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State Redress as Public Policy: A Two-Sided Coin

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Les programmes d'indemnisation pour des blessures subies par les survivantes et survivants de soins obtenus hors de leur foyer sont de plus en plus communs et dispendieux. La contribution particulière de cet article est d'examiner ces programmes d'indemnisation comme forme de politique sociale. Tant les survivant.e.s que les États ont des intérêts dans le fonctionnement de ces programmes d'indemnisation. Certains de ces intérêts sont compatibles; d'autres sont manifestement conflictuels. Cet article se termine par la mise de l'avant une stratégie pour résoudre un conflit révélateur.

Monetary redress programs that respond to injuries suffered by survivors of out-of-home care are increasingly common and very expensive. This article's distinctive contribution is to approach these redress programs as a form of social policy. Both survivors and states have interests in the operation of redress programs. Some of those interests are mutually compatible, but there are obvious conflicts as well. The article concludes by advocating a strategy for resolving an illustrative conflict.

OVER THE PAST CENTURY, MANY STATES SUBJECTED PEOPLE in out-of-home care to systemic abuse and neglect. Hundreds of thousands of care survivors now seek compensation. Most of their claims are "historic" and pertain to injuries incurred more than a decade previously. As plaintiffs, survivors confront significant obstacles to litigating historic abuse claims, including problems of evidence, limitations defences, diffuse causation, and the costs of litigation.[1] Litigation poses challenges for states too. States that defend themselves through litigation may be viewed as wasting public money on expensive procedures that re-victimize vulnerable survivors. A growing number of states are eschewing litigation in favour of a novel alternative dispute resolution process—the large-scale monetary redress program.

State redress programs discharge compensatory liabilities by providing monetary payments. They are arbitral—survivors apply to have their compensatory claims adjudicated according to criteria that define eligibility and prescribe monetary values. In that way, redress programs resemble victims of crime compensation (VCC) schemes. However, VCC schemes are general public insurance programs; they are not designed to discharge specific liabilities incurred by the offending state. The importance of specific liability makes state redress programs similar to mass tort settlements. Yet, unlike the settlement of tort liability, as the recent Australian Royal Commission observes, redress programs have a marked political character.[2] That political character is visible in the differences between a state's legal liabilities and its redress provisions. Monetary values in some redress programs are substantially less

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[1] Law Commission of Canada, *Restoring Dignity: Responding to Child Abuse in Canadian Institutions* (Ottawa, ON: Law Commision of Canada, 2000), online: <publications.gc.ca/site/eng/325713/publication.html> [perma]at 161ff; Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report: Redress and Civil Litigation* (Sydney, NSW: Commonwealth of Australia, 2015), online: <www.childabuseroyalcommission.gov.au/sites/default/files/file-list/final_report_-_redress_and_civil_litigation.pdf> [perma.cc/PLL7-6N2J] [Royal Commission]; Kent Roach, "Blaming the Victim: Canadian Law, Causation, and Residential Schools" (2014) 64:4 UTLJ 566.

[2] Royal Commission, *supra* note 1 at 248.

than legally required, while others provide significantly more. Moreover, some programs compensate non-tortious injuries, while the ambit of others is less than what litigation could include. Differences between the demands of law and the content of redress indicate the effects of (non-legal) political factors.

State monetary redress programs constitute a new and contested social policy field. This article asks what criteria should apply to their operation. Although a number of authors discuss how the interests of survivors should shape program criteria,[3] there has been no systemic discussion responding to the interests of states. By positioning redress as a form of public policy, this article opens a conversation of what states can be reasonably asked to do. That question demands attention. Redress programs are increasingly common and very expensive. Both states and survivors can reasonably expect that a redress program will not put either in a worse position, overall, than litigation. This is not guaranteed. A badly designed redress program can be worse for everyone. If redress is to be better than litigation, it must be made better.

I. METHOD

Corrective justice involves at least two parties—an offender and a survivor—and two forms of justice, procedural and substantive. But the demands of corrective justice apply differently to different agents in different contexts. Bridging the gap between corrective justice theory and state redress practice requires a contextually sensitive account of the considerations relevant to participating agents. This article provides (part of) such an intermediary account by describing states' and survivors' reasonable[4] "criterial interests"—interests that should inform appropriate criteria for evaluating the substance and procedure of state redress.

Influential models of corrective justice theory tend to depict one-time transactions between equal human agents.[5] But states are not human: they are pluralistic institutional agents. Appropriate criteria for state redress programs should reflect the state's distinct character, including the need for public policy tools that process hundreds or thousands of corrective transactions. Further, states use redress programs to discharge compensatory liability while, as sovereign authorities, they exercise ultimate responsibility for ensuring that justice is done—this is one way the agents who transact redress are not equals. Redress programs need to mitigate that, and other, inequalities. In addition, the redress of historic abuse claims, as section II indicates (below), engenders distinct evidential and assessment concerns. Evaluative criteria for state redress programs cannot abstract from the interests of real-world agents, from the constraints on resources they face, nor from the consequences of differing forms of agency.

To provide relevant empirical information, the paper draws upon a range of past and current redress programs, including: Ireland's Residential Institutions Redress program (2003–2016); two components of Canada's Indian Residential Schools Settlement Agreement (2006–),the Common Experience Payments and the Individual Assessment Process; New Zealand's Historic Claims Process (2008–); Western Australia's Redress WA program (2007–2012);

[3] Illustrative works include: Patricia Lundy, *Historical Institutional Abuse: What Survivors Want from Redress* (Ulster University, 2016), online: <www.amnesty.org.uk/files/what_survivors_want_from_redress.pdf> [perma.cc/8DWT-BEQL]; Suellen Murray, *Supporting Adult Care-Leavers: International Good Practice* (Bristol, UK: Policy Press, 2015); Kathleen Daly, *Redressing Institutional Abuse of Children* (Houndsmills: Palgrave Macmillan, 2014) [Daly, Redressing Abuse].

