

Real crime, real victims: environmental crime victims and the Crime Victims' Rights Act (CVRA)

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Abstract The Crime Victims' Rights Act (CVRA) was signed into U.S. federal law in 2004 with the expressed purpose of empowering crime victims, expanding the role of the victim in federal criminal prosecutions, and providing more clearly defined roles for victims in court proceedings. As environmental crime cases have progressed through the federal court system, the courts and legal scholarship have begun to address the complexities associated with environmental crime victimization under the CVRA. This article provides an overview of recent environmental crime cases that have addressed the CVRA. It then discusses criticisms of including environmental crime victims under the CVRA, while developing a thesis in support of victim recognition.

Introduction

On April 20, 2010, an explosion rocked the Deepwater Horizon drilling rig owned by British Petroleum (BP) in the Gulf of Mexico, resulting in 11 deaths and causing a massive oil spill affecting tens of thousands of people. On March 23, 2005, an enormous fire and explosion occurred in the isomerization unit at the BP Texas City refinery; fifteen people were killed and 170 were injured. On December 2, 1984, a poisonous gas leak at the Union Carbide plant in Bhopal, India, killed 4,000 people instantly and 14,000 over the course of several years. These cases have much in common; each case resulted in immediate deaths and/or serious injuries/illnesses, each case received extensive mass media attention, and in each case, no single person was criminally charged although the corporation was held criminally liable.

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Although these particular cases attracted global media attention, very few environmental crime cases garner such global, national, or even local media attention unless there are mass casualties and/or widespread ecological devastation. The vast majority of environmental crime victims will never be recognized or given the opportunity to speak about the consequences of their victimization, as most environmental crimes will go undetected or will escape criminal prosecution. In the rare event that an environmental crime is prosecuted criminally, environmental crime victims are now afforded several rights, including the right to speak about their victimization; a small step in the proper direction for environmental crime victims.

The Crime Victims' Rights Act (CVRA) was signed into U.S. federal law in 2004 with the expressed purpose of empowering crime victims, expanding the role of the victim in federal criminal prosecutions, and providing more clearly defined roles for victims in court proceedings. Recently, as a small number of corporate environmental crime cases have proceeded through the federal court system, the courts and a limited legal scholarship have begun to enumerate a number of problems with including environmental crime victims as victims under the CVRA [1–3]. While the CVRA will undoubtedly alter court proceedings, perhaps creating delays and uncertainties, victims of crime (including environmental crime victims) will benefit in myriad ways, as is the intention of the CVRA. This article provides an overview of the CVRA and recent environmental crime cases that have addressed the CVRA. It then responds to the issues raised in the legal literature and provides an argument in support of recognizing environmental crime victims as victims under the CVRA.

The Crime Victims' Rights Act

As noted by the Ninth Circuit Court in *Kenna v. U.S. District Court*, “The Criminal Justice system has long functioned on the assumption that crime victims should behave like good Victorian children—seen but not heard”. The Victim's Rights Movement gained momentum and national attention in the 1960s alongside the Civil Rights and Women's Movement. While these movements often had different goals, there were unifying themes for victims' rights. Over the past five decades, victims' rights is one of only a few issues that has united conservatives and liberals. As Beloof notes [4], “if popular and Congressional voters are any measure, victims' rights are as American as apple pie” (37). Victims' rights advocacy and legislation in the 1980s and 1990s led to the creation and implementation of the Crime Victims' Rights Act (CVRA), which was signed into law in 2004 as part of the Justice for All Act of 2004 (JFAA).¹ The CVRA, introduced by Senators Feinstein and Kyl, received broad bipartisan support [4, 5].

The primary purpose of the CVRA is to empower crime victims, expand the role of the victim in federal criminal prosecutions, and provide more clearly defined roles for victims in court proceedings. Under Rule 32 of the Federal Rules of Criminal Procedure, victims of violent crimes and sexual crimes are recognized. The CVRA

¹ For a more in-depth review of the victims' rights movement and the evolution of federal statutes since the 1970s, see [4, 5, 57].

extends the rights under Rule 32 to the victims of any federal crime and provides eight basic rights as defined in Section 3771(a) of the CVRA [6]:

- (1) “to be reasonably protected from the accused”
- (2) “to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused”
- (3) “not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding”
- (4) “to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding”
- (5) the “reasonable right to confer with the attorney for the Government in the case”
- (6) “to full and timely restitution as provided in law”
- (7) “to proceedings free from unreasonable delay”
- (8) “to be treated with fairness and with respect for the victim’s dignity and privacy”

