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Victims, Criminal Justice and State Compensation

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Abstract: This article examines one element of the state's responses to crime: the provision of a taxpayer-funded compensation scheme for victims of personal and sexual violence. The Criminal Injuries Compensation Scheme 2012 sits within a political context that seeks to ensure that victims of crime are better served by the criminal justice system of England and Wales, the jurisdiction that is the focus of this article. The government's fundamental policy is that this scheme exists to compensate only those victims who are 'blameless', either in terms of their character, criminal record, conduct at the time of the incident, or in their engagement with the criminal justice agencies. It is a policy that illuminates elements of two of the questions that the editors posed for this Special Issue of *Societies*. Reviewing the increased urgency in government policies concerning the treatment of victims of crime, the first section addresses the question of how, why and when victims came to shape political and criminal justice discourse and practice. The question of how, and to what end, cultural representations have shaped perceptions of victims is addressed in the second and third sections, which examine the notion of victim status and illustrate the ways in which eligible ('ideal') victims are perceived and their claims under this scheme are determined.

Keywords: victims of crime; ideal victims; criminal justice; state compensation

1. Victims and the Criminal Justice System

In any analysis of the criminal justice system (CJS) of England and Wales (but also of almost all other common-law Western systems),¹ it has been a commonplace to remark on what some have described as 'the rediscovery' [1] (pp. 5–10), the 'rebirth' [2] (pp. 69–94), [3] (pp. 7–19), or the 're-emergence' of the victim [4] (pp. 26–28) over the past 50 years, in contrast to their marginalised role as a third party to the criminal trial [5,6]. In truth, while their historical relationship with the CJS might have been more pronounced, victims had never gone away. Even as the state assumed a near-monopoly during the 19th century over the detection, detention, prosecution and disposal of those who break the criminal law [7] (pp. 127–158), victims played a legitimising role, at least in the sense that the unlawful infringement of their personal autonomy warranted state condemnation via the criminal trial.

As these and other analyses have documented, this did not carry with it a corresponding stake in the outcome of the trial. Here the victim's principal role was to give evidence in support of the Crown. Victims were little more than witnesses to the incident in which they were injured or their property stolen from them, and were, for the most part, subject to the same rules governing cross-examination by the defendant as was any other witness; conditions that, with the exception of child and rape victims, continue to apply. As third parties, they had no right to put their own case for recognition of the injuries or losses they had sustained, or for possible redress, as had been the case, notably, by

¹ 'CJS' is the standard abbreviation used by the Ministry of Justice.

means of prosecution for reward [8] (chs. 3–6). Any judicial satisfaction of these concerns became a matter for the victim's civil action against the offender.

As is also well documented, the government has, over the past half-century, made substantial changes to the relationship between victims of crime and the CJS. This victim focus gained traction as a predominantly state-led response to the collapse of the rehabilitative ideal [9] (pp. 9–10) and was designed to lead to what the government characterised as a 'rebalancing' of criminal justice policy in favour of the victim's interests [10]. No longer marginalised, 'the rising visibility of the victim' in the 1960s and 1970s' [11] (p. 24) [12] recast that relationship in a number of ways, intended to 'make sure that the victim's voice is heard at the heart of Government' [13] (p. 8). This is a claim that for many critics remains unfulfilled, but which in practice presents a number of challenges to an even-handed criminal justice system [14,15].

These ideological concerns were coupled with an instrumental recognition that as gatekeepers to the CJS, victims' willingness or otherwise to engage with it by reporting crime and supporting a prosecution is likely to be influenced by their perception of the extent to which the system both recognises their injuries and reliably produces the outcomes they reasonably expect. Those outcomes are 'that offenders are caught, that they are punished, and that they are dealt with in a way that reduces the likelihood of their re-offending and creating more victims' [16] (p. 8). These changes also implied an increasing degree of inclusiveness in which victims have, in a further extension of the marketplace analysis of the CJS, become *consumers* of its services [17] (pp. 24–25). Like the consumers of health care, financial, local authorities or legal services, victims of crime now have their own complaints procedures where the criminal justice agencies fail to deliver on their 'key entitlements' to be informed about the progress and the outcomes of those agencies' decisions.

First published in 1990 as the *Victims' Charter*, these entitlements are detailed in the current *Code of Practice for Victims of Crime (Victims' Code)* [18], restated in 2015 to give effect to Article 14 of the 2012 Victims Directive.² However, it should be recognised that while the *Victims' Code* comprises a formal recognition of the state's obligations to engage with them and to provide for their security [19,20], its entitlements also carry with them a mutual obligation to engage with the CJS. Thus, victims of crime may, variously, and at different stages in the CJS, be characterised as:

- both *suppliers* (e.g., to the police about an offence against them) and *recipients* of information (e.g., from the police concerning their response to that report);
- *partners* in crime prevention (e.g., in target-hardening their homes, or taking personal safety measures);
- the *beneficiaries* of remedial arrangements (e.g., concerning such matters as the giving of evidence in rape trials, or of the availability of state-funded, and where they are convicted, of offender compensation); and
- as *participants* in the system (e.g., in particular via restorative justice).

