



# Tools for Tragedy: Procedures for Assessing Historic Redress Claims

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*Programs providing monetary redress for historical injustices are often heralded as praiseworthy acts of national accountability. However, critics tend to judge their implementation harshly. Those unfavorable judgments respond, at least in part, to trade-offs between important values that are “hard-wired” into the basic tools of assessment. Exposing those trade-offs can help observers understand the compromises inherent in program design and, hopefully, support policy makers in creating more rational programs.*

**Keywords:** Human Rights, Redress, Institutional Abuse, Reparations, Historical Justice, Child Abuse.

## **Related Articles:**

Kahn-Nisser, Sara. 2018. “Constructive Criticism: Shaming, Incentives, and Human Rights Reforms.” *Politics & Policy* 46 (1): 58-83. <https://doi.org/10.1111/polp.12240>

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Woessner, Matthew, and April Kelly-Woessner. 2006. “Slavery Reparations and Race Relations in America: Assessing how the Restitutions Debate Influences Public Support for Blacks, Civil Rights, and Affirmative Action.” *Politics & Policy* 34 (1): 134-154. <https://doi.org/10.1111/j.1747-1346.2006.00007.x>

## **Herramientas para la tragedia: procedimientos para evaluar reclamos de reparación históricos**

*Los programas que brindan compensación monetaria por injusticias históricas a menudo se anuncian como actos loables de responsabilidad*

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Acknowledgements: The article benefited from comments offered at the annual conference of the New Zealand Political Studies Association in 2019. Geoff Kemp, Katherine Smits, and Martin Wilkinson read and commented on an early draft. *Politics & Policy's* editors and reviewers provided important suggestions. The Faculty of Arts at the University of Auckland funded relevant research.

*nacional. Sin embargo, los críticos tienden a juzgar su implementación con severidad. Esos juicios desfavorables responden, al menos en parte, a compensaciones entre valores importantes que están "integrados" en las herramientas básicas de evaluación. Exponer esas compensaciones puede ayudar a los observadores a comprender los compromisos inherentes al diseño de programas y, con suerte, ayudar a los responsables de la formulación de políticas a crear programas más racionales.*

**Palabras Clave:** Palabras Clave: Derechos humanos, Reparación, Abuso institucional, Reparaciones, Justicia histórica, Abuso infantil.

### 悲劇工具：評估歷史賠償要求的程序

為歷史上的不公正行為提供金錢賠償的計劃通常被譽為值得稱讚的國家責任行為。但是，批評家往往會嚴厲地判斷其實施情況。這些不利的判斷至少部分是對“硬連接”到評估基礎工具中的重要價值之間的權衡取捨。揭露這些折衷可以幫助觀察者理解程序設計中固有的折衷，並希望支持決策者創建更合理的程序。

關鍵字: 关键词: 人權, 補救, 機構虐待, 賠償, 歷史正義, 虐待兒童.

Most developed countries have programs that provide monetary redress to people (survivors) of historic injuries experienced as young persons in care. These monetary redress programs should benefit survivors, acknowledging their injurious experiences through remedial payments. But such redress programs are commonly criticized as both unjust and harmful (Daly 2018; Dion Stout and Harp 2007; Nagy and Gillespie 2015; Pembroke 2019; Reimer *et al.* 2010). Redress programs are often over budget, take longer than expected and, in a few cases, are subject to fraud. This article identifies how those problems arise and suggests some ways to mitigate them with reference to the procedures used to assess survivors' claims.

The first monetary redress programs emerged in Canada in the 1990s and were quickly followed by other states (Daly 2014). The programs developed at a time when a growing understanding of the significant and persistent damage caused by childhood abuse met a “burgeoning global preoccupation with coming to terms with past injustices” (Torpey 2001, 357). The programs both respond to, and are a part of, the surfacing of what Hannah Arendt (1958, ix) termed “subterranean” histories. There is a growing literature situating the redress of institutional abuse within the larger politics of repairing historical injustices, often from (post)colonial or transitional justice perspectives (see e.g., Hamber and Lundy 2020; Henry 2015; McAuliffe 2017; Vernon 2012; Woolford 2015). Reflecting the broad questions raised by historical injustices, monetary redress programs usually emerge as part of a suite of other rectificatory initiatives, including apologies, public inquiries, and criminal investigations (Murray 2015).

In the early years of the millennium, scholars interested in monetary redress proposed normative standards for this novel form of public policy (De Greiff 2006; Llewellyn 2002). Drawing from that work, in 2006 the United Nations published guidelines for state-run redress programs. Those guidelines recommend programs that are transparent, quick, effective, and fair, while protecting survivors' well-being and agency (General Assembly of the United Nations 2006). One might also hope for procedures that realize typical public policy values such as cost-effectiveness and integrity (see Winter 2019). The first half of this article demonstrates how the basic tools used to assess redress applications entail significant trade-offs (one of the "tragedies" of this article's title) between those values, with different assessment techniques resulting in trade-offs between different values for different participants. The article then applies that normative analysis to three prominent program design issues: the use of evidentiary standards; the redress of consequential damage; and the responsiveness of a program's payment values. Those three applications support the argument that trade-offs are unavoidable and pervasive, which, in turn, may help to explain persistent criticism of actual redress practice.