[4] The discussion concerns "reasonable" interests in the sense meant by Rawls: the "reasonable" is what agents can require from each other as free and equal beings guided by concern for justice. A full exploration of the reasonable interests of a state lies beyond this article, but Section 4 offers an introductory sketch. John Rawls, *Political Liberalism: With a New Introduction and the "Reply to Habermas*" (Chichester, NY: Columbia University Press, 1996) at 49–54.

[5] See *e.g.* Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974) at 78-84.

Queensland's Redress Scheme (2007–2010); and the presently developing Australian National Redress Scheme (2018–). Reflection on actual practice enables the discussion to respect applied theory's ambition to describe normative standards applicable to actual agents.

Nevertheless, the following account is not comprehensive. It attends to corrective claims only, excluding other relevant values and practices. This is a significant limitation because redress is usually part of a comprehensive package alongside apologies, memorialization, and truth recovery initiatives.[6] Moreover, the discussion's bilateral character—addressing only states and survivors—excludes relevant interests of family members, communities, and other parties, including third-party care and service providers.

The following two sections consider the criterial interests of survivors and states. Section II explores the criterial interests of survivors by engaging with the United Nation's Van Boven/Bassiouni "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law" (the VBB Principles).[7] Because there is no document analogous to the VBB Principles describing the state's interests, section III proceeds comparatively, considering how a redress program may be superior to litigation as a policy tool for states. Carrying the discussion a step further, section IV develops a strategy for resolving an illustrative conflict: the acceptable limits of state liability. The result is a significant advance towards a more adequate account of redress program criteria.

II. THE INTERESTS OF SURVIVORS

The VBB Principles are an influential international instrument specifying the remedial responsibilities of states to survivors, including compensation. The Principles derive from a decades-long global consultation process, are endorsed by states in the General Assembly, and are used by courts and advocates to satisfy survivors' high priority interests while avoiding or mitigating common problems. This section uses the VBB Principles as a guide to survivors' criterial interests in "fair and impartial" access to justice before turning to survivors' substantive claims for full compensation.[8]

A. PROCEDURE

Impartiality requires insulating redress procedures from arbitrary considerations. This is challenging when offending states act as both judge and defendant. In New Zealand, for example, redress programs have been run by the government ministries responsible for the original offending. In some cases, redress program staff worked at facilities in which abuses occurred.[9] This lack of independence reduces the confidence survivors have in the program and may deter them from participating.[10] The VBB Principles recognize that state-run redress

[6] Reg Graycar & Jane Wangmann, "Redress Packages for Institutional Child Abuse: Exploring the Grandview Agreement as a Case Study in 'Alternative' Dispute Resolution" (2007) Sydney Law School Research Paper 07/50 at 8; Daly, Redressing Abuse, *supra* note 3 at 196.

[7] *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, GA Res 60/147, UNGAOR, 60th Sess, Supp No 49, UN Doc A/60/PV.64 (2005), online: <www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx> [perma.cc/VW59-XQVD].

[8] *Ibid*, principle 12.

[9] Ministry of Social Development, *Review of Historical Claims Resolution Process: Report on the Consultation Process with Māori Claimants, July 2018*, (New Zealand: 2018), online: <www.msd.govt.nz/documents/about-msd-and-our-work/work-programmes/historic-claims/feedback-from-maori-consultation.pdf> [perma.cc/G58W-Z9J2] at 12.

[10] Elizabeth Stanley, "Responding to State Institutional Violence" (2015) 55:6 Brit J Crim 1149 at 1155.

programs always risk partiality. However, some programs are better than others. Several programs—the Irish Residential Institutions Redress program is an example—lodge responsibility for administering the redress with an independent tribunal. The Irish tribunal avoided hiring staff from offending ministries and was led by independent adjudicators with secure appointments and budgets. Moreover, it adjudicated claims using publicly-available regulations and produced written judgements that were subject to review.[11]

Because impartiality entails the like treatment of like claims, the VBB principles prohibit "discrimination of any kind or on any ground, without exception."[12] Nondiscrimination bars arbitrary distinctions between eligible and ineligible claims. Similarly, nondiscrimination favours procedural stability: other things being equal, claims should not be treated differently at different times. Again, existing redress programs confront difficulties: the beneficiaries of one program may be no more deserving of redress than excluded survivors with slightly different histories. For example, Queensland restricted eligibility to survivors of licensed institutions. That limit excluded most Indigenous survivors because they were usually placed in unlicensed institutions. In Canada, the Indian Residential Schools Settlement Agreement favoured "status Indians"[13] and disfavoured Métis survivors.[14] Survivors can reasonably reject redress programs that discriminate invidiously.

The VBB Principles' procedural requirements for fairness include the survivors' interest in having "relevant information concerning violations and reparation mechanisms."[15] Transparency requires survivors to know how to apply for redress and how claims will be assessed. Again, practice often departs from this requirement. Western Australia's Redress WA program did not have assessment criteria until six months after the program began accepting applications.[16] New Zealand's program has never published comprehensive assessment information. Procedural opacity means that survivors applying for redress do not know what evidence is relevant to the process.

Even when survivors know what information to provide, fairness requires that survivors are not unduly burdened (the VBB Principles suggest "minimiz[ing] the inconvenience … ") in presenting their claims and responding to adverse evidence.[17] Survivors of historic abuse regularly confront serious evidentiary problems that arise from the nature of the injuries and the time elapsed since their experience of care. The childhood experience of abuse can re-structure brain development, leading to memories being repressed, displaced, or otherwise disordered in ways that impede testimony.[18] Documentary evidence of abuse is rarely available:

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[11] Residential Institutions Redress Board, *Annual Report of the Residential Institutions Redress Board 2015* (Dublin, Ireland: Residential Institutions Redress Board, 2016), online: <www.rirb.ie/annualReport.asp>; Residential Institutions Redress Board, "Guide to Hearing Procedures" (April 2003), online: <www.rirb.ie/hearing.asp> [perma.cc/8NG7-F5R3].