Modern concepts of social citizenship assert that where the state supports their rights to health and welfare provision, citizens have a corresponding responsibility to take care of their bodily (e.g., to keep fit and not to smoke) and economic (e.g., to seek employment) well-being, as conditions for their access to that provision [21,22]. In the same way, victims of crime may be said to have responsibilities to the CJS that correspond to their access to its entitlements [23] [24] (p. 57). As a judge of the Upper Tribunal put the matter when dealing with paragraph 23 of the Criminal Injuries Compensation Scheme 2012 (CICS 2012), which provides that an award will be withheld unless the applicant has cooperated as far as reasonably practicable in bringing the assailant to justice, 'a person who seeks compensation from

² Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA [2012] OJ L315.

the State in respect of a criminal injury ought, as a quid pro quo, to assist the State to prosecute the offender insofar as that may be appropriate'.³

The legislation that authorised the *Victims' Code* also established the Victims' Commissioner,⁴ whose role is to promote the interests of victims and witnesses and to encourage good practice in their treatment by the CJS. The implementation of victims' entitlements under the *Victims' Code*, which the Commissioner also regularly reviews, engages the full range of the CJS's actors. It identifies 14 'service providers', of whom the police, the Crown Prosecution Service (CPS), HM Courts and Tribunals Service, the National Probation Service and the Parole Board are some of the principals.

In addition to these various initiatives, there have been important changes in substantive and adjectival law designed to secure more convictions by directly or indirectly addressing victims' concerns, in particular in connection with their place in the criminal trial [25] (pp. 116–190). More recent changes include strengthened statutory duties on sentencing courts to order offenders to compensate their victims,⁵ and a new non-statutory procedure by which victims can challenge decisions by the CPS not to prosecute in their case.⁶ These changes are not uncontroversial, typically presenting normative and ideological tensions between the public and the private interest in what the state and the victim recognise as criminal 'justice'. These tensions are illustrated, for example, by the continuing controversy concerning reform of the evidential rules governing the cross-examination of both adult and child victims of sexual offences,⁷ the CPS' failure to disclose unused evidence of relevance to the defence [27], and individual victims' concerns about what they perceive as the 'injustice' of potentially lenient sentences in their own cases.⁸

The success of these developments and the expectations that they have encouraged have faced two criticisms. The first is that while victims may, in other contexts, seek a judicial review of these service providers' decisions,⁹ none of the entitlements in the *Victims' Code* is of itself legally enforceable. Where they 'feel' that their 'entitlements have not been met or that any service provider has not delivered their duties under the Code', a victim may make a formal complaint to that provider. However, the provider's response does not carry with it an obligation to take any further action or to provide any other redress. In its first review of service providers' compliance with the complaints procedure, the Victims' Commissioner found that most of the victims interviewed said they had not been made aware

³ *R (RW) v First-tier Tribunal (as successor of the Criminal Injuries Compensation Appeals Panel)* [2013] AACR 8 [24] (Judge Rowland).

⁴ <https://victimscommissioner.org.uk/>. The Domestic Violence, Crime and Victims Act 2004 also established a *Victims' Advisory Panel* for victims of crime and their families to have a say in the reform of the CJS. This was abolished in 2013 (The Public Bodies (Abolition of Victims' Advisory Panel) Order 2013, 2013 No. 2853) but re-established as the *Victims' Panel* with effect from 6 February 2017; Hansard, House of Commons, Written question 64616, Victims' Panel, answered 27 February 2017 (Dr Philip Lee MP, Ministry of Justice); see also <https://www.gov.uk/government/news/criminals-paying-more-than-ever-to-help-victims>.

⁵ Section 130(2A) and (3) the Powers of Criminal Courts (Sentencing) Act 2000 now require a sentencing court to consider whether to make a compensation order when it has power to do so, and to give reasons where it does not do so.

⁶ Crown Prosecution Service, *Reconsidering a Prosecution Decision*, taking effect from June 2013; <https://www.cps.gov.uk/legal-guidance/reconsidering-prosecution-decision>. The CPS' *Victims' Right to Review Scheme* was introduced to give effect to Article 11 of the Victims' Directive; it also responds to the Court of Appeal's criticisms in *Christopher Killick* [2011] EWCA Crim 1608; and see *R v DPP and Boyling* [2018] EWHC 3508 (Admin).

⁷ Crown Prosecution Service, *Special Measures*; <https://www.cps.gov.uk/legal-guidance/special-measures> [26]. Similar criticism has been levelled at the current rules permitting personal cross-examination by the alleged abuser in family court proceedings concerning domestic abuse, currently being addressed in HM Government, *Transforming the Response to Domestic Abuse: Consultation Response and Draft Bill* (CP 15, January 2019).

⁸ Crown Prosecution Service, *Unduly Lenient Sentences*; <https://www.cps.gov.uk/legal-guidance/unduly-lenient-sentences>.