To understand redress policy, it is necessary to understand how participants with different interests and goals interact. Yet, in contrast to the larger corpus of work on historical injustice *politics*, the existing literature on redress *policy* is underdeveloped, and, excepting Daly (2014), provides little data. The nature of redress programs impedes some standard forms of data collection. Most public policy initiatives modify long-lasting programs, enabling analysts to use longitudinal data to assess the effects of those changes. By contrast, redress programs tend to be novel "start-up" institutions that complete most of their work within a few years. Unlike those domains of public policy where researchers and policy designers can analyze iterative patterns of participation, redress is a "one shot deal"—most survivors make only a single claim. Further, survivors often experienced terrible injuries: including sexual abuse, physical cruelty, and profound neglect. As a result, survivor populations are marked by high rates of ill health, homelessness, unemployment, and illiteracy (Carr *et al.* 2019; Higgins 2010). That marginalization aggravates practical difficulties in, and ethical concerns with, survivor research (Pembroke 2019, 44-5; Watson 2011, 115-6). These factors combine to reduce the available data for institutional analysis and, consequentially, for policy makers.

Although policy makers can address those problems in different ways, recent work emphasizes how stakeholder participation in the design process is important to improving the substantive outcomes, and procedural legitimacy, of public policy (Durose and Richardson 2015; Evans and Terrey 2016). But unlike other policy domains, those involved in designing redress processes rarely have immediate experience with redress programs. Most countries operate few such programs, meaning that stakeholders need to draw upon (second hand) experiences elsewhere. But those knowledge transfers confront methodological problems with comparisons. Superficially similar programs turn out, when

examined more closely, to be quite different. And different policy outcomes can result from interaction effects with other rectificatory initiatives. Compounding that challenge, redress programs interface with a range of preexisting social problems experienced by the disproportionately marginalized survivor population. Last, redress policy development must work within sharp normative constraints. The field's morally charged character means fewer opportunities to use design methods of "trial and error" or prototype experimentation. When understood in context, these characteristics suggest that redress policy has features often associated with "wicked problems" (Head and Alford 2015, 714).

The article builds, methodologically, upon the Institutional Analysis and Development framework (Heikkila and Andersson 2018). The focus is an example of what Elinor Ostrom (2005, 14) calls an "action situation." Here, the action situation is comprised by survivors' claims for monetary redress and the ways program assessors adjudicate their claims—part of what Kathleen Daly (2016, 164-6) terms a program's "money logic." A key presupposition is that institutional procedures affect the behaviors and understandings of interacting parties differently, both prospectively and in terms of outcomes. The argument explores how different assessment tools shape the operation of redress policy, entailing unavoidable and pervasive trade-offs between important values.

Fixing the usage of certain terms in advance of the discussion may help avoid confusion. "Redress" or "monetary redress" refers to the practice of paying money to remedy injuries. This is a narrower usage than "redress" often has. "Injurious experience" refers to all of that which comprises a survivor's injury. That term is intentionally capacious, including the experience of wrongdoing and all subsequent damage. Note the implied distinction between the immediate experience of wrongdoing—the discussion often refers to "abuse" and/or "neglect"—and subsequently caused (consequential) "harms" or "damage."

Turning to evidence, the discussion draws upon examples of state redress programs in Australia, Canada, Ireland, and Sweden. These programs provide evidence for, and illustrate the relevance of, the analysis for practical policy making. Because the inquiry concerns the means of assessing applications only, and is not a comprehensive program evaluation, the discussion spares the reader unnecessary program details. Readers seeking more program information can refer to sources in the footnotes.

### Assessment Methods

Redress programs use a diverse set of assessment methods. This analysis focusses upon three categories: the primary assessment tools of *rules* and *factors*; secondary arrangements of rules and factors using *standards* and *guidelines*; and the tertiary organization of both primary and secondary techniques using

*matrices*. This taxonomy may be incomplete, but further complexity would not improve the analysis (see Sunstein 1996, 21-34).

### **Primary Assessment Techniques**

Rules specify how assessors will use information *ex ante*. Ireland’s Magdalene Restorative Justice Scheme provides an effective illustration.<sup>1</sup> Throughout the twentieth century, young women were wrongfully incarcerated and forced to labor in Ireland’s Magdalene laundries and associated institutions (O’Rourke 2011). A small set of simple rules dominate assessment in the resulting Magdalene Laundries redress program (2013-present). All claimants who resided in a scheduled institution for three months or less received a minimum of €11,500. Then, for every further month of residence, the program paid €500 per month, up to a six-year maximum of €40,000 for the experience of forcible incarceration. Responding to the injury of unpaid forced labor, the scheme paid another €500 per month, up to a ten-year maximum of €60,000. Once the period of residence was confirmed, assessors simply added monies payable for incarceration to those payable for forced labor to generate a total redress value. Validated applicants also received the equivalent of Ireland’s full compensatory pension once they reach the age of 66.

Assessment in the Magdalene program was primarily rule based: residence duration was the only relevant fact and every month of residence “earned” a specific quantum of payment. This form of rule-based assessment works well when it operates conditionally, with assessors putting the application through a sequence of tests. When the outcome of those tests can be known in advance, the results are predictable. In the Magdalene example, a survivor who spent twelve months in a laundry could know exactly how much they should receive before they submitted a claim. As an aside, transparency is positively associated with grounds for eligibility that require little interpretation. The Magdalene program had a single ground for eligibility—residence duration—that institutional records could clearly establish for some survivors.