[12] *Supra*, note 7, principle 25.

[13] In Canada, individuals classified as "status Indians" are registered under the *Indian Act*. *Indian Act*, RSC 1985, c I-5, s 5.

[14] Tricia Logan, "A Métis Perspective on Truth and Reconciliation" in Marlene Brant Castellano, Linda Archibald & Mike DeGagné, eds, *From Truth to Reconciliation: Transforming the Legacy of Residential Schools* (Ottawa, ON: Aboriginal Healing Foundation, 2008) at 69.

[15] *Supra*, note 7, principle 11.

[16] Government of Western Australian, *Redress WA Guidelines: Guidelines to Provide for an Ex Gratia Payment to Persons Abused and/or Neglected as Children While in State Care* (Western Australia: Government of Western Australia, 2011), online: <www.findandconnect.gov.au/ref/wa/objects/pdfs/WD0000056%20Redress%20WA%20Guidelines%2018%20May%202011.pdf> [perma.cc/9EMX-CUKA].

[17] *Supra*, note 7, principle 12(b).

[18] Bessel A van der Kolk, "Child Abuse & Victimization" (2005) 35:5 Psychiatric Annals 374; Mark Kebbell & Nina Westera, "Investigating Historical Allegations of Sexual Abuse: The Investigation of Suspected Offenders" in Yorick Smaal, Andy Kaladelfos & Mark Finnane, eds, *The Sexual Abuse of Children: Recognition and Redress* (Clayton, AU: Monash University Publishing, 2016) 123.

individual and institutional offenders had little incentive to record injurious events. Poor archival practices and the loss or destruction of records pose further difficulties. Therefore, survivors with meritorious claims will be excluded unless redress programs relax evidentiary standards—most replace tort law's "probability" with "plausibility" and some accept non-standard evidentiary forms, such as "similar fact" evidence.[19]

Resourcing presents further challenges. A proceeding against the state places survivors in a profoundly unequal contest. Although individuals differ, survivor populations are characterized by lower-than-average numeracy and literacy, high rates of morbidity, including mental health infirmities, lower-than-average income and wealth, and high rates of homelessness.[20] By comparison, the financial resources of the state are nearly unlimited. And states have boundless resources of time. States can use those advantages to exhaust survivors. New Zealand's longest claim has been open for over thirteen years.[21] Lengthy litigation has meant that some New Zealand survivors received no more in redress than they owed in legal fees.[22] The VBB Principles stipulate that redress should be "prompt" and unimpeded by unreasonable delays.[23]

Expertise is another inequitably distributed resource. States have numerous legal, archival, and other professional staff. And they possess the subtle advantages of "repeat players."[24] Those advantages include the capacity to deploy long-term strategies that develop favourable precedents and rules. Whereas survivors usually participate in only one case (their own), the state employs experts who conduct hundreds of cases, enabling those officials to develop personal relationships with adjudicators, cultivate a reputation for credibility, and learn from experience. In response, the VBB Principles require "proper assistance" for survivors, including expert, medical, and legal support. Access to counsel is particularly important in redress programs for which higher monetary values require survivors to present complex evidence or make important decisions quickly. The VBB Principles' demand for "effective access" to justice vindicates simple programs that are low-cost to engage with and require all stakeholders to provide pertinent information, such as relevant records or prior findings, proactively.[25]

A fair proceeding protects the well-being of survivors. The VBB Principles stipulate that "appropriate measures should be taken to ensure [the survivors'] safety, physical and psychological well-being and privacy."[26] Survivors confront high risks of serious psychological damage, including re-traumatization during the redress process. Survivors must

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[19] Similar fact evidence uses information derived from injurious patterns, where similar things happened to different individuals. See HL Ho, "Similar Facts in Civil Cases" (2006) 26:1 Oxford J Leg Stud 131.

[20] Elizabeth Fernandez et al, *No Child Should Grow up Like This: Identifying Long Term Outcomes of Forgotten Australians, Child Migrants and the Stolen Generations* (Sydney, AU: University of New South Wales, 2016), online: <www.forgottenaustralians.unsw.edu.au/sites/default/files/uploads/UNSW_ForgottenAustralians_Report_Nov16.pdf> [perma.cc/EHD4-XVC4] at 227; Patricia Lundy & Kathleen Mahoney, "Representing Survivors: A Critical Analysis of Recommendations to Resolve Northern Ireland's Historical Child Abuse Claims" (2018) 7 The Annual Review of Interdisciplinary Justice Research 258 at 268; Mary Higgins, *Developing a Profile of Survivors of Abuse in Irish Religious Institutions* (Newbridge, Ireland: St. Stephen's Green Trust, 2010), online: <www.ssgt.ie/wp-content/uploads/2017/11/Developing-a-profile-of-survivors-of-abuse-in-Irish-religious-institutions-2010.pdf> [perma.cc/T9CU-UVTP] at 2ff.

[21] Ministry of Social Development, *Claims Resolutions Quarterly Data Report for Claims Received 1 January 2004 to 31 March 2018* (2018). Copy on file with the Author.

[22] Murray, *supra* note 3 at 91.

[23] *Supra*, note 7, principle 14.

[24] Richard C Reuben, "Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice" (2000) 47 UCLA L Rev 949 at 1065.

[25] *Supra*, note 7, principle 12.

[26] *Ibid*, principle 10.

describe their injuries, often on multiple occasions, in situations that are very stressful (such as under cross-examination). Ascertaining the physical, psychological, and cultural damage resulting from childhood abuse requires an intrusive assessment of the survivor's personality and character, their medical and employment history, and their relationships with family and friends.[27] Regarding privacy, specific forms of abuse may be humiliating and, for some survivors, to have been in out-of-home-care is shameful.[28] The VBB Principles support the development of programs that limit re-traumatization through the reuse of testimony provided in other forums, the use of expert reports, similar-fact evidence, and public documents. In addition, the Principles suggest that survivors should not bear the costs of any medical, psychological, or other support services needed to pursue compensation.