⁹ For example, the decision by the Parole Board where it was considering an offender's early release from prison, *R (DSD and NBV) v The Parole Board of England and Wales* [2018] EWHC 694 (Admin) (John Worboys). Responding to this decision, the government is to introduce a new mechanism by which victims who believe a decision may be fundamentally flawed will be able to make a case for reconsideration by Ministry of Justice official, rather than having to resort to the courts and engage legal representation to argue their case; House of Commons Debates, vol 654, ws cols 5–6, (4 February 2019); <https://hansard.parliament.uk/commons/2019-02-04/debates/19020414000011/ParoleBoardReconsiderationMechanismAndRulesReview>.

of the *Victims' Code* or of their entitlements, and did not know what to do if they had concerns. Almost three quarters of those who had complained were unhappy with the response that they received.¹⁰

The second criticism, also illustrated by research conducted by the Victims' Commissioner, is that the implementation of such other initiatives as offering victims the opportunity to engage in restorative justice with their offenders, and on offering them the opportunity to make a Victim Personal Statement when the court is considering its sentence on their offender, has been patchy.¹¹ Against the background of increasing rates of recorded sexual offences and of crimes of violence against the person involving knives,¹² the terms of reference for the Ministry of Justice's review of CICS 2012 asserts that 'compensation is an important part of government provision of end-to-end support for victims of violent crime'.¹³ However, there has been growing criticism that when dealing with their claims, the Criminal Injuries Compensation Authority (CICA), the statutory agency responsible for dealing with applications made under CICS 2012, is failing to recognise the impact of the offence on the victim. The Victims' Commissioner's Review of the scheme, published in January 2019, found that the interviewed victims felt validated when the impact of the crime had been recognised by society in the form of an award of compensation, but the process of making their claim was often traumatic: 'we have an overly complex transactional process, which pays insufficient regard to the complex needs of its users, many of whom are likely to be suffering from the effects of trauma.'¹⁴

Responding to what were, by 2015, long-standing criticisms, the Conservative Government indicated that it would bring forward measures 'to increase the rights of victims of crime', which would 'build on the existing Victims' Code to guarantee greater protections for victims and witnesses in the CJS, including that victims of crime have the right to make a Victim Personal Statement and read it out in court at sentencing and at the Parole Board.'¹⁵ No such measures were introduced, but in 2018, the government published its cross-departmental *Victims Strategy*, whose overarching aims are to consolidate the reforms that have been made and to strengthen them 'to ensure victims have the right help in the aftermath of a crime and are properly supported in the process of seeing justice delivered' [29] (p. 8). There are many specific proposals, notably 'to introduce new guidance for criminal justice agencies to provide practical advice to assist when explaining the Victim Personal Statement process to victims'. Of potentially greater significance for the implementation of the *Victims' Code* is the government's proposed consultation on a Victims' Law, which will address the procedural limitations to making sure that victims receive the services to which they are entitled, and to holding criminal justice agencies that fail to deliver them to account.

2. The Social Construction of Victims of Crime

'What does it mean to be a victim? Why is it this status is conferred on some and denied to others?' [30] (p. 45). Positivist victimology had sought to explain victimisation by an examination of those held (typically by formal criminal justice processes) to be victims, in particular by a concentration

¹⁰ Victims' Commissioner, *A Review of Complaints and Resolution for Victims of Crime* (2015) p. 5; https://s3-eu-west-2.amazonaws.com/victimscomm-prod-storage-clhgxgum05k1/uploads/2015/01/A-Review-of-Complaints-and-Resolution-for-Victims-of-Crime_January20151.pdf.

¹¹ On victim personal statements (alternatively called victim impact statements [28], see *Victims' Commissioner, Victim Personal Statements 2017/18* (2018); <https://s3-eu-west-2.amazonaws.com/victimscomm-prod-storage-clhgxgum05k1/uploads/2018/10/VPS-slide-pack-2017-18-FINAL.pdf>; and on restorative justice, Victims' Commissioner, *A Question of Quality: A Review of Restorative Justice, Part 2—Victims* (2016); https://s3-eu-west-2.amazonaws.com/victimscomm-prod-storage-clhgxgum05k1/uploads/2016/11/VC-review-into-restorative-justice-services-part-2_November-2016.pdf.

¹² Some of these increases are attributable to better recording; otherwise, there has been 'no change in overall violent offences estimated by the CSEW (1,389,000). Office for National Statistics, <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/crimeinenglandandwales/yearendingseptember2018>; Sections 2 and 6.

¹³ http://data.parliament.uk/DepositedPapers/Files/DEP2018-1283/terms_of_reference_CICS_Review.pdf.

¹⁴ Compensation without re-traumatisation (2019); <https://s3-eu-west-2.amazonaws.com/victimscomm-prod-storage-clhgxgum05k1/uploads/2019/01/CIC-report-FINAL.pdf>, p. 97.