Transparent rules of assessment enable survivors to limit their applications to relevant information. If program can minimize the amount of information they need to administer, assessment is likely to be faster and cheaper. Equally, when rules determine what information is relevant, assessors know what information to look for within a larger corpus of potential evidence. Assessors can be parsimonious, amassing only the evidence needed to apply the rule(s): this may help minimize privacy-invading investigations. As a result, rule-based assessment is likely to increase the speed of assessment while imposing lower costs on both states and survivors.

Turning to fairness, when all assessors apply a common sequence of tests, rule-based assessment helps ensure that like cases are treated alike. Furthermore, rule-based transparency helps survivors understand how their claims should be

<sup>1</sup> For information on Ireland’s Magdalene redress program, see Office of the Ombudsman (2017).

assessed. That understanding may help people accept the results of the process. Program officials can explain settlement values by simply matching information in the claim to the rules. Similarly, when rules are misapplied, applicants can discover errors. As a result, rules decrease an assessor's discretionary power and promote fairness.

Rules are predictable, quick, fair, and cost-effective. But they are not flexible. Rule-based assessment requires programs to determine how information will be treated prior to (and abstracted from) actual cases. What rules specify as pertinent may not accord with experiences that survivors think are relevant. Similarly, rule-based assessment cannot weigh all the components of a complex injurious experience. And the capacity of rules to eliminate discretion and create fairness can be overstated. Recall how the Magdalene program used residence duration to set redress values. While the rule is simple, in practice, assessors often could not find adequate institutional records (Office of the Ombudsman 2017, 39). Assessors using other, less dispositive, forms of evidence must judge what facts that evidence supports. For example, they might need to determine if testimony is reliable or what its content, which might be circumstantial, entails for residence duration. Those judgments create opportunities for discretion. And they are often made using factors.

A factor of assessment is a relevant consideration for which no *ex ante* rule requires an outcome. Redress WA (2008-09), operated by the State of Western Australia, provides clear examples.<sup>2</sup> Redress WA responded to survivors of abuse and/or neglect experienced while in the care of the state. It graded applications according to the severity of the injury experienced. There were four standards of severity: moderate, serious, severe, and very severe. Assessors assigned applicants to one of those standards using variety of factors, including: the number of abusive incidents; the degree of harm sustained and the length of recovery; the age of the survivor when the abuse occurred; and the duration of the injurious experience (Government of Western Australia 2010, 65). Those factors of assessment did not determine outcomes, rather they “weighed” in favor or against certain conclusions—requiring assessors to use their judgment to assess claims.

Because factor-based assessment requires judgment, assessors have discretion over the weight given each factor, including, potentially, a zero value. Most programs propose some relevant factors *ex ante*, with more inclusive programs encompassing a larger set of eligible grounds for claim. Redress WA illustrates the potential diversity, with eligible grounds that included policy-level wrongdoing, abusive acts, and various forms of consequential damage: it also permitted claimants to introduce novel considerations. A program that aims to redress all the survivors' diverse injurious experiences cannot predetermine rules adequate to describe those experiences. Therefore, as a program's grounds of

<sup>2</sup> For information on Western Australia's Redress WA, see Senate Legal and Constitutional Affairs References Committee (2010, chapter 2).

eligibility become more inclusive, the use of factor-based assessment tends to increase.

The disadvantages of factor-based assessment mirror the advantages of using rules. Inconsistency is a problem. The weighting of factors may differ from case to case and from assessor to assessor, resulting in unfairness. By enabling assessors to employ greater discretion, factor-based assessment is less transparent, meaning that survivors are less able to know how their claims will be assessed. Factor-based assessment also makes programs more complicated and harder to understand, causing survivors to have greater need of legal assistance, increasing procedural costs. Moreover, factor-based assessment tends to increase the volume of data flowing through the program because claimants are induced to include more potentially relevant information in their applications. Assessors also tend to collect more evidence. Because assessment using factors entails contestable judgments, assessors amass more data to support better justified (more defensible) decisions. As the range of potentially relevant factors widens, assessors take longer to identify relevant information in case files. Factor-based assessment will, therefore, tend to be slower, more intrusive and costly, both psychologically and monetarily.

### **Secondary Assessment Techniques**

At the primary level of assessment, the disadvantages and advantages of rules and factors are significant. While no program can avoid using both rules and factors, different programs employ each technique to differing degrees. Because all redress programs contain a complex set of assessment techniques, policy makers must concern themselves with how these are organized. Secondary assessment techniques, such as standards and guidelines, structure the use of primary assessment techniques.

Assessors use standards to establish if an application presents a certain category of fact(s). A standard is rule-like in that its satisfaction specifies a particular outcome. In practice, some standards are, in fact, fulfilled by rules. For example, Redress WA did not accept psychological reports as evidence—an illustration of a rule prescribing the application of a standard (Government of Western Australia 2010, 12-3). Other standards may contain one or more factors that require assessors to exercise judgment. As an example, recall how Redress WA categorized applications into four grades (standards) of severity using a range of factors.