This survey of the survivor's interests in procedural criteria concludes with a value the VBB Principles do not explicitly address; the interest of survivors in active participation. Redress programs respect survivors as agents by creating opportunities and structures within the program wherein survivors can act.[29] Participation may occur in program design, in providing support services, in testifying, or in being involved in payment negotiations. However, because opportunities for participation are not cost-free, effective survivor participation requires good communal and institutional support.[30]

B. SUBSTANCE

The VBB Principles suggest survivors have both monetary and non-monetary remedial claims. Non-monetary remedies in the form of rehabilitation, restitution, and satisfaction are important, but monetary compensation has distinctive value.[31] Compensation respects the survivor's agency by providing the means to pursue and obtain a wide range of goods and services.[32] Unlike redress "in-kind" or through service-provision, money is extremely fungible—putting power in the hands of survivors.[33]

The VBB Principles define compensation as a response to any "economically assessable damage."[34] The substantive content of the survivor's claim depends on the nature of

[27] Western Australian Department for Communities, *Overview of Redress WA Administration: Key Learnings*, (Undated) [unpublished] at 7. Copy on file with the author. Undated) at 7.

[28] Ruth Emond, "Longing to Belong: Children in Residential Care and Their Experiences of Peer Relationships at School and in the Children's Home" (2014) 19:2 Child & Family Social Work 194; Leonie Sheedy, "Try to Put Yourselves in Our Skin: The Experience of Wardies and Homies" (2005) 2005:1 International Journal of Narrative Therapy & Community Work 65.

[29] Carlton Waterhouse, "The Good, the Bad, and the Ugly: Moral Agency and the Role of Victims in Reparations Programs" (2009) 31:1 U Pa J Intl L 257.

[30] Daly, Redressing Abuse, *supra* note 3 at 170.

[31] To expand, the VBB Principles suggest that *rehabilitation* includes claims for the treatment of medical or psychological damage. In international law, *restitution* usually concerns the restoration of properties and liberties wrongfully taken or denied. The VBB Principles specify that restitution also includes the recovery of personal identity and family life. Lastly, the VBB Principles identify a range of goals and measures as claims for *satisfaction*. In general, these include researching and publishing accurate accounts of the injury, punishing offenders and apologies. The Principles also include a fifth category of remedy: measures to prevent *re-occurrence*. But that is not a 'remedial' demand.

[32] Madeleine Dion Stout & Rick Harp, *Lump Sum Compensation Payments Research Project: The Circle Rechecks Itself* (Ottawa, ON: Aboriginal Healing Foundation, 2007), online: <www.ahf.ca/downloads/newest-lsp.pdf> [perma.cc/E9W2-GJRN] at 27.

[33] There may be cases in which in-kind provision is better for all parties. For example, one study suggests that "therapy could be at least 32 times more cost effective than financial compensation" in relieving psychological distress. Christopher J Boyce & Alex M Wood, "Money or Mental Health: The Cost of Alleviating Psychological Distress with Monetary Compensation Versus Psychological Therapy" (2010) 5:4 Health Economics, Policy and Law 509 at 509.

[34] *Supra*, note 7, principle 20.

the original wrongdoing (the experience of injury) and the effects of that wrongdoing on the survivor (consequential damage). As a "regulative ideal,"[35] compensation should make the survivor as well off as they would have been had the injury not occurred. That demand is easy to articulate, but hard to satisfy. There may be no way to recover lost childhoods or to repair psychological and social damage. Nevertheless, the Principles' ambit of compensable damage includes physical and mental harms, loss of opportunities, including employment, education and social benefits, loss of earnings and earning potential, and moral damage, which may include damage to family and cultural relationships, reputation, or character. The Principles also include the cost of any treatment needed by survivors as a result of their injury.

To conclude this section, the VBB Principles articulate survivor-respecting program criteria. Reflecting their unique circumstances and capabilities, the specific content of each survivor's substantive and procedural interests will differ. Nevertheless, as a regulative ideal, redress should fully compensate survivors through fair and impartial procedures that respect their situation-relevant criterial interests.

III. THE INTERESTS OF STATES

A state's remedial responsibilities arise from its responsibilities for furnishing citizens with a reasonable framework for civic life, specifically the maintenance of just institutions.[36] When a state fails to discharge those responsibilities by injuring a citizen, it assumes liability. That distinctive basis for corrective liability is matched by the state's distinctive resourcing. States tax the citizenry to pay for institutions that meet basic demands of justice. Because the rectificatory obligations the state has towards survivors constitute part of those demands, the citizenry has reason to contribute resources to redress. However, citizens fund redress for the same generic reasons they fund other public expenditures: they are not (usually) guilty of the relevant wrongdoing and have countervailing claims upon the public revenue.

States are optimizing agents that aim to serve a range of public goods efficiently. The state's primary policy goal in the domain of historic abuse claims is the political *resolution* of the survivors' salient claims. That policy goal is a regulative ideal; it does not dominate the state's decision structure. Every existing state is marked by significant and persistent injustices. Therefore, the survivors' redress claims are in competition with other remedial demands. In addition, states must balance the commitment of resources to redress against other public responsibilities, such as defence, medical services, and public infrastructure. The survivors' just demands are, from a public policy perspective, a competing claim upon the public revenue.