The CVRA intends to move the victim from a passive role to a more active role [7] replacing “illusory victims’ rights with enforceable rights” [4, 8]. The CVRA provides crime victims’ with the right to be “reasonably” heard at all stages of court proceedings, including plea bargaining and sentencing. The CVRA permits victims’ to confer with the prosecution and allocates funding for victims’ legal services, as well as remedies for violations of victims’ rights [5]. The CVRA allows both the government and the victims to enforce these rights. If a victim believes his/her rights under the CVRA are violated by the district court, the victim can petition for a writ of mandamus from the court of appeals. Under the CVRA, the appellate court must respond to the petition within 72 h of the filing [6]. While the CVRA expands victims’ rights, there are limitations to the rights afforded under the CVRA. Most illustrative of these limitations is that a “reasonableness” caveat is attached to five of the eight rights in order to preserve judicial discretion and independence.

Critics of the CVRA argue that the CVRA creates a number of problems that are just now emerging in the federal courts [7]. Levine [7] suggests that the CVRA will “impair” prosecutorial and judicial discretion and erode the rights’ of defendants. In addition, debates about the mandamus provision have emerged in the courts and in the literature. Levine suggests a narrow interpretation of the mandamus provision; that “only flagrant abuses of law warrant a grant of mandamus petition”. Cassell and Joffe [5] suggest that Congress intended for crime victims to receive ordinary appellate review if the trial court denies their rights under the CVRA.

The Crime Victims’ Rights Act and environmental crime cases

More recently, major environmental crime cases involving the CVRA have gained attention in the courts and legal literature. Both the courts and the burgeoning legal literature have addressed the issue of whether environmental crime victims should be included as victims and the associated difficulties of doing so under the CVRA. To date, three major environmental crime cases have raised CVRA issues. We will

provide a discussion of each of these cases, followed by a response to the subsequent legal literature that has emerged.

United States v. BP products

On March 23, 2005, a fire and explosion occurred in the isomerization unit at the BP Texas City refinery. Fifteen people were killed and 170 people injured. After a two-year investigation by the Environmental Crimes Section (ECS) of the Department of Justice (DOJ), BP agreed to plead guilty to a “knowing violation” of the Clean Air Act’s Risk Management Plan (RMP) provisions. Internal memos revealed that BP executives and managers “willfully ignored recurring major safety violations for years [9]. BP agreed to pay a \$50 million fine, serve 3 years probation, and make numerous safety and environmental improvements. Prior to announcement of the plea agreement, the government entered a motion asking the district court to allow for victim notification after the plea was announced at a press conference. The district court agreed with the prosecution that notifying the victims prior to the public announcement would be “impracticable” given the large number of victims and could result in prejudicial media coverage. After the press conference announcing the plea agreement, the government notified victims via email, phone, and mail.

One week before the hearing, over twenty victims requested that the court reject the plea as too lenient and noted that as victims, they should be informed prior to announcement of the plea agreement; failure to do so was a violation of their rights under the CVRA. The district court held that the victims’ rights were not violated under the CVRA because the victims were able to submit Victim Impact Statements and speak at the hearing. The victims filed a petition for writ of mandamus with the 5th Circuit Court of Appeals. The 5th Circuit Court agreed with the victims that their rights were violated but denied the writ, stating that the crime victims’ CVRA petition was subject to discretionary mandamus review, not ordinary appellate review; aligning with the 10th Circuit Court. The 2nd and 9th Circuit Courts have held that the CVRA entitles crime victims to ordinary appellate review. A letter to the judge in the BP case from an attorney representing several victims stated that the victims were very upset with the “relatively minor fine” and despite the fact that evidence existed showing criminal culpability “no criminal charges were levied against anyone in BP management” [10]. The victims stated that “so many lives were lost or ruined. Human lives should be more important”.

United States v. W.R. Grace & Co. (2005)

W.R. Grace & Co. mined and processed vermiculite ore close to Libby, Montana, from the early 1960s until the early 1990s. In a CNN report, David Uhlmann [11], a former environmental crimes prosecutor stated, “there’s never been a case where so many people were sickened or killed by environmental crime”. W.R. Grace has faced more than 270,000 asbestos-related lawsuits and filed for bankruptcy in 2001. On February 7, 2005, the Department of Justice indicted Grace and several officials on numerous charges including improper disposal of asbestos-contaminated vermiculite and the knowing release of asbestos, a hazardous air pollutant, into the ambient air.

W.R. Grace was charged with defrauding the United States by impairing, impeding, and frustrating government agency investigations and clean-up operations.