¹⁵ *Queen's Speech 2015: Background Briefing Notes*; https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/430149/QS_lobby_pack_FINAL_NEW_2.pdf#page=94.

on the notion of victim-types, on victims of interpersonal crime and on those who contribute to their own victimisation. This approach signally failed to explain or advance an understanding of why and how some persons who sustain harm are regarded as victims of that harm, and others are not [31]. By contrast, it is now widely accepted that whether a person who has sustained harm is called a 'victim' is contingent on, and performs important social functions that follow from, the observer's view of the world in which that harm has been sustained. In common with the label 'offenders', 'victims' are not a homogeneous subset of the population possessing certain characteristics by which they can be commonly identified and set apart from non-victims but are socially constructed, and constructed for different purposes and with different consequences. In short, 'the very concept of victimhood can be viewed as an identity or status developed through a process of publicly validated construction' [32] (pp. 179–180), [17] (pp. 22–24).

As Nils Christie and others have observed, the concept 'victim' is complex, fluid and systemically contested [33], [17] (pp. 25–31), [34] (pp. 47–52), [35]. From the observer's standpoint, an initial and major problem in deciding whether to label a harmed person a 'victim' lies in the fact that social cues and signs may be vague or ambiguous. One response to this pervasive social phenomenon has been the development of conventions that stereotype certain instances of suffering as victimising events. Paradigm instances comprise elderly victims of robberies, burglaries and assaults, and children who are sexually abused. These are Christie's 'ideal victims': Persons or categories of individuals 'who—when hit by crime—most readily are given the complete and legitimate status of being a victim' [33] (p. 18).

Some of these conventions are formalised as legal, medical or psychiatric norms; others, such as those held within family or peer groups, may be less well defined. However well formalised, though, that response may well entail some expectations that the victim holds of those conferring the label; for example, sympathy and various forms of benign intervention designed to ameliorate the harm. The key point is that to label a person a 'victim' has significant resource implications for both private (emotional or other support) and public (medical and welfare provision) economies, as is the case with state compensation schemes where public funds are engaged [23] (p. 62).

A corollary of the expectations that victims may have of those who have accorded them victim status is that those others may also have expectations of how victims should themselves conform to the accepted indicators of that status; to be a victim is also to occupy a social role. Ideal victims of crime do not provoke or instigate the violent encounter in which they are injured. However, as in the case of claimants to CICS 2012, discussed in the following section, drawing a normative (and in that case forensic) distinction between ideal and non-ideal victims can be highly contentious. 'When victims are not faultless [. . .] They become much more problematic, both as an object of public empathy but also in terms of their entitlement to formal compensation on the part of the state' [36] (p. 115), [37] (pp. 54–59). Victims may be expected, and be permitted, to voice anger against their offender. Nonetheless, there are limits, some legal, to what the role of a crime victim properly entails. Anger mediated through the CJS is acceptable (for example, in a victim personal statement), but not through vigilantism, where victims may, through their use of disproportionate force against the offender, themselves be labelled an offender [38].

One of victimology's major weaknesses has been its failure to reflect on the foundational nature of criminal law [23] (pp. 49–68).¹⁶ The law does not talk of 'victims' but of 'offences', many of which, but by no means all, do contemplate harm (or its potential) to the interests of an identifiable person; that is, to their bodily or sexual integrity, or to a 'protected characteristic' recognised in law.¹⁷ Where such

¹⁶ It may be noted that the victim surcharge, a levy payable by offenders on conviction, applies to all offences, including those that can have no direct victim. The surcharge benefits all victims indirectly via its contribution to the government's Victim and Witness General Fund, which supports services for victims of crime.

¹⁷ The nine 'protected characteristics' listed in section 4 of the Equality Act 2010 consolidate the grounds of unlawful discrimination that existed in a number of earlier enactments. See Equality and Human Rights Commission, *Protected characteristics*; <https://www.equalityhumanrights.com/en/equality-act/protected-characteristics>.

characteristics were once largely confined to persons performing some official function (e.g., police officers, postal workers, the clergy), the criminal sanction now extends to offences against a wide range of personal, rather than functional, protected characteristics, notably, ‘hate crimes’ [39,40]. Some of these are discrete offences,¹⁸ while others, where they are motivated by hostility or demonstrate hostility towards the victim’s disability, race, religion, sexual orientation (or transgender identity, constitute aggravating features of established offences;¹⁹ but they all may justify an uplift in sentence for those convicted of such an offence.²⁰

Many of these extensions of the criminal sanction are the product only of the past decade or so and are symptomatic of the constant expansion of the boundaries of harm [34] (pp. 30–34), see also [35] (passim). A recent political critique identified what the author sees as the unwanted social consequences in a liberal democracy of an untrammelled notion of ‘victimhood’ [41],²¹ implicitly asking whether there can or should there be any limits to:

- the kinds of subjects (persons/animals (warm or cold blooded)²²/living/inanimate,²³ environmental²⁴), or;
- the harms (bodily/mental/physical/economic/aesthetic²⁵);
- that are sustained directly or indirectly (relatives/viewers of those harms²⁶);
- at the hands of other persons (or by natural events²⁷).