Standards are retrospective, they categorize existing facts. By contrast, guidelines indicate how assessors should proceed. Guidelines use rules to limit discretion. An example appears in Ireland's Industrial Schools program (2003-11), which redressed survivors of residential schools and similar institutions.<sup>3</sup> That program benchmarked successful applications using five grades (standards)

<sup>3</sup> For information on Ireland's Industrial Schools program, see The Compensation Advisory Committee (2002).

of severity (McCarthy 2016). Each standard corresponded to a limited points range. Having first assigned the applicant to a standard, assessors then used factors to assign a specific points value within the corresponding range. That guideline uses a rule to restrict the ambit of, without prescribing, judgment. Another type of guideline sets presumptive rules operative in the absence of specific considerations. So, for example, the maximum payment in that Irish program was €300,000. However, assessors had discretion in “exceptional” cases (a standard) to add up to 20 percent to the settlement. That discretionary provision turned a rule into a guideline.

Standards and guidelines structure the use of rules and factors. They help decompose complex procedures into discrete components. That simplification facilitates transparency: simpler assessment is easier to perform, understand, and predict. Moreover, these secondary techniques enable fairness by making assessment more accurate and fairer. And finally, by organizing information they help reduce the costs of assessment for survivors and for states. However, just as standards and guidelines produce certain advantages, they bear the trade-offs involved in applying their composite rules and factors.

### **Tertiary Assessment Techniques**

Tertiary techniques provide comprehensive organization. The matrix is a common tertiary device that structures the use of secondary and primary assessment techniques. Different programs use matrices in different ways. Ireland’s Magdalene program had a two-step matrix that converted residence duration directly into a settlement value. More complex programs, like Redress WA, use a three-step (or more) process. Some complex programs move different aspects of a claim through different matrices before aggregating the results to arrive at a monetary value. A good example is Canada’s Individual Assessment Process (IAP).<sup>4</sup> The IAP (2007-16) was a component part of the Indian Residential School Settlement Agreement, which provided an array of remedial initiatives for survivors of Canada’s genocidal residential schools.

Canada’s IAP disaggregated four grounds of eligibility: the experience of abuse, aggravating factors, psychosocial consequential harm, and consequential loss of opportunity. Each subcomponent used a matrix comprised of guidelines and standards that applied rules and indicated which factors were relevant to each part of the procedure. To illustrate, the IAP provided more points to survivors who experienced harm that included “severe post-traumatic stress disorder” than those assessed with a “mild traumatic stress disorder” (Indian Residential Schools Adjudication Secretariat 2018). Those two standards (severe and mild) were part of a rule: a claim with a severe posttraumatic stress disorder was assigned to a higher category in the “Consequential Harm” matrix, while a mild disorder was assessed at a lower standard. The IAP’s matrices also

<sup>4</sup> For information on Canada’s IAP, see Indian Residential Schools Adjudication Secretariat (2018).



employed factors. For example, the severity of injury depended, in part, on the frequency of abusive experiences. The program distinguished “one or more” incidences of anal or vaginal penetration from “persistent” penetrative incidents (Indian Residential Schools Adjudication Secretariat 2018). Assessors exercised discretion over what factors distinguished “one or more” from a “persistent” standard of frequency.

Matrices clearly, and visually, indicate what information is relevant to what part of a complex process. As previously noted, that form of transparency promotes cost-effective evidence provision and speedier assessment. Moreover, by decomposing the assessment process, matrices structure step-by-step procedures. In doing so, matrices promote fairness between applicants by helping ensure that similar cases are treated in the same way (Royal Commission into Institutional Responses to Child Sexual Abuse 2015, 21). Insofar as matrices enable applicants to understand how the process should operate, they can help applicants to identify errors and reduce discretion, facilitating some aspects of agency and reducing unfairness.

However, matrices have negative consequences for agency as well. A matrix reduces human suffering to discrete figures and cells, abstracting from the survivor’s lived experience. Because only particular elements of their injuries are relevant to the assessment of value, a matrix can prescind from what survivors think salient (Diller 2003). In addition, survivors often object to the way matrices appear to grade their injuries like “meat” (Feldthusen, Hankivsky, and Greaves 2000, 109; Miller 2017, 127). Reflecting upon the character of comprehensive assessment procedures, Robyn Green (2016, 153) argues that, in programs like Canada’s IAP, “a therapeutic ethos and the law overlap to discipline compensation claimants as dysfunctional individuals in need of repair from the state.”

### **Design Considerations**

The preceding analysis illustrates some of the unavoidable trade-offs “hard-wired” in all redress programs. Program design determines which trade-offs occur at different points in the assessment process. The analysis now turns to three prominent program design considerations relevant to those decisions: the use of different evidentiary standards; the redress of consequential damage; and the responsiveness of a program’s payment values. These applied discussions demonstrate the practical relevance of the analysis and explore some methods used to mitigate some of the negative effects that trade-offs entail.

### **Evidentiary Standards**

An evidentiary standard concerns the quality of evidence needed to validate a claim. Relevant considerations include the quantity of applicable information, its reliability and the presence or absence of contradictory factors. “Higher”

standards of evidence require better quality and/or more information; while “lower” standards of evidence accept claims supported by poorer quality and/or lower quantities of evidence. As a result, low standards of evidence can jeopardize a program’s integrity, while high standards may exclude potential claims.

