful conviction, a great deal of it quantitative in nature, with little attention paid to the lived experience of the exonerated or how they navigate the criminal justice system in seeking justice.<sup>117</sup> By outlining the many barriers to these processes that exist within the Canadian jurisdiction, and underscoring their inefficacy, it is hoped that regulatory and legislative change may follow. While ambitious, this analysis can be construed as a framework for movement toward a more just (and legitimate) system for addressing wrongful convictions, one that not only speaks to its current deficits, but also provides avenues for improvement based on greater access, independence and expediency.

### A. Concluding Remarks

This overview of Canadian post-conviction schemes of exoneration and compensation for the wrongly convicted has illustrated that while these schemes represent both policy and practice aimed at addressing miscarriages of justice, realistically they fall somewhat short. Given that a wrongful conviction raises a number of questions about the inherent ability of the system to correctly convict only those who are guilty and acquit the innocent, government policies on post-conviction review and compensation are an attempt, albeit ineffective in most cases, to rectify these miscarriages of justice. Clearly, both schemes are normatively unjustifiable as they do not conform to expected beliefs about their rightful purpose and exercise. At

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<sup>116</sup> Those contributing to the field of innocence scholarship include a number of noted legal scholars, including: Kimberley Cook, Keith Findlay, Jon Gould, C. Ron Huff, Richard Leo, Bruce MacFarlane, Carole McCartney, Daniel Medwed, Robert Norris, Hannah Quirk, Kent Roach, Christopher Sherrin, Clive Walker, Lynne Weathered, Sandra Westervelt and Marvin Zalman.

<sup>117</sup> There are some exceptions. See Campbell & Denov, *supra* note 82; Sandra D Westervelt & Kimberly J Cook, *Life After Death Row: Exonerees' Search for Community and Identity* (New Brunswick, NJ: Rutgers University Press, 2012).

the same time, this examination of questions of legitimacy regarding systems of post-conviction review and compensation does not fall neatly into categories that are either easily observable or quantifiable. This analysis has revealed that given that aspects of the schemes themselves are highly problematic in their application, neither can truly address the magnitude of cases that present for review, nor do many cases meet the threshold for review or compensation. While both schemes refuse most requests they receive, it is unclear as to whether that is due to too high an evidentiary burden or the exercise of too much discretionary power. Regardless, the wrongly convicted would be mistaken to have faith that either system is an effective means of rectifying the aftermath of a conviction in error.

As opposed to earlier legitimacy work that examined citizen reactions to law enforcement<sup>118</sup> and prisoner responses to penal authorities,<sup>119</sup> questions regarding legitimacy around post-conviction review and compensation may not hinge on measures of law-abiding behavior per se, but rather on measures of faith in legal institutions to exercise their rightful purpose. Evidence of a lack of confidence in such schemes may be reflected in the low percentages of individuals that take advantage of them and the even lower percentages that are successful on review or who are compensated. Those who believe they have been wrongly convicted and have exhausted legal remedies through the courts have little choice but to apply for review if they wish to overturn their original conviction. Furthermore, the exonerees who seek compensation for their ordeal are attempting to make up for the numerous losses they experienced as a result of their wrongful conviction. Given that such schemes lack legitimacy, it may logically follow that they are unable to enhance the procedural justice of the system and as a consequence many wrongful convictions remain unacknowledged and un-indemnified. The advent of future wrongful convictions is no doubt inevitable and consequently systems of review and compensation that retain legitimacy in the eyes of the public are sorely needed.

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<sup>118</sup> See Tyler I, *supra* note 6.

<sup>119</sup> See Leibling, *supra* note 28.