Some of the examples cited in the footnotes use the label ‘victim’ to categorise the deleterious effects of the exploitation of the world’s natural resources. No doubt that exploitation deserves serious attention, but the question that they prompt is whether it is helpful or appropriate to label countries or destroyed artefacts as ‘victims’. We may recognise that the parameters that influence which harmed persons will be labelled victims and thus have a legitimate call upon society’s resources are fluid and uncertain, but there may also be a need to recognise the implications of yet broader victim paradigms. Does the promiscuous use of the word both dilute its use when applied to human suffering and raise expectations about benign interventions that cannot be met? The questions implicit in the ‘victimhood’ critique are important for the following reasons:

1. that to call someone a victim is to make a statement about our moral/ethical view of the world in which the harm was sustained;
2. that we would not normally use the label where the harm is trivial or fanciful because that devalues its use where we wish to regard seriously harmed persons as victims, for example, who have been raped or otherwise subject to unwanted sexual contact or exploitation;
3. that the use of the label carries with it a bundle of expectations that to a greater or lesser degree draw upon our private and public resources;

¹⁸ Racially or religiously aggravated offences; Crime and Disorder Act 1998, sections 28–32.

¹⁹ Criminal Justice Act 2003, sections 145–146.

²⁰ Crown Prosecution Service, *Hate crime*; <https://www.cps.gov.uk/hate-crime>. Home Office, Hate Crime, England and Wales, 2017/18; Statistical Bulletin 20/18, 16 October 2018, ISBN: 978-1-78655-706-3.

²¹ I also googled ‘victimhood’ and ‘we’re all victims now’, which yielded dozens of hits; ‘victimhood chic’ captures the flavour of many politically driven critiques.

²² ‘Plastic-bag-swallowing-sperm-whales-are-victims-of-our-remorseless-progress’, <https://www.theguardian.com/environment/shortcuts/2018/may/23/>.

²³ ‘Archaeological Victims of ISIS Rise Again, as Replicas in Rome’, <https://www.nytimes.com/2016/10/07/world/europe/rome-artifact-reconstruction-isis.html>.

²⁴ ‘The Ivory Coast and Ghana are ‘the biggest victims of deforestation’, <https://www.theguardian.com/environment/2017/sep/13/chocolate-industry-drives-rainforest-disaster-in-ivory-coast>.

²⁵ ‘Culturally the [Elgin marbles] are presented as abduction victims, forcibly separated from the Greek homeland’, F. Rose-Greenland, ‘The Parthenon Marbles as icons of nationalism in nineteenth-century Britain’ (2013), doi:10.1111/nana.12039.

²⁶ ‘We had to stand there and watch them burn to death’; <https://www.independent.co.uk/news/uk/home-news/grenfell-tower-inquiry-victims-family-evidence-rania-ibrahim-a8363311.html>.

²⁷ ‘Philippines: Dozens killed by typhoon as rescuers rush to aid of victims in north’ <https://edition.cnn.com/2018/09/16/asia/typhoon-mangkhut-ompong-philippines-intl/index.html>.

4. that the greater the number of persons included in (1), the higher the level of expectations under (3), and therefore, other things being equal, the fewer the persons in (3) whose expectations will be met;
5. that the greater the number of persons included in (1), the more likely it is that our concern for one group of victims will be displaced in favour of a more clamorous or better organised group; and
6. that the greater the number of persons included in (1), the more likely it is that the significance of the word 'victim' will be diluted.

3. The Criminal Injuries Compensation Scheme and the Ideal Victim

Much of the literature that discusses these aspects of the social construction of victims and of the implications of that construction for persons harmed by criminal offences focuses on the use of the label in victimological and broader social discourse. With the exception of the literature examining the notion of the 'ideal' (female) victim of rape and the consequent implications for the law of evidence and the conduct of a trial, there has been comparatively little discussion of that construction's implications for a crime victim's legal remedies, whether against the offender or the state.²⁸ Given that they are generally impecunious, civil actions for damages against offenders are very rare, and even where ordered to pay compensation on conviction to their victims, the sums are usually less than what could have been ordered in civil litigation. The reason for this is that the sentencing court must, before making an order, take account of the offender's means.²⁹

By contrast, CICS 2012 is a compensation scheme that offers a realistic financial remedy for victims who sustain serious physical or mental injury as a result of a violent or a sexual offence. This statutory scheme was made in 1996, replacing a common law scheme that was first introduced in 1964. The 1996 Scheme, last revised in 2012, receives nearly 33,000 applications a year, of which approximately two-thirds are resolved in the victim's favour, as either a full or a reduced award. Compensation for the victim's injury (or death) is assessed by reference to a tariff, which applies fixed levels of awards (from £1000 to £250,000) that notionally correspond to the severity of the injury. CICS 2012 also compensates for loss of earnings assessed by reference to statutory sick pay, and for special expenses where the victim requires long-term care. The total award in any one case is capped at £500,000; around £150 million is paid out annually; see generally [42].³⁰

The key difference between a civil action against the offender and a claim under CICS 2012 is that the scheme is publicly funded. Whereas the victim's own 'non-ideal' behaviour may have some relevance in a civil action, the distinction between ideal ('deserving') and non-ideal ('undeserving') victims continues to be central to its political legitimacy. When setting its underlying policy in the first Scheme in 1964, the government considered that it would be inappropriate for those with significant criminal records, whose own conduct before, during, or after the incident led to their being injured, or