Section II's discussion of the survivors' criterial interests relied on an authoritative document (the VBB Principles). No such instrument discusses the state's criterial interests. Therefore, this section proceeds differently. Because redress is a form of public policy, reasonable criteria are derivable from public policy analysis—at least in part. An axiom of public policy analysis is that the optimal relation between a policy target and a policy tool is one-to-one. To have more than one policy tool for a policy goal invites inefficiency. All states maintain a policy tool for resolving corrective obligations—the ordinary courts. This section proceeds comparatively, developing criterial interests by comparing redress and litigation with regard to the state's policy goal of resolution. Litigation resolves claims through processes that are lawful, public, and effective. Redress should not detract from those procedural values. Substantively, redress should be efficient.

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[35] A regulative ideal is a principle or value that serves to shape action without presuming that the principle or value can be wholly realized. See Dorothy Emmet, *The Role of the Unrealisable: A Study in Regulative Ideals* (Houndsmills: The Macmillan Press, 1994).

[36] John Rawls, *A Theory of Justice* (Cambridge, MA: The Belknap Press of Harvard University Press, 1971) at s 43.

A. PROCEDURE

Litigation assures legality—claims are resolved in conformity with public law and regulation. Redress programs must be equally lawful. Lawfulness requires that public money be disbursed only when legally authorized. Moreover, it requires program operations to conform to all applicable laws. That is a significant constraint. Employment law offers an illustrative challenge. State redress programs operate within public sector regulatory environments designed for stable long-term career development. Those regulations can make it difficult to hire and retain good staff for short-term redress programs.[37] Some programs rely on temporary contract workers, whose insecure employment creates incentives for greater staffing turnover or "churn."[38] Others use existing civil servants, creating concerns with impartiality. Either way, lawful program staffing incurs significant procedural costs. However, while states can reasonably avoid inefficient investments in large numbers of new staff, the overall procedural costs of litigation are (often) much greater than redress. In 2013, New Zealand estimated that litigating a historical child abuse case cost NZD $640,000 (USD $422,400),[39] *excluding* the costs of any award.[40] At the time, New Zealand's administrative costs for its redress program were around NZD $17,700 per claim (USD $11,682). Although redress programs should aim to draw upon existing human resources and infrastructure, even extensive new resourcing can be lawful and cost-effective.

Section II raised the survivor's interest in procedural transparency—programs should operate according to rules and procedures that are public, prospective, and stable. States have an analogous interest in publicity. Publicity enables people to know what rules apply and the extent to which agents conform to those rules. Litigation satisfies that demand with open courts that operate according to known rules and procedures using evidence available to, and contestable by, all parties.

By testing claims to exclude non-meritorious applications, redress programs can provide comparable forms of publicity. Although privacy concerns may prohibit publishing the details of individual cases, aggregate information and robust review procedures can deliver program-level publicity. Assessment should approve meritorious and exclude non-meritorious claims. To do this, a redress program needs to obtain relevant and reliable information, including potentially adverse evidence. Program guidelines can instruct officials to accept survivor testimony as true and to use low evidentiary thresholds, but programs are accountable for their decisions—legally to their auditors, politically to the citizenry. "[T]he public expects

[37] Indian and Northern Affairs Canada, *Management Practices Review of the Resolution and Individual Affairs Sector (RIAS)* (Ottawa, ON: Indian and Northern Affairs Canada, 2009), online: <publications.gc.ca/site/eng/9.829862/publication.html>; Evaluation, Performance Measurement, and Review Branch, *Lessons Learned Study of the Common Experience Payment Process* (Aboriginal Affairs and Northern Development Canada, 2015), online: <www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-AEV/STAGING/texte-text/ev_lls_1468332975934_eng.pdf> [perma.cc/46UH-BNVJ] at 37–38.

[38] Indian Residential Schools Adjudication Secretariat, *Annual Report, 2011: Annual Report of the Chief Adjudicator to the Independent Assessment Process Oversight Committee* (Indian Residential Schools Adjudication Secretariat, 2011), online: <www.iap-pei.ca/media/information/publication/pdf/pub/ar2011-eng.pdf> [perma.cc/9GJD-N5R5].

[39] USD equivalents were calculated on 8 July 2019 using exchange rates of: NZD: $0.66; AUD: $0.70; CDN: $0.76. There is no adjustment for inflation.

[40] Office of the Minister for Social Development, *Memo to the Chair, Cabinet State Sector Reform and Expenditure Control Committee: Resolving Historic Claims of Abuse - Proposal to Bring Funding Forward* (2014), online: <www.msd.govt.nz/documents/about-msd-and-our-work/work-programmes/historic-claims/cabinet-paper-proposal-to-bring-funding-forward-nov-2014.pdf> [perma.cc/N8LV-BT2V] at 2–3.

that a decision to pay a settlement is made only where there is good information to support that [decision]."[41]

A last procedural interest concerns effectiveness: the adjudication of redress should normally be final and not regularly displaced by independent processes. Litigation serves this value by being a "closed system" wherein claims are adjudicated according to legal rules and issued by legal authorities. There is no appeal on points of law beyond the legal system. However, most survivors never file claims, making litigation ineffective in resolving their claims. Effective redress programs need to attract survivors. There is some evidence that plaintiffs prefer the outcomes of well-designed alternative dispute resolution programs to those of litigation.[42] Attractive programs are easy to understand and to contact, and are characterized by simple, straightforward, and predictable procedures. Redress should be no slower than litigation (preferably much faster). Because increasing information quantity is strongly correlated with decreasing adjudication speed (and higher procedural costs),[43] states have an interest in ensuring that a program's informational infrastructure provides adjudicators with easily useable data. Their interest in effectiveness means that states have an interest in specifying the form and character of redress applications.