In litigation, the “balance of probabilities” requires plaintiffs to establish that their version of events is the most probable. Few redress programs require all aspects of a claim to meet that high standard. Good evidence is rarely available for claims that arise from injurious events occurring years, if not decades, previously. Records are lost, people become less able to recall details of events, and their chronology becomes less accurate. Mental and physical illnesses can further degrade the quality of testimony.

Responding to those (and other) challenges, redress programs often indicate that they employ a “plausibility” evidentiary standard: applicants are believed unless there is disconfirming evidence. But programs can apply different evidentiary standards to different aspects of a claim. For example, an assessor in Ireland’s industrial schools’ program might apply a higher standard to evidence of residence when they could access robust institutional residency records. By comparison, they might apply a lower evidentiary standard to claims of neglect—Irish institutions were very unlikely to record that they neglected a child. Better programs match the appropriate evidentiary standard to the appropriate grounds of eligibility—even relatively simple programs can have multiple evidentiary standards.

Unfairness may arise when different assessors apply evidentiary standards differently. This problem is prominent in complicated, factor-based programs that employ numerous assessors to make a series of difficult judgments. Programs can take mitigating measures, such as providing all assessors with standardized training (Indian Residential Schools Adjudication Secretariat 2011). Further, using multimember assessment panels is fairness-promoting because a panel’s decisions must be mutually justified among its members, which reduces discretion and helps develop common practices among assessors (Audit and Assurance Services Branch 2015). Canada developed a precedential database to improve both transparency and fairness. However, those mitigating techniques add costs to, and potentially slow down, the assessment process.

Some programs use what is sometimes called, after an Australian case, the “*Briginshaw*” principle, wherein more serious abuses (which might attract higher-value settlements) require more robust evidence (Royal Commission into Institutional Responses to Child Sexual Abuse 2015, 367). However, *Briginshaw* variability may be unfair to those with more serious injuries. Many programs treat sexual abuse as the most severe form of injury. Yet historic claims for sexual abuse are unlikely to have strong confirming evidence. Therefore, imposing higher evidentiary standards for more grievous injuries may disadvantage those claimants. When the severity of the injury depends on complex factor-based

assessment, unfairness also arises from inequalities between survivors. In Redress WA, application quality was “strongly linked to the literacy level of the applicant... This had the potential to significantly disadvantage applicants with poor literacy skills” (Western Australian Department for Communities n.d., 9). The advantages enjoyed by better-resourced survivors can be reinforcing and comprehensive. Better-resourced applicants may be more likely to get expert assistance, obtain their personal records, and receive treatment for physical and psychological complaints: they will have, as a consequence, better evidence. That unfairness may be aggravated if more serious injuries are associated with greater disadvantages, and therefore, lower quality applications.

Fairness may justify the use of easier-to-satisfy evidentiary standards. As evidentiary standards decrease, per-case assessment should speed-up and application numbers increase. Per-case procedural costs will decrease because, if applicants need to provide lesser quality, and lower quantities of, evidence, that data will be less costly to administer and survivors will be less burdened by its provision. But lower evidentiary standards entail trade-offs. In programs that calibrate payments to the severity of injury, lower evidentiary standards should be associated with the success of more, and more high-value, claims. That makes programs more costly.

In addition, lower evidentiary standards may make it harder for programs to detect false claims, raising integrity concerns. Because human memory is suggestible, survivors may submit false claims without fraudulent intent. Research indicates that people will populate autobiographical memories with suggested details (Bernstein, Nourkova, and Loftus 2008). It would be surprising if the popular dissemination of abuse narratives in various media forms did not affect survivors’ memories. Low evidentiary standards also invite fraud. As an illustrative example, the Canadian province of Nova Scotia operated a redress program (1995-2000) that validated some claims of abuse by reference to their compatibility with findings in a public report.<sup>5</sup> Those assessors applied a simple rule: accept claims that match patterns of abuse described in the report. A review of that program found that awareness of the program’s low evidentiary standards among potential applicants prompted numerous fraudulent claims (Kaufman 2002). Fraudulent applicants crafted their applications to match descriptions that assessors were likely to accept.

Lower evidentiary standards favor fairness at the cost of integrity. However, programs can leverage their large data capacity to mitigate that challenge. Conventional litigation employs higher evidentiary standards because, in most cases, courts have evidence about a single case only. But redress programs obtain hundreds, if not thousands, of applications. Moreover, they often follow or accompany public inquiries that investigate injurious care experiences. As a result, assessors can use common (similar-fact) evidence. There are different

<sup>5</sup> For information on the Nova Scotian program, see Kaufman (2002).

models for deploying common evidence. Redress WA used information provided by applicants to compile historical dossiers on institutional practices and staffing. That larger evidential pool might strengthen weaker applications to improve fairness. Similarly, the use of common evidence can mitigate some concerns with integrity, if false claims are discovered by reference to the preponderance of contradictory common evidence.