According to the indictment, W. R. Grace and its executives, attempted to conceal information about the adverse health effects of the company's mining operations and distribution of vermiculite in the community. According to the Department of Justice's Environment and Natural Resources Division (ENRD), "anecdotal reports from local physicians indicate that over one hundred Libby residents have died from asbestos-related causes. In addition, hundreds of Libby residents suffer from decreased lung function due to pleural fibrosis or interstitial disease" [12]. The district court concluded that the thirty-four victims the government planned to call at trial as witnesses, were not victims under the CVRA; in fact, there were no identifiable victims to the charges indicated in the indictment. The victims filed a petition for a writ of mandamus with the Ninth Circuit Court of Appeals. The Ninth Circuit Court granted the writ of mandamus petition, allowing the victims to be recognized as victims under the CVRA and to attend the trial. On May 8, 2009, W.R. Grace and officials were acquitted of "knowingly" harming the people of Libby, Montana. In June 2009, the EPA declared a Public Health Emergency in the towns of Libby and Troy, Montana; marking the first time the EPA [13] "has made a finding under the Comprehensive Environmental Response, Compensation, and Liability Act (or Superfund) that conditions at a site constitute a public health emergency".

United States v. CITGO

On August 9, 2006, a federal grand jury in Corpus Christi, Texas, returned a 10-count indictment, charging CITGO Petroleum Corporation, its subsidiary, CITGO Refining and Chemicals Co., and the environmental manager at its Corpus Christi East Plant Refinery with criminal violations of the Clean Air Act (CAA) and the Migratory Bird Treaty Act (MBTA). On June 27, 2007, a Corpus Christi federal jury unanimously determined that CITGO Petroleum and Refining knowingly operated two large open-top tanks (Tanks 116 and 117) as oil-water separators between January 1994 and May 2003 without the required emission controls. As a result, the tanks emitted volatile organic compounds for 9 years, including benzene, a known carcinogen. In April, May, and June 2008, pre-sentencing hearings were held to hear evidence showing whether individuals identified by the Government as alleged victims qualified as "crime victims" under the CVRA and if the odors/emissions traced back to Tanks 116 and 117 were the "direct and proximate cause" of health effects. Over three hundred people filled out Victim Impact Statements prior to the pre-sentencing hearings at a town hall meeting. Sixteen victims testified (as a representative sample of victims), as well as expert witnesses for the government and CITGO. The victims testified that they experienced numerous symptoms consistent with chemical exposure including burning eyes and nose, odors, sore throat, skin rashes, shortness of breath, vomiting, dizziness, nausea, and headaches. Numerous motions and memorandums were filed with respect to the issue of "crime victims" and "causation". A state environmental investigator testified that she investigated three specific odor complaints that were traced directly back to Tanks 116 and 117.

Three years later, on April 5th, 2011, Judge Rainey issued an order excluding the victims as victims under the CVRA, based primarily on lack of specific medical

evidence as proof of victimization and held that in the Court's opinion, the government "failed to present sufficient evidence that the alleged victims' physical symptoms were directly and proximately traceable to emissions from Tanks 116 and 117" [14]. The judge held that expert witness testimony on both sides would be considered at sentencing but that the victims' symptoms were common symptoms and could be related to the fact that many victims' were elderly and/or smoked. The Government filed a motion for reconsideration on April 19, 2011, stating, "the Court abused its discretion when it dismissed and ignored the testimony of the victim witnesses" Motion to Reconsider, Docket 733 [14]. The judge denied the motion for reconsideration on July 27, 2011. The sentencing hearings are scheduled for 2012.

Critics of including environmental crime victims under the CVRA

A nascent legal literature surrounding the issue of including environmental crime victims under the CVRA began in 2009 with an article written by Tresa Baldas entitled "A New Type of Crime Victim is Speaking Up" [2]. A few months later, a prominent defense attorney and former head of the DOJ's Environmental Crimes Section, Judson Starr (along with Brian L. Flack and Allison D. Foley), published an article in *Natural Resources and Environment* which enumerated a number of problems with including environmental crime victims as victims under the CVRA [3]. In late 2010, a law student at Washington and Lee published a more in-depth article in the *Washington and Lee Law Review*, drawing from Starr et al. [1]. These articles make the following claims against including victims of environmental crimes under the CVRA that will be addressed below: inclusion will complicate the legal process; properly identifying environmental crime victims is a difficult task; Congress did not intend to include environmental crime victims under the CVRA; and recognizing these victims will draw negative publicity, making the negotiation of plea agreements and voluntary disclosure more difficult.

