
Advocacy groups were also established to raise awareness and concern for victims and their families.¹¹ As Justice Scalia put it, “A public sense of justice . . . found [its] voice in a nationwide victims' rights movement.”¹²

Relatedly, several important Executive initiatives also brought victims' rights to the forefront: President Lyndon B. Johnson's Crime Commission and Law Enforcement Assistance Administration (LEAA), and President Ronald Reagan's Task Force on Victims of Crime.¹³ President Johnson's Crime Commission published a report in 1967 that illustrated the widespread victimization within the United States, while the LEAA established the Crime Victim Initiative as a resource for victim programs in local prosecutor offices and law enforcement agencies.¹⁴ Even more important to raising public cognizance w2(i) 0.0.2 (us) -0.2 (t) 0.2 (ra) 0.0.24 1774de ra 0. 0.2-0.2 (2(us) -0.) -0.2 (T) 0.2 (a) 0-

The Act defines a crime victim as “a person directly and proximately harmed as a result of the commission of a Federal offense,” and provides that a guardian or representative of a crime victim may assert the victim’s rights in the event he or she is incapacitated or deceased.²⁴ If a right provided for by the CVRA is asserted and denied in district court, the movant may petition the court of appeals for a writ of mandamus.²⁵ In instances “where the court finds that the number of crime victims makes it impracticable to accord all of the crime victims the rights described in subsection (a),” the CVRA

disbelief in experience, cognitive shock, indignation, and fear.³⁵ As consideration of victims' rights came to the forefront of criminal law, numerous strains of punishment theory began to identify and explain some of the unique benefits the criminal law and criminal punishment can provide to victims.³⁶ This subsection will examine two benefits in particular, through the lens of different contemporary punishment theories: victim satisfaction and psychological benefits.

Attached to the criminal law are blame and consequence, two deeply satisfying ideals for victims of crime. Oftentimes, victims seek revenge and social condemnation of the offender.³⁷ The criminal law is uniquely able to provide both of these as it has the power to punish and to stigmatize.³⁸ Allowing victims to participate in the criminal process increases satisfaction because participation allows them to, "restore the unequal balance between themselves and the offender."³⁹ Two theories of criminal law best explain the promotion of victim satisfaction: distributivism and retributivism.

Distributive justice holds that punishment exists to ensure victim welfare.⁴⁰ In other words, the offender is punished in order to distribute pleasure and pain between the offender and victim.⁴¹ Distributive justice seeks to offset the pleasure gained by the offender through the infliction of punishment, thereby increasing the satisfaction of the victim.⁴² Punishment increases victim satisfaction in numerous ways, such as the

³⁵ Zvi D. Gabbay,

victim.”⁶⁸ These theories suggest that giving victims a voice in the criminal process is essential, and those victims who are included receive many therapeutic benefits.

Victims also have a desire to be compensated for their harms. Another consequence of the victims’ rights movement is increased overlap between civil and criminal law.⁶⁹ Of particular interest is the emphasis placed on compensating the victim for losses suffered via the criminal system. Conventionally, any fine against the offender was money paid to the state; victims could only receive compensation if he or she brought a civil suit.⁷⁰ However, with laws such as the CVRA, victim compensation through criminal sanctions has gained popularity.⁷¹ Although criminal compensatory options are generally available, civil remedies are structured in a way that may do a better job at compensating the victim.

While these civil and criminal compensatory remedies have significant overlap, there are numerous differences that affect the choice of the victim to proceed down either avenue. As civil suits have historically existed as a means of compensation, they are generally better at doing such.⁷² First, in civil suits the standard of proof is preponderance of the evidence, which is significantly easier to satisfy than the beyond a reasonable doubt standard in criminal law.⁷³ While both civil and environmental criminal proceedings have their own set of evidentiary issues, having a lower burden of proof generally makes it easier for individual plaintiffs.⁷⁴ Second, many of the constitutional safeguards present in criminal prosecutions are not available to defendants in civil

⁶⁸ Barnard, note 34, at 75.

⁶⁹ Alan T. Harland, , 30 UCLA L. REV. 52, 58 (1982).