Mitigating techniques do not eliminate the need for trade-offs. A database of common evidence will tend to have more information about some care experiences than it will regarding others. For example, programs will tend to receive more applications from care residences with larger populations, such as orphanages. Larger institutions tend to have better and more comprehensive records. By contrast, a survivor of abuse or neglect in a foster family may be the only applicant with any information about their care placement and will not benefit from a common evidence pool, which is unfair.

To conclude this discussion, policy makers must decide what evidentiary standards to apply to different aspects of the assessment process. Any choice has consequences. Because all redress programs confront problems with evidence, high evidentiary standards will exclude meritorious claims, create inequities, harm survivors, and slow the process down, while lower standards create concerns with cost and integrity. Because these trade-offs can be mitigated, but not eliminated, policy makers should ensure that their choice of evidentiary standard is rational with respect to their desired outcomes.

### **Consequential Damage**

Consequential damage consists of harms caused by injurious experiences in care. The potential harms are diverse, including damage to survivors' psychological, physical, and financial well-being; their family relationships, career prospects, and cultural affiliations (Carr *et al.* 2019). Research into the damage caused by systemic abuse and neglect is ongoing, with recent information indicating potential biological effects at the level of the genome (Wetsman 2018).

Some programs do not remedy consequential damage. Others redress a small range of consequential harms using simple rules. Recall how Ireland's Magdalene program provided all validated applicants with the equivalent of a full contributory pension. That provision was justified because their unpaid forced labor in a laundry denied some survivors opportunities for employment that would have made them eligible for a contributory pension (Quirke 2013). But the program did not investigate whether specific individuals suffered that harm—the rule simply prescribed an outcome. Other programs match redress to the harmful experience of each individual using factor-based assessment. Examples of factor-dominant approaches include the Canadian IAP, Ireland's Industrial Schools program, and Redress WA. Those programs confronted significant assessment difficulties with uncertain evidence and intrusive assessment. Both

considerations tend to increase program costs, slow assessment down, and harm survivors.

Some observers worry that redressing consequential damage will “punish” some survivors (Hansard 2009, CA56; Western Australian Department for Communities n.d., 7). That concern can be understood in different ways. One point relevant to evidence can be quickly stated. Inequities arise if some applicants find it harder to present typical forms of factor-based evidence. For example, psychological damage is often associated with other consequential harms, such as educational failings and persistent unemployment (Carr *et al.* 2019). A resilient survivor might not present those “typical” evidentiary forms and find it harder to evidence psychological damage. That is unfair.

A second point relevant to evidence also concerns fairness and arises from the absence of an appropriate baseline from which to make judgments. The point depends upon how consequential damage is assessed using counterfactuals, a methodology that raises interesting questions well beyond this discussion (see Vernon 2012). In brief, an assessor adjudicates harmful effects by imagining how the survivor would be if an injurious experience did not occur, and then comparing the actual world with that counterfactual “baseline.” If a survivor is to claim consequential damage, they need to show that there is a plausible baseline world in which they would not have experienced the relevant harm. Assessors use a variety of causal factors to construct plausible baseline worlds using what they know of the survivor’s personal circumstances.

This technique creates unfairness when multiply disadvantaged survivors have a harder time establishing the plausibility of “better” baseline worlds. A good example is the Canadian IAP’s redress of income loss. The maximum redress for income loss (CDN\$250,000) almost doubled the monies that were otherwise available, but the assessment process imposed a high standard of evidence. A valid claim needed to demonstrate a financial injury by reference to baseline income that the survivor could reasonably expect to enjoy had it not been for harms attributable to injuries suffered in care. That component of the IAP paid very large sums of money to a very few survivors (18 of the 38,262 applicants) who experienced consequential harm(s) that caused them to lose a job or work reduced hours (Galloway 2017). But the program did not pay equivalent redress for those who never had a good career: those survivors could not point to factors that would construct a plausible baseline income that could be damaged. That inequity enabled some better-off survivors to claim actual income loss but denied redress to those whose were worse off, whose injuries might contribute to their economic marginalization. Beyond the glaring unfairness, it is irrational for a program to redress a ground of eligibility using evidentiary standards that only .04 percent of applicants satisfied.

The compounding effects of multiple disadvantage complicate causal links between past events and present damage. As stated previously, survivor populations suffer disproportionately from physical and mental illness and experience higher-than-average rates of homelessness, unemployment, and

illiteracy. With extremely marginalized populations, like the indigenous peoples of Canada, the problem of the baseline is acute: what is normal for survivors may be, at least in part, be a consequence of systemic injustice (Wilk, Maltby, and Cooke 2017). Again, factor-based assessment creates inequities that disadvantage the worst-affected survivors most.

To judge that a consequential harm was caused by historical wrongdoing requires assessors to trace the causal influence of a range of potential factors over long periods of time. It can be challenging to distinguish consequential damage caused by injuries experienced in care from the consequences of numerous other factors (Government of Western Australia 2010). Assessors making causal judgments may find it impossible to ascertain, even approximately, what the “true” consequences of historic abuse may be. Some survivors may oversubscribe blame for personal failings, while others will fail to lodge otherwise eligible claims because they do not associate psychological disorders and other disadvantages with their injurious experience.