Complicating the process

Starr et al. [3] and Atkins [1] highlight these three aforementioned environmental crime cases to discuss how the CVRA creates complications in these particular cases. The central point raised is that the CVRA will further complicate criminal proceedings in already complex environmental crime cases by creating extensive problems and delays for the court, the prosecution, and the defense. Most significant here is the potential number of victims: "If every victim in a large-scale environmental case were given unfettered access to the government's attorney at every stage of the case, criminal prosecutions could be significantly delayed, and the government's resources stretched thin" [3]. Atkins additionally suggests victims should seek redress under civil law, in lieu of complicating the legal process.

While the inclusion of victims in environmental crime cases may potentially complicate the legal process, the CVRA provides district courts discretion in cases involving multiple victims to set a "reasonable procedure" to acknowledge victims. The presence of multiple victims occurs in criminal cases outside of environmental crime cases, most notably financial crime cases. The court determines the parameters

for “reasonable” in terms of the right to be heard and the right to confer with government attorneys. Delays that complicate legal proceedings are already common in corporate crime cases and tend to benefit corporate defendants much more so than victims. As White [15] notes, “the powerful are able to manipulate rules of evidence, frustrate investigatory processes, confuse notions of accountability, and to forestall potential prosecution by ostensibly abiding by and complying with record-keeping procedures” (373). Victims can still seek redress in civil court, but allowing victims the right to speak and confer with counsel is a fair addition to a legal process that benefits well-funded corporate defendants.

The problem of establishing victimization and identifying victims

The CVRA defines a “crime victim” as a person “directly and proximately harmed as a result of a federal offense” (18 U.S.C. § 3771) [6]. Starr et al. [3] and Atkins [1] state that it may be very challenging for the prosecution and the courts to determine victimization in environmental crime cases. As Atkins [1] notes, “perhaps the most troubling and time-consuming issue concerning the application of the CVRA to victims of environmental crimes is determining whether a victim was directly and proximately harmed such that he or she has standing under the CVRA” (1639).

Proving victimization and identifying victims does not always prove intractable in environmental crime cases. The level of victimization required for such recognition is and should continue to be left to the courts, which have already begun to define these parameters, drawing in part from prior cases. The CVRA attaches a reasonableness standard to provide discretion to the courts on these matters. In some cases, such as the BP and W.R. Grace cases, victimization is decidedly evident and the courts were able to identify victims. The government’s petition for writ of mandamus in the W.R. Grace [12] argues for a broad definition of victims’: “the status of ‘crime victim’ is not limited to those that manifest physical symptoms of injury...simply increasing the future risk of developing one of these diseases suffices as harm”, drawing from the Courts’ findings in *U.S. v. Protext Industry* (1989) and *U.S. v. Thorn* (2006).

In cases, such as *CITGO* that may better fit the above description than the BP or Grace cases (although individuals did report being harmed in various ways in their Victim Impact Statements), it is more difficult to identify proximate victims. In some cases, individuals may be harmed but the court decides that such harm is either indirectly or not connected to the crime of conviction or does not rise to the level of defining them as victims under the CVRA. Regardless, this is simply the process of the courts continuing to decide such facts under case law. Judge Rainey's argument in *CITGO* is illustrative of this evolution in the context of the relevant case law: “The Court wishes to make clear that this ruling is in no way intended to diminish or otherwise marginalize the putative victims’ individual and collective plights. It is beyond argument that many, if not all, of the purported victims suffered some level of adverse health conditions during the time in which they lived near the CITGO refinery. In all likelihood, their negative experiences can be at least partially attributed to their proximity to the group of refineries, including CITGO’s, bordering their community” [16].

Congressional intent

Atkins [1] suggests that Senators Kyl and Feinstein, the CVRA sponsors, did not likely intend to include environmental crime victims. He points to the fact that only murder cases were presented in support of the Act in the Legislative record and states that “while this does not necessarily limit the statute’s scope to protect only murder victims, it does show that the bill’s sponsors were particularly focused on and concerned with protecting the rights of victims of the most egregious crimes”. However, it does appear that Congress was deliberate in providing a broad definition of a “crime victim”. Senator Kyl stated that the definition of a crime victim was intentionally broad because “all victims deserve to have their rights protected” [4]. In 2008, the 11th Circuit Court upheld a similar position that “as long as a person suffers harm as a result of the crime’s commission, he or she is a crime victim under the CVRA, regardless of whether the defendants’ intended to victimize the particular person” [17]. While murder is certainly egregious, families of environmental crime victims would undoubtedly argue that losing a loved one in a preventable environmental crime was equally egregious. The scholarly literature recognizes that defining victimization in terms of environmental crime and harm is challenging [18], but it is clear that both Congress and the courts have recognized environmental crime victims under the CVRA.