B. SUBSTANCE

States can expect redress to be more efficient than litigation—obtaining a higher value ratio of the policy target when compared to input costs. In terms of monetary costs, litigation is always expensive and sometimes risky for states. Where redress offers lower value payments, it releases monies that can be put toward other policy goals. To give some comparative data, one landmark historic abuse case, *Trevorrow v State of South Australia (No 5)*,[44] resulted in an award of AUD $525,000 (USD $367,500), while the maximum payout in the present Australian National Redress Scheme is AUD $150,000 (USD $105,000).[45] Offending states may confront thousands of historic claims with commensurate financial risks. In 2005, a Canadian court certified over ten thousand plaintiffs in a class action seeking CDN $36 billion (USD $27.36 billion) in damages.[46] The risk of potential liability made Canada's CDN $5 billion (USD $3.8 billion) Indian Residential Schools Settlement Agreement, settling 79,309 claims, an efficient strategy.[47]

Another source of efficiency is the potential for redress programs to address meritorious claims that litigation is incapable of resolving. Previously-noted problems of evidence, limitations defences, diffuse causation, and the costs of litigation (for plaintiffs) prevent states from discharging remedial obligations through litigation. Some meritorious claims fall beyond the limits of tort law; sibling-separation is a good example. With greater flexibility, policymakers can craft redress programs to target salient claims (and claimants).

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[41] Ministry of Social Development, News Release, "Ministry Process for Historic Claims Working Well" (24 July 2009), online: *Scoop Politics* <www.scoop.co.nz/stories/PO0907/S00260/ministry-process-for-historic-claims-working-well.htm> [perma.cc/UH2Q-B5Y2].

[42] Reuben, *supra* note 24 at 963.

[43] Stephen Winter, "Two Models of Monetary Redress: A Structural Analysis" (2018) 13:3 Victims & Offenders 293.

[44] [2007] SASC 285 [*Trevorrow*].

[45] *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (Austl), 2018/45, s 16(1)(a).

[46] Ronald Niezen, "Templates and Exclusions: Victim Centrism in Canada's Truth and Reconciliation Commission on Indian Residential Schools" (2016) 22:4 Journal of the Royal Anthropological Institute 920 at 921.

[47] Indigenous and Northern Affairs Canada, *Statistics on the Implementation of the Indian Residential Schools Settlement Agreement* (Last modified on 19 February 2019), online: <www.aadnc-aandc.gc.ca/eng/1315320539682/1315320692192> [perma.cc/EW8U-5Z5P] [IRSSA Statistics].

A good redress program should resolve more salient claims than litigation. To take a further step, redress programs are better when they resolve more meritorious claims. But that interest in resolution is balanced by a concern with costs: states have an interest in expending no more (ideally less) on redress than they would on litigation, while good redress programs resolve no fewer (ideally many more) meritorious claims than litigation. An efficient redress policy might optimize those two interests: if payment values decrease as the number of (expected) resolved claims increases, programs become more efficient, increasing the ratio of the achieved policy target as compared to input costs.

To summarize points made in section III, a redress program's operative criteria must respect the agency of defendant states. That requires attending to the kind of agency states exercise. States bear remedial obligations, however, those obligations are "on all fours" with other policy goals—redress is a form of public policy. This section canvassed an indicative set of criterial interests of states: procedurally, redress should be lawful, public, and effective, while substantively, redress should optimize costs and resolution efficiently.

IV. CONTESTED CRITERIA

Sections II and III described important criterial interests. The values of impartiality and fairness respect survivors' interests in transparent redress programs that provide adequate support to applicants, while protecting their well-being and privacy. Substantively, survivors have an interest in full compensation for any meritorious claim they pursue. For states, redress programs will be no worse than litigation if they are lawful, public, effective, and efficient. This overview reveals several operative criteria that both states and survivors could reasonably accept. Both could endorse stable and transparent redress processes that respect reasonable privacy constraints, both have an interest in lower cost and speedier resolutions, both can agree that a redress program's procedures should be simple and easy to use, and both can agree that redress should be lawful.

The discussion also indicates potential disagreements. The need for lawful public employment may slow redress operations. Survivors' privacy concerns may conflict with the state's interest in robust public evidence of validity. Such conflicts will multiply. Therefore, policymakers require strategies for reasonable resolution. This section develops a strategy for resolving an illustrative conflict over compensatory values.

Survivors have a substantive interest in full compensation. Full compensation completely satisfies all of the survivors' claims for the experience of injury and any harm (damage) foreseeably resultant from that injury. Yet, it is often presumed that redress programs will not provide full compensation.[48] The difference is rarely justified. Many programs present survivors with a "Hobson's Choice" of partial compensation or nothing. If monetary values are set by what (marginalized, disadvantaged, and economically insecure) survivors are willing to accept, redress may insult survivors and risk equivalency with "hush money."[49] Values that are too low may lead to ineffective policies of resolution because they do not encourage survivors to accept redress, or they give reason for survivors to continue to pursue partially satisfied claims, or both.

Attempts to justify partial payment sometimes point to the purported unaffordability of full compensation.[50] The enormous resources of developed states raise questions about that

[48] Jaime E Malamud-Goti & Lucas Sebastián Grosman, "Reparations and Civil Litigation: Compensation for Human Rights Violations in Transitional Democracies" in Pablo De Greiff, ed, *The Handbook of Reparations* (New York, NY: Oxford University Press, 2006) 539; Royal Commission, *supra* note 1 at 220.
[49] Daly, Redressing Abuse, *supra* note 3 at 181; J R Miller, *Residential Schools and Reconciliation: Canada Confronts Its History* (Toronto, ON: University of Toronto Press, 2017) at 167–69.
[50] Royal Commission, *supra* note 1 at 248.

claim: states regularly commit themselves to large expenditures underwritten by long-term debt financing. Other commentators suggest that characteristic injuries such as sexual abuse, damages done to family relationships, and lifetime illiteracy are not quantifiable.[51] If survivors' injuries are incalculable, then compensation is impossible, and remedial efforts might instead recognize the survivor's experience, help make a positive difference in their life, or help them integrate socially. Such arguments shift the justificatory burden for redress from corrective justice to matters of distributive justice or citizenship. This detracts from the policy target; when redress values are unmoored from compensation, the survivors' corrective claims are not resolved. And survivors can rightly point to numerous examples in litigation (like the above-mentioned *Trevorrow* case) where courts award compensation for supposedly non-quantifiable injuries.[52]