Ireland’s Magdalene program illustrates a common technique to mitigate the problem of assigning causation. The pension provision in that program presumed that all survivors experience a consequential harm and applies a rule: redress all claimants as if they suffer that harm. (A similar approach could use a guideline—make a payment unless a countervailing factor is identified.) Other programs might require survivors to present evidence that they experience(d) certain harms but not require individualized evidence of injurious causation. For example, it is well established that abuse-in-care can create psychological disorders (Featherstone 2018). Presuming a causal linkage, a program could redress all applicants with a diagnosed disorder. Since the disadvantages that survivors experience as a population are significant, a program could assess causation at the level of the population and apply a rule to redress all applicants presenting the identified consequential damage.

The shift from factor- to rule-based assessment involves trade-offs. As with any rule-based assessment, such programs must determine what harmful consequences they will redress *ex ante*. That task is challenging, for the harmful outcomes of injurious experiences in care are extremely diverse and expert knowledge in this area is evolving rapidly. If the rule prescribes redress for only some harms, it is likely to exclude some valid claims. But if the rule is broader, the program will redress more harms that are not caused by care experiences—reducing its integrity.

In response to this problem, some programs—an example is Ireland’s Industrial Schools program—employ medical and other professionals to report on consequential damage experienced by claimants. Outsourcing assessment allows program officials to justify assessment decisions using expert opinions. It also enables survivors to obtain individuated assessments by an impartial professional. Those examinations sometimes lead to the discovery of previously undiagnosed injuries or the attribution of known pathologies to injurious care experiences. But getting expert evidence adds time and cost, both psychological

and financial, to the program. Moreover, professionals confront the same complex set of evidentiary factors as program officials. If the medical (or other) professional eschews causal analysis and simply warrants that a survivor experiences harm that is plausibly associated with their care experiences, the program confronts the same trade-off between fairness and integrity confronting any rule-based approach to evidence: some applicants will present harm that correlates with, but is not caused by, abuse in care.

Because redress for damage caused by wrongdoing tends to be added to payments for those experiences, adding consequential damage to the grounds of eligibility usually increases program costs for states. Moreover, assessing consequential damage increases the amount of information both states and survivors must provide and process. The uncertainty involved in assessing consequential damage encourages redress programs to obtain more information to offset the poor quality of the evidence, leading to more intrusive assessments. Moreover, as the program becomes more complicated and harder to navigate, survivors have greater need of expert assistance (lawyers), which further increases procedural costs.

In addition, the type of evidence required to assess consequential damage can be invasive and alienating. When programs attempt to isolate the causal influence of injurious care, they require information about all other potential causal factors. This assessment embraces the applicant's entire life, including deeply personal information. The invasive (and pervasive) character of the assessment reflects both the fact that relevant damage may affect the entirety of the person and the need to determine the role(s) of any coincidental factors in causing the specified damage. Moreover, the prospect of monetary redress may encourage survivors to portray aspects of their person, including their life choices and undesirable character traits, as consequential damage. That representation is alienating because it involves characterizing aspects that are (or should be) integral to the survivor as discrete from, and hostile to, them (Winter 2017). As a result, testifying to consequential damage may increase the psychological costs of redress for survivors who must describe who they are and what they have done in strongly negative terms.

Assessing consequential damage requires trade-offs. Given the costs to both programs and survivors of evidencing consequence damage, better programs will not *require* applicants to provide that evidence. But some do. Redress WA combined questions concerning wrongs experienced while in care and questions concerning consequential damage in the same section of the application form. Completing that section (Section 5) was mandatory, therefore, all applicants had to apply for the redress of consequential damage (a copy of the application form is on file with the author). The resulting difficulties led one synoptic report on Redress WA to recommend that future programs avoid redressing consequential damage (Western Australian Department for Communities n.d.). That broad recommendation is unwarranted, but it is certainly irrational to make consequential damage a necessary component of redress.

### Conversion Ratio Responsiveness

The above discussions of evidentiary standards and consequential damage concern how redress programs assess facts. As previously mentioned, programs often use matrices to translate those facts into standards corresponding to point values, which assessors then aggregate to assign an overall score for the application. That total score specifies a final monetary value. While the processes are conceptually distinct (first assign points to an application, then, assign a monetary value), in practice the two operations are interdependent. The responsiveness of the points-to-money conversion rate affects how a program assesses facts, and therefore, entails trade-offs between the accuracy, speed, and intrusiveness (cost) of the assessment process.

A conversion ratio can be variably responsive. Highly responsive programs may vary monetary values in step with every point. For example, recall how the Irish Industrial Schools program used five standards of severity corresponding to discrete point ranges. Each point range corresponded to a €50,000 band. (The band for the most severe claims was larger and spanned €200-300,000.) The program rounded its settlement values to the nearest thousand euros; however, the lower four severity standards corresponded to a range of fewer than 50 points. In the four lower bands, which encompassed over 99 percent of settlements paid, every point made a significant difference to the monetary outcome. In effect, when the assessors assigned a specific score to the application that point value entailed a guideline specifying a narrow range within each €50,000 band. This is an example of highly responsive conversion ratio.