²⁸ A person whose conviction has been quashed by the Court of Appeal as being 'unsafe' is, nevertheless, not necessarily an ideal victim for the purpose of state compensation, since that decision does not of itself contain any finding as to whether that person was in fact innocent of the crime. The government's concern that public money should be sparingly used where there has been a miscarriage of justice led to further restriction in its statutory formulation. Since 2014, it has been the case that compensation may be paid only where the Secretary of State determines that the Court of Appeal quashed the conviction in circumstances where fresh evidence shows beyond reasonable doubt that the person did not commit the offence. In *Hallam, and Nealon v Secretary of State for Justice* [2019] UKSC 2, the Supreme Court found that 'the words "did not commit the offence" can be read as synonymous in this context with the words "is innocent"'. It also held that the imposition of the criminal standard of proof as a condition to the possible award of compensation was not incompatible with Article 6 of the European Convention on Human Rights (presumption of innocence).

²⁹ The total number of persons ordered in the 12 months ending June 2018 in all courts to pay compensation as the principal disposal on conviction of an offence was 4,975, of which 103 were for offences of violence against the person and 13 were for sexual offences (these numbers have declined over the past 10 years (11,058, 415 and 15 in 2008); the vast majority of orders are made for offences against property; Ministry of Justice, Overview Tables (January 2019), Tables Q5.1a and Q5.3; https://www.gov.uk/government/statistics/criminal-justice-system-statistics-quarterly-june-2018?utm_source=28904e4e-dcb3-4296-a2df-6a25c72fa679&utm_medium=email&utm_campaign=govuk-notifications&utm_content=weekly.

³⁰ See Criminal Injuries Compensation Authority: *Annual Report and Accounts 2017–2018* (House of Commons Paper 1337, July 2018).

who were otherwise of bad character, to receive compensation from public funds. The problem with ‘victims’ who have these kinds of personal histories is that they either resemble too closely, or were once themselves, offenders. These considerations continue to inform government policy, the structure, and the implementation of CICS 2012.

It follows that not all victims succeed in their claims. Around 50% of the rejected claims fail because there was no crime of violence or the injury was valued at less than the £1000 minimum. The other 50% were rejected because they were not ‘ideal’ victims. In short, to be successful in an application to the CICA, the ideal victim is a (good) citizen who reported their injury to the police as soon as was reasonably practicable, co-operated with the criminal justice agencies in bringing their offender to justice and co-operated with the CICA,³¹ has no unspent convictions, did not contribute to their injuries, is of good character, and if applying for loss of earnings or special expenses (or in fatal cases, dependency) has a good work record. The following section deals more closely with three of these eligibility conditions.

3.1. The Victim’s Own Delinquent Behaviour

Paragraph 25 of CICS 2012 provides that: ‘An award may be withheld or reduced where the conduct of the applicant before, during or after the incident giving rise to the criminal injury makes it inappropriate to make an award or a full award.’ CICA’s online Guide to the Scheme advises that ‘before making a payment we have to consider if your behaviour before, during or after the incident caused or contributed to the incident in which you were injured.’ It continues, ‘we will consider if you were acting in an aggressive or threatening way and provoked the incident in which you were injured; you intended to provoke an assault or fight; there was a history of violence between you and the assailant; or you were injured as a result of challenging someone over a previous incident.’³²

CICA has always taken a strict view of the application of paragraph 25 and its predecessors. Where the applicant challenged or voluntarily agreed to fight their assailant but emerged the loser, their claim is likely to be wholly refused, even where the applicant was seriously injured. While their assailant’s retaliation may well be the direct result of the applicant’s own aggressive conduct, it would be wrong to conclude that paragraph 25 applies only when there is a *causal* link between the victim’s conduct and the criminal injury. There may, as the Guide indicates, be such a link, but the Guide is only advisory; it is not the law. As paragraph 25 makes clear, what is required is a *temporal* link: that the victim’s conduct occurs ‘before, during or after’ the incident.

What is at issue for the scheme is not, as would be the case in a civil action against the assailant, whether it is ‘just and equitable’ to apportion financial responsibility as between the taxpayer and an applicant who caused or contributed in some way to the incident, but whether the applicant is a person whose moral worth, assessed according to strictly defined criteria, is such that their ensuing injuries should be compensated from public funds. As the judge hearing a claim that raised exactly this issue observed, ‘paragraph 25 does ‘not allow any general balancing out of the nature of a claimant’s conduct against the seriousness of the injury and other consequences’.³³ Instead, given that the scheme is publicly funded, the determining question is whether it would be ‘inappropriate’ to make any award.

These points are well illustrated by a comparison of the ways in which a civil court and the CICA deal with claims by offenders in respect of the injuries they receive at the hands of a householder defending their property. In *Revill v Newberry*, the plaintiff was a young man who had been seriously injured when shot in the chest by the householder from whose allotment shed he intended to steal some equipment. Because there had been similar incidents, the householder was lying in wait inside the shed; as he heard someone trying to break in, he discharged his shotgun through a small hole in the

³¹ ‘We propose that eligibility to claim from the Scheme should be tightly drawn so as to restrict awards to blameless victims of crime who fully co-operate with the criminal justice process’ [16] (p. 50).