Negative publicity

Starr et al. [3] and Atkins [1] argue that the CVRA and environmental crime cases might attract media attention, which has the potential to create negative publicity for the defendant that will pose complications for plea agreements and government negotiations. Starr et al. [3] suggest that “in such a situation, where a large number of victims are given notification of and access to complex and fragile negotiations, negative publicity may combine with a drawn-out time table to thwart a plea agreement”. Atkins [1] suggests that the publicity surrounding the CVRA and environmental crime cases could additionally inhibit the success of the EPA’s Voluntary Disclosure policy.

As noted in Cassell and Joffe [5] in reference to a 1976 Nebraska case, “the Supreme Court has cautioned that ‘pretrial publicity’, even pervasive, adverse publicity, does not inevitably lead to an unfair trial”. If a case proceeds to trial, the court can address concerns about publicity through extensive voir dire [5]. Environmental crimes and environmental crime cases are underreported in the media [19–21]. Corporate defendants, unlike most criminal defendants, have the resources to shape the public and media discourse surrounding the crime and media reporting of environmental crimes often favors the corporation [19, 21]. For example, Jarrell [19] found that CITGO launched an intensive PR campaign in the local media before and during their criminal trial involving violations of the Clean Air Act. The company aired favorable commercials, donated thousands of dollars to local schools, and displayed billboards that highlighted CITGO’s positive contributions to the community. In most criminal cases, the defendant does not have the resources to ensure fair media coverage of the case.

Media publicity may provide a deterrent for future environmental crime. Criminal sanctions are intended to serve deterrent and retributive purposes. Fines are often ineffective, particularly in cases involving large corporations. Spurgeon and Fagan [22] note “if corporate executives do not fear incarceration, only the social stigma of conviction remains a deterrent” (430). Negative media attention as the result of increased involvement by environmental crime victims may increase the deterrent effect, an overlooked but potential benefit of the CVRA, particularly in cases involving corporate criminality. Corporate defendants may be more willing, rather than less willing, to engage in plea negotiations in order to avoid negative publicity surrounding a criminal trial. Furthermore, voluntary disclosure affects the government’s decision to charge. In cases involving voluntary disclosure, the government is more likely to negotiate with the corporate rather than pursue criminal charges. Charging decisions by the EPA and DOJ are affected by voluntary disclosure, cooperation, preventive measures, and compliance measures [23]. Most importantly, “having crime victims scrutinize plea deals and present any objections to a judge for review can potentially improve the plea bargaining process [5:181].

Recognizing environmental crime victims under the CVRA

The CVRA may create delays and raise questions concerning the direct role of victims in the legal process in many federal criminal cases, particularly as the courts, prosecution, and defense familiarize themselves with the CVRA and adapt to its inclusion in federal criminal cases. The complexity of environmental crime cases may complicate the process in terms of proving victimization and identifying victims. Complexities aside, there are numerous reasons why environmental crime victims should be recognized under the CVRA. The more important considerations include: many defendants in environmental crime cases commit willful acts that, like murder or street crimes, produce victims; only the most serious violations of environmental law are likely prosecuted as criminal cases (and these serious cases involve victims); despite minimal prosecutions, environmental victimization is widespread; for the courts to take environmental criminals seriously requires an equal recognition of their victims; if we care about victims' rights, allowing victims to participate in some capacity under the CVRA creates a general public good for all crime victims.

Environmental crime is “real crime”

Environmental crimes are often perceived as victimless crimes and administrative or technical violations, despite the fact that many researchers suggest such crimes cause more illness, injury, and death than all street crimes combined [24]. “Traditionally, harmful environmental practices have not been viewed with the same moral repugnance as crimes against person or property” [25: 19]. Traditional definitions of environmental crime address acts or omissions that violate federal, state, or local environmental standards and laws [26]. Many of the actions that cause widespread human and environmental harm result from willful acts of negligence that negatively affect human health and produce a multitude of environmental victims [27]. Some acts, particularly acts committed by corporations, may not violate a criminal law, but

cause substantial harm to the environment and human health and should be treated as criminal violations of law [24, 28–30].