⁷⁰ Goldstein, note 7, at 530.

⁷¹ 18 U.S.C. § 3771(a)(6) (2004) (requiring restitution for crime victims).

⁷² Goldstein, note 7, at 530.

⁷³ Laura J. Kerrigan et. al.,

proceedings.⁷⁵ This again makes civil proceedings easier for plaintiffs. Finally, the amount awarded in civil damages is likely to be significantly larger due to the fact that restitution is based on actual loss while civil damages can include punitive damages, and loss of consortium.⁷⁶ There are several disadvantages of the civil suit, including cost of litigation (although this can be alleviated through the class action), and certain evidentiary issues, which the criminal system can resolve through statute.⁷⁷

Restitution is essentially the criminal version of civil damages.⁷⁸ Although restitution in the civil context is understood to mean disgorgement from unlawful gains, restitution in the criminal context is roughly equated to victim compensation.⁷⁹ The Court considers “the losses to each victim, any restitution owed pursuant to a plea agreement, and information relating to the economic circumstances of each defendant.”⁸⁰ Similar to civil suits, restitution can be paid directly to crime victims.⁸¹ Some scholars argue that restitution should not be classified as purely compensatory because it serves traditional roles of criminal punishment, such as deterrence, rehabilitation, and incapacitation.⁸² The fact that the victim has no control over the amount of restitution awarded, and that “the decision to impose restitution generally does not turn on the victim's injury, but on the

⁷⁵ Kerrigan, note 73, at 374-75 (“The Constitution expressly provides defendants in criminal proceedings with: the privilege against self-incrimination; the right to a speedy and public trial; the right of confrontation;

penal goals of the State and the situation of the defendant,” bolster their argument.⁸³ Additionally, by casting restitution as a form of punishment, victim compensation is

II. APPLICATION OF VICTIM BENEFITS TO ENVIRONMENTAL CRIMES

Before engaging in a micro-level analysis of the unique aspects of environmental law, it is important to expand upon the arguments and justifications for treating victims of environmental crimes similarly to victims of traditional crimes. First, victims of environmental crimes often suffer real harms, and are thus deserving of inclusion in the

but public sentiments associate environmental violations with human suffering and victimization.⁹²

Although the focus of this Note is from the perspective of how criminal law can benefit the environmental crime victim, it would be imprudent to ignore the positive effects victim inclusion can have on environmental law as a whole. Encouraging victim participation in environmental prosecutions can help reinforce social norms and strengthen environmental law.⁹³ As mentioned earlier, criminal law has “its unique ability to give force and symbolic representation to moral values by conveying condemnation and disgrace.”⁹⁴ According to many scholars, “most people obey the law only because they are responding to an ‘internalized moral belief’ that an activity is ‘wrong.’”⁹⁵ Publicizing environmental crime victims and their stories—particularly through the inclusion of the criminal process—can enhance moral outrage, and further demonstrate to potential offenders why their conduct is wrong. Additionally, including victims of environmental crimes in the criminal process may assist the judicial process, particularly during the sentencing phase, by allowing judges to evaluate the somewhat abstract environmental crime in terms of real human suffering.⁹⁶

Although there are basic similarities between victims of environmental crimes and victims of traditional crimes, typical environmental crime prosecutions are different from traditional criminal law in many respects. For one, many scholars point out that environmental criminal statutes differ from traditional criminal statutes because of aspirational qualities, evolutionary nature, and high degree of complexity.⁹⁷ Moreover, prosecutions are typically not brought against individual “midnight dumpers,” but instead

⁹² at 2 (explaining the well-known community of Love Canal, NY where Hooker Chemical disposed of hazardous chemicals resulting in more than 1000 houses being declared uninhabitable).

⁹³ Using social norms to strengthen environmental law is not a new idea. Susan Hedman, , 59 GEO. WASH. L. REV. 889, 892 (1991) (“The history of environmental policy in the United States clearly demonstrates the reciprocal relationship between law and social norms.”) However, using victims in that process is under-considered.

⁹⁴ at 896.

⁹⁵ at 898.

⁹⁶ Barnard, note 34, at 59 (“Requiring that victim impact testimony be heard in open court will materially assist the sentencing judge in determining an appropriate sentence.”).