³² <https://www.gov.uk/guidance/criminal-injuries-compensation-a-guide>.

³³ *R (SB) v First-tier Tribunal* [2010] UKUT 250 (AAC), [2011] AACR 11 [27]–[31].

door, injuring the plaintiff. In the subsequent civil action, the Court of Appeal agreed with the judge's two-thirds reduction for the young burglar's contributory negligence.³⁴ By comparison, on similar facts, CICA's then appeal body found that it would be 'inappropriate' that someone who was injured in the course of burgling someone's home, and who struggled to escape and was injured when detained, should receive an award from public funds, agreeing that the claim should be entirely rejected.³⁵ As Farmer observed of the Tony Martin case, one consequence of the contested and fluid nature of the label 'victim' was that the burglar whom Martin had shot in the legs while he was seeking to escape reinvented himself as a 'victim' of Martin's unlawful use of force, and when he sought to sue him for his injuries, in turn relabelling the householder 'victim' an 'offender' [21] (p. 59).³⁶

3.2. The Victim's Criminal Record

The administrative body responsible for the implementation of the pre-statutory (1964) scheme would refuse or reduce an award where the applicant had convictions that it regarded as being qualitatively or quantitatively 'serious', whether they were, or were not, causally related to the incident in which they were injured. This interpretation, which could include a 'spent' conviction under the Rehabilitation of Offenders Act 1974, was at that time approved by the Court of Appeal.³⁷ This specific possibility was omitted in the 1996 statutory scheme, which provided instead that the CICA 'must refuse or reduce an award to reflect unspent criminal convictions' unless there were 'exceptional reasons not to do so'.

In order to assist in answering the question whether an award was to be refused or reduced, CICA introduced a system of 'penalty-points'. In essence, the more severe the sentence and the shorter the period of time between the date on which it was ordered, and the date on which CICA received the application, the greater the number of penalty points, and thus the greater the likelihood of the claim being refused or rejected. Conversely, the less severe the sentence and the longer the period of that time the fewer the resulting penalty points; an outcome that sought to give the applicant credit for going straight. This approach, however, did not satisfy the government's stated objective that taxpayer 'cash compensation should be focused on blameless victims of the most serious crimes' [16] (p. 3). 'The Scheme is a taxpayer-funded expression of public sympathy and it is reasonable that there should be strict criteria around who is deemed "blameless" for the purpose of determining who should receive a share of its limited funds. We consider that, in principle, awards should only be made to those who have themselves obeyed the law and not cost society money through their offending behaviour' [16] (para 207).

Accordingly, CICS 2012 introduced stricter criteria for determining when an award would be appropriate in these cases. By paragraph 26 and Annex D paragraph 3, no award will be made where an unspent conviction resulted, broadly speaking, in either a custodial sentence or a community order. Refusal of an award in these cases is mandatory. This applies to any unspent convictions the applicant has at the time of applying or that they receive before their claim is settled. The lawfulness of this exclusionary rule was challenged on a number of grounds that primarily engaged provisions of the European Convention on Human Rights (ECHR). It is a complex case whose issues cannot be detailed here [42] (pp. 129–133), but the conclusions of the High Court and of the Court of Appeal were that however those issues were answered, the rule was not unlawful: 'There is plainly a legitimate aim in limiting eligibility for compensation to those who are morally deserving of it, namely, "blameless

³⁴ [1996] QB 567 (CA).

³⁵ Criminal Injuries Compensation Appeals Panel, *Annual Report and Accounts for the year ended 31 March 1997* (Cm 3840, February 1998).

³⁶ Following this case, the law governing the use of force in self-defence was amended so that in a 'householder' case, the degree of force used by the 'victim' may be regarded as having been reasonable in the circumstances as the householder believed them to be, unless it was grossly disproportionate in those circumstances; see *Collins* [2016] EWHC 33 (Admin), and *Cheeseman* [2019] EWCA Crim 149 (CA).

³⁷ *R v Criminal Injuries Compensation Board, ex parte Thompstone and Crowe* [1984] 1 WLR 1234 (CA).

victims of crimes of violence”.³⁸ As a proportion of all resolved claims, the number rejected under paragraphs 22–28 is lower than was the case before the commencement of CICS 2012, but the underlying policy remains central to its purpose.