Survivors have an interest in full compensation. If redress will not fully satisfy that interest, policymakers need to provide publicly-acceptable strategies for discounting. One option is for policymakers to defend a maximum financial commitment by reference to competing demands on the public revenue. Survivors can endorse the authority of democratically elected officials to allocate public expenditure. In this "democratic" strategy, the justifiable discounting of monetary values will vary according to the state's existing commitments and future projects—the degree to which funding must be diverted from other programs, or debt accrued, to satisfy the claims. However, this democratic strategy confronts concerns with impartiality. It will be politically challenging for officials representing an offending state to say to survivors that they have decided to allocate monies to other priorities. And observers will note the enormous resources of developed states.

Another approach justifies reduced payouts by reference to the advantages redress provides to survivors as compared to litigation. For example, lower monetary values could be "the quid pro quo for lower barriers to participation and [less stringent] testing of evidence."[53] That line of argument risks being unfair to survivors with meritorious claims.[54] The problems survivors confront in litigation are usually created by legal procedure (such as technical defences led by the state) or by the offending state's previous failures to fund care placements properly, keep appropriate records of abuse, investigate complaints, or provide timely

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[51] The Compensation Advisory Committee, *Towards Redress and Recovery: Report to the Minister for Education and Science* (Dublin, Ireland: Department of Education and Science, 2002), online: <www.lenus.ie/bitstream/handle/10147/45264/7030.pdf?sequence=1&isAllowed=y> [perma.cc/BBY2-HFBT] at 66; Marilyn Rock, *Submission to the Senate Community Affairs Committee Inquiry into the Progress Made with the Implementation of the Recommendations into: The Child Migrant Inquiry Report, Lost Innocents: Righting the Record; the 2004 Report, Forgotten Australians: A Report on Australians Who Experienced Institutional or Out-of-Home Care as Children; the 2005 Protecting Vulnerable Children: A National Challenge Report* (Western Australian Department for Communities, 2008), online: <www.aph.gov.au/~/media/wopapub/senate/committee/clac_ctte/completed_inquiries/2008_10/recs_lost_innocents_forgotten_aust_rpts/submissions/sub12_pdf.ashx> [perma.cc/E4F5-JHWF] at 3; Kathleen Daly, "Money for Justice? Money's Meaning and Purpose as Redress for Historical Institutional Abuse" in Yorick Smaal, Andy Kaladelfos & Mark Finnane, eds, *The Sexual Abuse of Children: Recognition and Redress* (Clayton, AU: Monash University Publishing, 2016) 160 at 173–174; Anna Bligh, *Inquiry into Government Compensation Schemes: Queensland Government Submission to Senate Standing Committee on Legal and Constitutional Affairs* (Queensland, AU: Queensland Government, 2010), online: <www.aph.gov.au/DocumentStore.ashx?id=52ef4fa9-d73a-4d1d-a288-a8ba4fd55100> [perma.cc/34TD-787M].

[52] *Supra*, note 44.

[53] Estelle Pearson, David Minty & Justin Portelli, "Institutional Child Sexual Abuse: The Role & Impact of Redress" (Paper delivered at the Actuaries Institute Injury Schemes Seminar, Sydney, Australia, 8–10 November 2015) [unpublished], online: <www.actuaries.asn.au/Library/Events/ACS/2015/PortelliPearsonChildAbuse.pdf> [perma.cc/3AG6-N7HT] at 41; See also Royal Commission, *supra* note 1 at 222.

[54] Gwen Reimer et al, *The Indian Residential Schools Settlement Agreement's Common Experience Payment and Healing: A Qualitative Study Exploring Impacts on Recipients* (Ottawa, ON: Aboriginal Healing Foundation, 2010), online: <www.ahf.ca/downloads/cep-2010-healing.pdf> [perma.cc/T987-LPPW] at 31–32.

compensation. Survivors could reasonably reject incomplete compensation as perverse—making survivors bear the costs of the state's compounding failures.

Nevertheless, survivors may reasonably accept restricted compensation, if they receive full compensation for a limited range of injuries. It is common for programs to redress specific injurious "policy wrongs."[55] For example, Canada's Common Experience Payment program, as part of the Indian Residential Schools Settlement Agreement, calibrated payments according to the period of time that survivors were in out-of-home care, with payouts increasing in step with the duration of care. In total, 79,309 survivors obtained redress from that program, which redressed only a specific injurious experience, ignoring other abuses and all consequential damage.[56] It serves as a model for a potential strategy.

The envisioned strategy does not attempt to reduce the value of specific claims. Rather it reduces the ambit of eligible injuries. Some survivor-focused material suggests support for this approach.[57] The demand for "effective access"[58] in the VBB Principles justifies simple programs that are easy to understand and navigate. More limited programs target claims that are easier to resolve: these might be claims that are less costly for survivors or states (or both parties) because they require less information or use more accessible information. Limited ambit programs can operate more quickly than those that engage in comprehensive assessments and can eschew costly, invasive, and psychologically challenging assessments.[59] Canada's Common Experience Payment program was relatively quick and easy to negotiate.[60] The evidence for most claims could derive from public records. Despite the large number of applications, the average processing time was 74.8 days per claim: [61] 94 per cent of validated applications were paid within twenty-six months.[62]

To respect the value of transparency, payment values must be publicly justifiable. This is hard, but not impossible. For example, if compensation is for the policy wrong of neglect, then the values provided might track the price of care services. Redress programs might draw upon a method used by American courts that prices the cost of replacing the care services a non-negligent parent provides. Using that technique, Andrew Laurila suggests that a single American parent's nurture is "worth" around USD $1500/month between the ages of four and eighteen.[63] In a program redressing the policy wrong of neglect, both states and survivors might prefer redress payments that are sensitive to injurious experiences, with payments increasing in step with the duration of neglect. As an indication, Canada's Common Experience Payment average was CDN $20,457 (USD $15,547).[64] That figure corresponds to around 4.6 years in