Queensland's Ex Gratia Scheme (2007-08) was less responsive.<sup>6</sup> Queensland divided its program into two levels. Level 1 required minimal evidence of injury and all successful applicants received identical settlements of A\$7,000. Queensland's Level 2 process invited applicants to supply more robust evidence in pursuit of an additional payment. Level 2 assessment assigned each successful claim to one of four severity standards: a rule then prescribed a specific payment value of either A\$6,000, A\$14,000, A\$22,000, or A\$33,000—each value corresponding to one of the four standards of severity. In principle, Queensland's less-responsive stratification could require less intrusive assessment, because assessors could make more approximate judgments without affecting the monetary outcome. A less-responsive conversion ratio may make assessment simpler because it may be easier to see how an application fits within a broader, rather than narrower, range of factors. In programs with a maximum standard, the most grievous cases might be quickly assigned to the highest standard. Therefore, a less-responsive conversion ratio could decrease processing time and generate greater certainty that the claim has obtained an appropriate result.

Turning to survivors, a less-responsive assessment process could be more transparent and put less pressure on applicants. If the matrices are published

<sup>6</sup> For information on the Queensland program, see Royal Commission into Institutional Responses to Child Sexual Abuse (2015).



(Queensland's was not) efficient applicants may choose to leave out some factor-based evidence if they aim to meet the minimum standard for a specific range. For example, a survivor who was subject to two similar abusive events might need to describe only one event to obtain redress at the relevant standard. Moreover, considered practically, an applicant who scores in the bottom or middle of a points range will have less incentive to seek a rescoring if a small change is unlikely to result in a different monetary outcome. So long as marginal cases are, as a rule, "rounded up," a broader range, with less-responsive conversions ratios, might create procedural cost-savings for both states and survivors.

The analysis suggests that the epistemic depth of assessment should match the responsiveness of the payment structure. But some programs do not fit that pattern. The program created by Sweden's *Financial Redress Act* (2012) is an example.<sup>7</sup> Sweden's program (2013-14) combined an invasive assessment of the survivor's individual circumstances with a rigid payment structure. The assessment process was slow, amassed large amounts of evidence and subjected the survivors to potentially re-traumatizing interviews. Yet, despite the epistemic depth of the assessment process, all validated claims received the same amount of money, SEK 250,000. That program design is irrational.

Finally, while less-responsive ratios can be faster, less harmful, and impose lower costs, the trade-off is a form of unfairness. Research with survivors indicates a widespread expectation that redress values should correspond to the degree of injury (Lundy and Mahoney 2018). Weakly responsive points-to-payment ratios provide the same redress for very different injuries, risking false, and unfair equivalences between very different injurious experiences. Insofar as payment values are a form of communicative acknowledgment, false equivalences between very different experiences may undermine the value of redress for survivors.

## Conclusion

The analysis demonstrates how the basic tools used to assess redress claims entail trade-offs between important values. The values involved are diverse and different trade-offs cluster around different assessment techniques. Drawing upon the Institutional Analysis and Development methodology, the normative analysis of assessment tools—rules, factors, standards, guidelines, and matrices—helps explain why different programs, or different aspects of a programs, involve differing trade-offs. Moreover, it shows why particular trade-offs are hard to avoid. That information can help both survivors and state officials understand the operation of redress programs better. In turn, knowing what is likely to happen may assist survivors who participate in redress programs, which might lead to better outcomes.

<sup>7</sup> For information on Sweden's program, see Sköld, Sandin, and Schiratzki 2020(2020).

Although the trade-offs involved in assessing redress claims are contextually nuanced and complex, some abstract points are worth summarizing. As a primary technique, rules tend to encourage quicker assessment that reduces procedural resource needed by both survivors and the program, while imposing lower psychological costs upon survivors. In addition, rules help, when published, make the program transparent and promote fairness because all applicants are treated similarly. However, rules are inflexible—diminishing survivor agency—and, consequentially, less effective in settling meritorious claims because they tend to limit the ambit of the program. They can also diminish the program’s integrity.

By contrast, the use of factors tends to increase a program’s ambit, making it more effective in settling a wider range of meritorious claims and enabling programs to better respond to the survivor’s unique circumstances, improving the agency of the survivor in the program. The use of more invasive factor-based assessment can also improve the program’s integrity. However, the use of factors in assessment will tend to make the program slower and will impose greater costs upon programs and survivors, including higher psychological costs for survivors. The discretion entailed by factor-based assessment will also tend to make programs less transparent and less fair.

Secondary techniques, such as standards and guidelines, structure the use of primary tools. They decompose assessment into distinct procedural steps, enabling greater transparency and fairness, while reducing monetary costs. Similar points apply to matrices, which as a tertiary technique, helps to organize primary and secondary tools. However, all secondary and tertiary techniques bear the trade-offs inherent to their composite primary elements. In addition, they discipline survivor agency by enforcing procedural structures with the potential to impose alienating processes and values upon survivors.

That critical analysis also has prescriptive implications. Because different procedural arrangements create trade-offs that affect different participants differently, there may be no “all-things-considered” best way to assess redress claims. However, programs can avoid incurring unnecessary sacrifices through poor design. Irrational programs, such as those that require survivors to apply for consequential damage, like Redress WA; or that use intrusive and costly factor-based assessment in the service of rigid payment structures, like Sweden’s, demonstrate errors that better program design can avoid. More rational design is likely to create better redress programs and better outcomes for participants.

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