3.3. *The Victim’s Bad Character*

A victim’s bad character is primarily evidenced by their unspent convictions, but earlier versions of CICS 2012 enabled CICA ‘to take account of ‘other evidence available’ when determining whether to reject or reduce an award. This evidence could relate to police reports but on which the CPS had decided not to prosecute,³⁹ or to a police caution given to the applicant. This power is now set out in paragraph 27, which provides that an award may be withheld or reduced because the applicant’s ‘character’ makes it inappropriate to make an award or a full award.⁴⁰

CICA’s Guide lists the kind of character evidence that can fall within this provision. It includes any association in illegal drugs or crime, tax evasion, benefit fraud, and, as previously, police cautions, but there does not have to be evidence of a crime; an applicant who has been made the subject of an Injunction to Prevent Nuisance and Annoyance in civil proceedings,⁴¹ or a football banning order made on application to a magistrates’ court,⁴² may be caught by this paragraph. Nor does the relevant aspect of the applicant’s character need to have any connection with the incident in which they were injured. The application by a foreign national who had lied about having leave to remain in the UK was refused on the ground of her unlawful status. The court held that the earlier scheme ‘did not place any limitations on the type of conduct which might justify the conclusion that an applicant’s character renders an award of compensation inappropriate’.⁴³ This general point, which could in an application on facts such as those in that case engage the discrimination provisions of the ECHR, has not been tested under CICS 2012.

4. Conclusions: Non-Ideal Victims

Negligent, reckless, or intentional injuries caused by an offender against another person are, aside from any criminal liability,⁴⁴ theoretically remediable in an action for damages. Other injuries, such as those that are caused by road traffic accidents, industrial processes, or contaminated vaccines, may or may not be remediable in this way. The state’s response may be to place the burden of insuring against such injuries on those who engage in the relevant activity, as in the case of compulsory motor insurance, itself to directly assume the burden of providing financial support that may in part have been funded by those receiving that support, as in the case of national insurance contributions, or to create specific ex gratia taxpayer-funded compensation schemes, as in the case of vaccine damage and the variant Creutzfeldt-Jakob disease scheme.

³⁸ *R (McNiece) v (1) Criminal Injuries Compensation Authority (2) The Lord Chancellor and Secretary of State for Justice and R (1) A (2) B v (1) Criminal Injuries Compensation Authority (2) The Lord Chancellor and Secretary of State for Justice*, [2017] EWHC 2 (Admin); *A and B v Criminal Injuries Compensation Authority and Secretary of State for Justice* [2018] EWCA Civ 1534 (CA). Unspent convictions carrying sentences not specified in paragraph 3 will result in refusal or rejection of the claim, unless there are exceptional reasons not to do so.

³⁹ CPS has to apply its two-stage ‘full code test’, namely, there is sufficient evidence to provide a realistic prospect of conviction, and whether it is in the public interest to prosecute; <https://www.cps.gov.uk/publication/code-crown-prosecutors#section4>. A conviction would require proof beyond reasonable doubt; but the standard of proof in CICS 2012 is the balance of probabilities.

⁴⁰ This does not apply to the separate provisions relating to unspent convictions.

⁴¹ IPNA; these replaced Anti-Social Behaviour Orders (ASBOs; Anti-Social Behaviour, Crime and Policing Act 2014, Part 1).

⁴² Football Spectators Act 1989 ss 14A and 14B. Under section 14B(2), it is necessary to show only that the person ‘has at any time caused or contributed to any violence or disorder in the United Kingdom or elsewhere’ but does not depend on a conviction, as does section 14A.

⁴³ *Andronati v Criminal Injuries Compensation Appeals Panel* [2006] EWHC 1420 (Admin) [9].

⁴⁴ Negligence alone is generally insufficient for an offence against the person, but gross negligence may be sufficient basis for a conviction of manslaughter where the victim dies.

These instances by no means fully recognise these many alternative compensation systems,⁴⁵ of which CICS 2012 is one such alternative. It does not substitute for a known offender against whom a remedy is possible, either via a civil action, or a compensation order on conviction. In both cases, any sums recovered are fully deductible from any CICA award; there is no double recovery at the taxpayer's expense. However, as such sums are likely to fall short of what could be recovered from an insured defendant, or one with sufficient means, CICS 2012 stands as an additional source of compensation, and where, as is frequently the case, the offender is unknown or not brought to trial, it is the only source; a remedy of last resort.

All taxpayer-funded schemes whose purpose is, as in the case of the instances above, to provide financial redress for injuries that public policy dictates should not fall unmitigated upon the individual, by definition specify those eligibility criteria with which the injured person must comply. These criteria may be characterised as a 'payment trigger' whose primary function is 'to select worthy claimants from the less deserving and to make payments only to the former' [44] (p. 640). In the case of CICS 2012, this measure of desert is implicitly achieved by drawing a line between ideal and non-ideal victims of violent and sexual crime, and explicitly so in the case of the various disempowering provisions discussed above.

Unless they are applicants whose claims have been refused or any award reduced, there is probably very little wider societal awareness of the state's restrictions on non-ideal victims' access to this particular source of public funds. The point being made in this article is that CICS 2012 is an exemplar of the legal implications of an unsympathetic construction of an applicant's possible social status as a victim of a violent or sexual crime. This construction in turn illustrates one consequence of the contested cultural representations that continue to shape perceptions of victims of crime [45]. It also, secondly, illustrates the inevitable legal difficulties that attend political and criminal justice discourse and practice, which are, similarly, a consequence of that contest.

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⁴⁵ See [43], (pp. 99–121), [43].

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