⁹⁷ Andrew Atkins,

, 67 WASH. & LEE L. REV. 1623, 1628 (2010).

sophisticated, usually industrial, parties with a history of repeated non-compliance.⁹⁸ It follows then that the victims of environmental crimes will often look different than those of traditional or violent crimes. As such, questions arise about whether the same potential benefits available to victims of traditional offenses via criminal prosecution are equally available to victims of environmental crimes. These questions bear directly on the factors government attorneys should consider when determining whether or not to seek criminal enforcement of environmental violations.

Another unique aspect of environmental criminal law is the challenge of defining who qualifies as a victim. Environmental crime victims can be considered in terms of “the nature of the wrongful act, nature of the harm to the victim, extent of damages suffered, scale of the crime, and perpetrator identifiability/relationship with the victim.”⁹⁹ Each of these factors reveal something important. However, for the purposes of this Note, it is more helpful to categorize victims by ease of identification—as the precise problem many government attorneys face with respect to environmental crime victims is how to

someone who was injured during a robbery as it would for someone who was injured because of an explosion as the result of a company's environmental misconduct. The key elements supporting the benefits of criminal prosecution are present in both situations: a victim who was harmed, an offender that is blameworthy, a formal process in which society can recognize the victim, and an imbalance in the moral equilibrium between the victim and the offender. A study revealed that the main reason victims participated in restorative justice programs was to "to show offenders the human impact of their actions, and to tell the offenders their own story."¹⁰¹ This desire does not discriminate between violent or environmental crimes. An example of an easily identifiable crime victim can be seen in _____, in which the defendant was convicted of dumping acidic wastewater into a city sewer line and badly burning two sewage treatment plant employees.¹⁰² Here, there is no problem in defining who is a victim; thus, including them in the criminal process presents no major challenge to government attorneys. As such, when deciding whether or not to bring criminal charges, prosecutors should meaningfully involve victims to every extent practicable, not only in accordance with the CVRA, but also with the ideologies of the victims' rights movement as a whole.

One possible challenge in environmental prosecutions, even when there are easily identifiable victims, is the potential for hundreds, or even thousands of victims all seeking a voice in the criminal prosecution, thus making it inefficient or impractical. The statutory language of the CVRA alleviates this problem to a degree, as it prescribes that the court make "reasonable accommodations", but it is entirely possible some victims will be left out of the process and thus left unfulfilled. Moreover, one of the main desires of victims of traditional crimes is to be informed of the proceedings.¹⁰³ This may not ring true for victims of environmental criminal catastrophes that are highly publicized and

¹⁰¹ Zvi D. Gabbay,

covered by the media; in such instances the victim may already feel sufficiently informed.¹⁰⁴

B. Victims Identified via Statistical Probability

Many victims of environmental crimes are not as easily identified. Instead, their harms and injuries are identified via statistical probability. Rather than having a clear and direct causal link—e.g. an oil rig explosion and loss of life—harms caused by releases of toxic substances are not as certain.¹⁰⁵ Compounding the problem, these harms are often latent for many years, thus victims may not know they are victims for decades, and proving causation becomes even more difficult.¹⁰⁶

If there is “virtual certainty” that the victim’s illness was caused by the offender’s environmental misconduct,¹⁰⁷ perhaps the benefits gained from criminal prosecution would parallel those gained in prosecutions of traditional crimes and environmental crimes when there is an easily identifiable victim. The suffering and blameworthiness is highly comparable—as is the potential for release of emotion, storytelling, and healing. The desire for victims to humanize the offender’s crime may be even more applicable. Also, in cases like *United States v. Thorn*,¹⁰⁸ in which entire towns are impacted by the release of asbestos, principles of restorative justice and community involvement in the healing process are highly applicable.¹⁰⁹

Similar problems occur with a large number of victims, and may actually be worse in instances of statistical victims. Again, the CVRA may account for some of these

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¹⁰⁵ Carrie C. Boyd,

32 WM. & MARY ENVTL. L. & POL’Y REV. 483, 500 (2008).

¹⁰⁶ *United States v. Thorn*, note 74, at 90.