Laws are social constructions; thus, behaviors legally recognized as green or environmental crimes include only those behaviors that law-makers and the law-making process determines should be criminalized. For example, corporations can wield influence in the regulatory process through lobbying efforts to oppose new laws and regulations. As such, green criminologists take a much broader approach to defining environmental crime and include acts (illegal and legal) that cause harm to human victims, animal victims, and the environment itself. Green criminologists also recognize that environmental crimes are often committed as the result of individual, industry and corporate decisions to maximize profits and externalize costs [19, 24, 31].

Sixteen years ago, Williams [18] defined environmental victims as “those of past, present, or future generations who are injured as a consequence of change to the chemical, physical, microbiological, or psychosocial environment, brought about by deliberate or reckless, individual or collective, human act or act of omission” (21). Environmental victimization should be recognized as an “active social process involving relations of power, domination, and resistance” [32:106]. Often, environmental crime victims may not even know that they are victims as the harm does not always manifest immediately and it is challenging to determine who caused the harm [25, 33, 34]. While more attention is now given to victims of traditional “street” crimes, criminal justice victims’ rights advocates have generally ignored victims of corporate crimes [34–37]. The common image of a victim is a victim of murder, rape or robbery rather than a victim of a white-collar, corporate, or environmental crime [38]. The focus of victims of street crimes can actually deflect attention away from victims of white-collar, corporate, and environmental crime [38]. Yet, every living entity falls victim to environmental crime and environment harm, particularly when we consider crimes and behaviors that result in ozone depletion, air and water pollution, acid rain, and global warming [32].

“The problem is learning to accept that when companies dump chemicals into rivers, streams, and landfills, or alongside roadways, they do so purposefully and with knowledge that the likely results of their actions will include injury and death for those exposed to their waste products. These are not accidents- they are planned actions no less serious than assaults of killings” [37:169]. Contaminated drinking water, untreated human waste, and air pollution account for more than 7 million deaths each year, approximately 15 % of annual deaths globally [39]. “An estimated 40 % of deaths around the world can now be attributed to various environmental factors, especially organic and chemical pollutants” [39:286]. Many of the actions that cause such devastation result from willful acts of negligence that negatively affect human health and produce a multitude of environmental victims. “Criminal environmental violations have the potential to cause harm on an even greater scale because these crimes are often committed intentionally and under the cover of darkness” [3].

In 2006, Overseas Shipholding Group Inc. was fined \$27.6 million as the result of 33 felony convictions for intentional dumping of waste oil, falsification of pollution logs, and obstruction of justice. In 2002, Olympic Pipeline Co. and Equilon Pipeline Co. were fined \$21 million for a 1993 pipeline explosion that resulted in the deaths of

three people, including two children, and the release of 230,000 gal of gasoline into local streams. In 2005, Motiva Enterprises was fined \$10 million for felony violations of the CAA and CWA involving a tank explosion that released over a million gallons of sulfuric acid into the air and 100,000 gal into the Delaware River. In addition to the cases discussed previously, these environmental crime cases illustrate that environmental crimes are serious crimes that affect many people and are deserving of serious attention. “Environmental crimes are not ‘victimless’, but have far-reaching and pervasive consequences, the effects of which are often concealed for years, or even decades” [40:457].

Prosecuting wicked offenses

Criminal prosecution of environmental crimes is a relatively recent development. In the 1970s, criminal enforcement provisions for environmental crimes were limited to misdemeanor sanctions and were under-utilized [41]. Prior to 1982, only 25 environmental crimes were prosecuted by the federal government [42]. The recognition that prosecuting corporations and corporate officers was necessary in order to ensure compliance led to the creation of the Environmental Protection Agency’s Office of Environmental Enforcement in 1981 and the Department of Justice’s Environmental Crimes Section in 1982. Devaney [40], then-director of EPA criminal enforcement, stated that “one of the hard lessons learned in environmental law enforcement is that individuals and companies confronted with only administrative or civil judicial fines often find it advantageous to continue to violate the law and merely absorb such penalties as a cost of doing business” (457).

Environmental law violations encompass a wide range of behaviors from record-keeping violations to willful negligence that causes death and serious injury. Most environmental law violations are treated as administrative, civil, or regulatory violations [43] and penalties generally involve fines. Given the amount of resources required to prosecute an environmental crime case, only a small number of the more serious crimes are prosecuted as criminal, rather than civil offenses. “The EPA requires its criminal investigators to focus on matters involving significant environmental harm and culpable conduct, with culpability defined to include repetitive violations, deliberate misconduct, and acts of concealment or falsification” [8:1244]. In the Principles of Federal Prosecution, DOJ attorneys are instructed to consider the nature and seriousness of the offense, the deterrent value of the prosecution, and the availability of non-criminal alternatives to criminal prosecution. The manual further states, “as a matter of fundamental fairness and in the interest of the efficient administration of justice, no prosecution should be initiated against any person unless the government believes that the person probably will be found guilty by an unbiased trier of fact” [20]. Brickey’s [44] analysis of 330 hazardous waste prosecutions revealed that nearly two-thirds of cases involved more than one environmental statute and that many cases involved non-environmental crimes such as conspiracy and making false statements; supporting the idea that only the most serious environmental cases lead to criminal prosecution.