[55] Daly, Redressing Abuse, *supra* note 3 at 126–128.
[56] For information on the Canadian program see Reimer et al, *supra* note 54. See also IRSSA Statistics, *supra* note 47.
[57] Kathleen Mahoney & Patricia Lundy, *What Survivors Want: Part Two: A Compensation Framework for Historic Abuses in Residential Institutions* (Ulster University, 2016), online: <uir.ulster.ac.uk/34640/1/WSW%20FINAL%20APPROVED.pdf> [perma.cc/D9P5-QDZN] at 8–9; Graycar and Wangmann, *supra* note 6 at 7-8; Alliance for Forgotten Australians, *Response to the Royal Commission Consultation Paper: Redress and Civil Litigaton* (Alliance for Forgotten Australians, 2015), online: <forgottenaustralians.org.au/assets/docs/Royal-Commission/AFA-response-to-Royal-Commission-Consultation-Paper-on-Redress-Civil-Litigation.pdf> [perma.cc/WD7Q-ZV58] at 4, 11–12.
[58] *Supra*, note 7, principles 3(c), 11(a).
[59] Winter, *supra* note 43.
[60] This is a general claim. Some survivors experienced serious problems with the program. Reimer et al, *supra* note 54.
[61] Strategic Policy and Research Branch, *Evaluation of the Delivery of the Common Experience Payment: Evaluation Report* (Ottawa, ON: Employment and Social Development Canada, 2013) at 41.
[62] As of November 2009, the program had made 74,701 payments out of an eventual total of 79,309. Reimer et al, *supra* note 54 at 6.
[63] Andrew Laurila, "Valuing Mom & Dad: Calculating Loss of Parental Nurture in a Wrongful Death Action" (2013) 35:1 U of La Verne L Rev 39 at 70.
[64] IRSSA Statistics, *supra* note 47.

care,[65] which, using Laurila's figure, would garner an unadjusted average payment value of around USD $82,800. While Laurila's figure represents the total value of all care received by a minimally non-neglected child, most survivors will have received some care, therefore, they would not be entitled to the full sum. The redress of neglectful care could provide compensation on a pro rata basis, using a baseline sum appropriate to the jurisdiction.

The range of compensable injuries addressed by a program can vary significantly, including or excluding differing forms of abuse and damage that appear at different times or over differing periods. Different survivors will have different preferences regarding the optimal balance between participatory costs and compensatory quantum. A limited-ambit program restricts the scope of eligible claims to ease access to redress. Moreover, section III observed the state's interest in optimizing cost-to-output ratios by decreasing payment values as the number of resolved claims increases. A limited ambit program responds to the state's interest in efficiency. But some survivors will prefer to pursue more complete compensation through processes that subject their claims to greater scrutiny, choosing not merely the prospect of larger monetary payments, but also the opportunity to put their personal testimony on record and to obtain a fuller acknowledgement of their experience. Canada gave survivors the option to pursue more complete compensation through the "Independent Assessment Process."[66] Following that Canadian model, better redress programs might provide two or more "streams" with average monetary payments increasing in conjunction with the ambit of compensation.

In no case should survivors be compelled to accept a non-compensatory resolution of their corrective justice claims. Acceptable lower value programs have a limited ambit of eligible injuries, not arbitrary limits to compensation. Survivors receive full compensation for all validated claims with values derived using robust assessment methodologies. Where full compensation is provided, then waivers indemnifying the state, or other parties, against further claims may be appropriate. But it is unreasonable to ask survivors to waive legal rights that have not been satisfied. Survivors should only waive claims for which they receive full compensation, remaining free to litigate unsatisfied claims.

The complex policymaking involved means that better redress programs are likely to require deliberations with survivors or their representatives. Survivor organizations can be involved in every phase of policy development, including determining eligibility requirements, devising assessment procedures, and setting monetary values. Section II observed the procedural value of survivor participation. Their participation respects survivors' agency interests and may aid the state in obtaining resolution, if survivor-involvement improves program delivery and provides a public endorsement of the program. The influence of survivors as program advocates is likely to be particularly important to the successful defence of contestable policy decisions.

The "limited redress" strategy aims to displace the pursuit of full compensation with (more) accessible redress for a limited range of claims. The expectation (hope) is that many survivors will be satisfied with access to quicker and easier redress thereby optimizing resolution. Claims that remain outstanding may reduce in salience as the redress program attracts survivors. Previous examples indicate that this type of approach can work politically, when accompanied by other non-compensatory redress measures demonstrating the state's commitment to the fair and equitable treatment of survivors.[67]

V. CONCLUSION

[65] Daly, Redressing Abuse, *supra* note 3 at 128.
[66] See Indian Residential Schools Adjudication Secretariat, *A Guide for Claimants in the Independent Assessment Process*, online: <www.iap-pei.ca/former-ancien/iap/claimant_guide-eng.pdf> [perma.cc/GQ26-7T3M].
[67] Graycar & Wangmann, *supra* note 6 at 12–13.

State redress programs are a form of social policy that discharges corrective justice obligations. Both survivors and states have procedural and substantive criterial interests in the operation of redress programs. The survivors' procedural interests in impartiality and fairness underpin the development of transparent programs providing sufficient support to survivors, while protecting their well-being and privacy. Substantively, survivors have an interest in full compensation for all meritorious claims. For states, redress programs will be no worse than litigation if they are lawful, public, effective, and efficient, the last being a substantive criterion. Some of the state's and survivors' criterial interests are congruent. Others conflict. The paper concluded by advancing a strategy for managing an illustrative conflict over payment values.