In addition to carefully considering which cases to prosecute criminally, the EPA and DOJ must take into consideration the resources available. “A relatively small amount of federal resources are typically devoted to environmental criminal matters”

[45]. The EPA has less than 200 special agents that are charged with investigating criminal violations of environmental laws [46]. In comparison, the FBI has over 13,000 special agents [8]. Limited resources mean that the EPA and DOJ can only target the most egregious violators. Commenting on the government investigation and prosecution efforts after the Exxon Valdez spill, Solow and Carpenter [45] note that “at one point or another, nearly all of the Justice Department’s Environmental Crime prosecutors [approximately 35 trial attorneys] were working on the case”. The difficulties inherent in prosecuting environmental crimes, limited resources of EPA and the DOJ to do so, and the many alternatives available to criminal prosecution suggest those cases that do go forward are likely major offenses that involve potentially serious harm to victims. As with any other criminal cases of similar magnitude, these victims should be included under the CVRA as well.

Extensive victimization

The few cases that actually result in a criminal prosecution are exceptional and the victims are not only speaking for themselves, but also on behalf of the hundreds, if not thousands, of environmental crime victims in their communities. Environmental crimes are not victimless crimes. “Effective enforcement of environmental laws against corporations is vital to any environmental protection regime: by virtue of their size and industrial nature, corporations are often among the largest producers of pollution” [47:1609]. Paul Cassell, a former District Court Judge, has written extensively about the CVRA and has participated in every environmental crime case involving the CVRA. In Cassell’s petition for writ of mandamus in the W.R. Grace case, Cassell stated “Congress presumably would not have wanted the uninjured target of an attempted murder or drive-by shooting to be denied victim status simply because of the mere fortuity of the criminal’s bad aim with a gun”, calling attention to the fact the victimization in environmental crime cases does not have to result in immediate death or illness [12]. The threat of harm is an important component in environmental crime cases.

If anything, environmental crimes that involve hundreds, if not thousands, of victims should be taken more, not less seriously than common street crime [48]. There are numerous victims’ rights groups that advocate on behalf of victims of violent crimes and personal crimes. Criminal justice victims’ rights advocates have usually ignored victims of corporate crimes [37]. While environmental justice groups have formed over the past few decades, given the nature of environmental crimes, victim advocacy takes on a much different form than that of most victim advocacy groups. Environmental justice groups are often pulled in many different directions and struggle to “prove” their victimization. As such, the CVRA is arguably more important for environmental crime victims. Furthermore, it is well established in the literature that low income people of color are more likely to be exposed to environmental risks [37, 49–52]. The majority of crime victims are likely unaware of their rights under the CVRA. Many crime victims are indigent and cannot afford counsel. Without counsel, the vast majority of victims will not be able to understand and assert their rights under the CVRA, much less petition the appellate courts for a writ of mandamus. Those few victims that are able to overcome such hurdles should be granted the limited rights afforded by the CVRA.

Real crimes require real victims

Juries may be more sympathetic to environmental defendants as the “corporation and the environmental manager do not fit most jurors’ (or for that matter judges’) preconceived notions of how criminals walk and talk” [53:38]. Without victims, environmental crimes are likely to be taken less seriously by judges, juries, and the public. As noted by Cassidy [53], “the jury is more likely to balance the equities on the otherwise good citizen defendant side” (39). Michael O’Hear’s [41] analysis of environmental crime sentencing revealed that environmental defendants are treated more leniently than other federal defendants and that even in cases that lead to incarceration, defendants usually receive probation and/or terms of incarceration less than 6 months. Judges appear to view environmental defendants as less culpable than other criminal defendants, undermining the seriousness of environmental crimes. Judges are likely inexperienced to some extent in presiding over environmental crime cases; O’Hear [41] notes that judges, on average, come across an environmental defendant only once every 6 years. Allowing environmental crime victims to be treated as victims affirms our desire to treat all victims of serious crime equally under the law, by affording them the same protections as murder, robbery or other victims of street crime. Our recognition of the latter as victims and the gravity afforded to their victimization plays a major role in how the courts perceive and sentence their attackers. Serious environment assailants will only be given proper attention when we provide the same attention and protection to their victims.

Improving the system, helping the victims

Congress intended for the CVRA to apply to all federal crime victims, because of a growing recognition that victim representation is a positive social good. Broad victim representation under the CVRA means that the CVRA becomes a more widespread public good. Recognition and the right to be heard is empowering for crime victims and has therapeutic and healing effects [5]. The Ninth Circuit Court stated that the purposes of victim allocation were “(1) to ensure that the district court doesn’t discount the impact of the crime on the victims; (2) to force the defendant to confront the human cost of his crime; and (3) to allow the victim to regain a sense of dignity and respect rather than feeling powerless and ashamed” [54].

Conclusions

“Properly understood, crime victims’ rights are not barriers to an effectively functioning criminal justice system, but rather an important part of such a system” [5:181]. Excluding victims of environmental crime from the CVRA further marginalizes victims of environmental crime and makes it even more challenging to recognize environmental crime as “real” crime and environmental crime victims as “real” victims. While corporate defense attorneys will likely continue to argue against environmental crime and the CVRA, victims’ rights advocates and government prosecutors will likely join in the discussion.

Conceptualization of crime is very important. Critical criminologists have long argued that we need a much broader definition of crime and of violence. Corporate environmental crime causes widespread harm to thousands of people, many of whom are powerless. We need to pay more attention to the serious and widespread environmental harms that threaten humans and the environment [55]. “Environmental crime is part of an entire pattern of criminal behavior in which many of these industrial giants engage with alarming frequency” [21:634]. These crimes are not “random” or “accidental” [21, 37]. Environmental crimes cause physical and emotional harm [41]. There has been a particular neglect of green criminological research by American criminologists [56]. As a discipline, criminology has focused on street crime to the exclusion of all other forms of crime. While street crimes are certainly harmful, the harms produced by street crimes pale in comparison to those caused by green crimes [24]. Drawing attention to victims of environmental crime is one of the central goals of green criminology. The CVRA, if utilized in environmental crime cases, has the potential to draw more attention to victims of environmental crime in the legal system and perhaps then, more public and political attention will be forthcoming as a result of increased legal consideration. This concept is not without precedent. In 1985, the UN General Assembly adopted the Declaration on the Basic Principles of Justice for Victims of Crime and Abuse of Power. Similarly, the CVRA offers a broad definition of crime victimization. Under these doctrines, if identified, environmental crime victims across the globe should be recognized and receive restitution or compensation for their victimization. Green criminologists recognize that political and legal support for environmental crime victims is challenging at best and these policies, declarations, laws and acts, while defining victimization broadly, do not necessarily translate to widespread recognition of environmental crime victimization in practice.

In addition to drawing attention to green criminology, green crimes, and green victims, green criminologists also endeavor to work toward viable solutions. Just as we challenge traditional definitions of crime and victimization in our discipline, we must also challenge the systems that allow environmental crime and victimization to flourish in the first place. The CVRA is a step in the right direction, but as recent environmental crime cases have revealed, the Courts and corporate environmental defense attorneys are not welcoming environmental crime victims with open arms; they are quick to point out the practical problems of including environmental crime victims as crime victims, without seeing the necessity of doing so.

Justice for victims of environmental crime and environmental harm will likely not be achieved on a mass scale in the domestic courtroom. As White [32] notes, “effective environmental law enforcement will require collaboration and knowledge-sharing between different nation-states and environmental law enforcement agencies” (138). Battles will continue to be fought in the thousands of communities across the globe, with the hope that the scholarship and activism efforts of green criminologists will help to bring attention to these long-suffering victims of environmental crimes.

Taking environmental crimes seriously first requires recognizing that environmental crimes cause serious harm to people and the environment. Yet even the courts may find it difficult to perceive these often violent environmental crimes in the same light as street crime, without the appearances and voices of the victims. Environmental

crimes are widespread, but their criminal prosecution is extremely limited. An increase in environmental crime prosecutions is not likely to change in the distant future given the limited resources of the Environmental Crimes Section to prosecute such cases and the high barriers to successful litigation. Including environmental crime victims under the CVRA will do little to change this situation. In many respects, the CVRA provides only a minimal amount of support for environmental crime victims, as victims can only assert their rights when a crime has been charged. Environmental crime victims should simply be considered victims under the broad definition constructed by Congress to protect and empower all federal crime victims.

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