¹⁰⁷ *United States v. Thorn*, 317 F.3d 107, 115 (2d. Cir. 2003) (“[I]ndividuals who work with asbestos in

difficulties, but what happens in cases that include victims who never realize they have been victimized? In these situations, perhaps the needs of the victims are different and they don't seek retribution or recognition by society. However, the stigma and moral condemnation criminal law uniquely provides could result in greater media attention and thus alert them to their own victimization. Whether this is beneficial is unclear, but at the very least it could provide the victim with the possibility of receiving compensation in some form.

Another issue with statistical victims, particularly with respect to restorative justice, is the possibility of victims serving in a representative capacity. When victims cannot be identified with any measure of certainty, participants in restorative justice programs would essentially act as representatives for the unidentifiable. For example, if

civil remedies can both relieve some of the strain on the criminal system and satisfy victims' compensatory needs. Civil remedies are particularly appealing in the environmental context because, although restitution can go towards things such as medical expenses, lost wages, or damaged property, civil damages could cover a broader variety of expenses, such as pain and suffering.¹¹² Also, restitution in environmental crimes is limited under Title 18.¹¹³ While Title 18 makes restitution mandatory for certain crimes, such as embezzlement or conspiracy,¹¹⁴ restitution for environmental crimes is discretionary and must be a condition of probation.¹¹⁵

When the identity of victims is available only through statistical probabilities, prosecutors may need to focus on the benefits to society as a whole when deciding to bring criminal prosecutions. Although the benefits may still be available to this class of victims, they may not be as strong or as clearly obtainable. Moreover, monetary compensation may be more accessible via civil remedies. However, stakeholders—whether they are defined with certainty or not—should still be given an opportunity to participate in order to include those who feel compelled to be part of the proceedings.

prosecuted for reporting violations, or tampering with monitoring devices, without causing any sort of harm to the environment, much less any individual.

As such, in instances when society is a victim or the crime was truly “victimless”, government attorneys should utilize traditional considerations when deciding whether or not to bring criminal charges. The justifications for including the undefined or totally absent victim’s interest in these situations are not compelling.

III. STATUS QUO

An examination of existing environmental law and policy illuminates the problems government attorneys often face when considering environmental crime victims’ rights. A major issue that plagues many environmental crime prosecutors is defining who is a victim. For example, as noted above, the CVRA defines a victim as someone who is “directly and proximately harmed” as the result of a federal crime.¹²² In traditional criminal prosecutions, oftentimes discerning who has been directly and proximately harm poses no great obstacle.¹²³ However, in many environmental crime prosecutions, the answer is not as readily apparent.¹²⁴ According to one Department of Justice report:

Responding to victims harmed by environmental crime is beyond the current reach and capacity of most in the victim services field, due largely to a pervasive lack of data about victims and the defining characteristics of such crimes, as well as the long-term unfolding of evidence about the criminal nature of some environmental “accidents.”

Overall, agencies and courts have not provided definitive guidance with respect to

A. Easily Identifiable Victims

In instances of easily identifiable crime victims, the case law and policy is relatively straightforward and comparable to traditional criminal law. Inclusion of such

exposed to the noxious fumes submitted victim impact statements to the Court under the CVRA. However, only fifteen were classified as victims and thus entitled to rights under the Act.¹³⁰

Although defining who qualifies as a victim 50 0 0 50 0 0 0 5cl

young man being trapped for over an hour before he could be rescued.¹³⁶ Including victims' interests in cases like these would be simple; prosecutors would probably encourage their participation in order to tell a coherent story. The problem lies in the fact that cases in which there are easily identifiable victims "are more the exception than the rule in most environmental prosecutions."¹³⁷ This suggests that while the status quo can accommodate easily identifiable victims of environmental crimes, there may not be that many victims to include.¹³⁸

B. Victims Identified via Statistical Probabilities

Victims of environmental crimes who are identified via statistic probabilities

Moreover, the court concluded that victims of knowing endangerment are not “directly and proximately” harmed under the CVRA, and thus do not qualify as victims under the Act.¹⁴³ This conclusion poses even more challenges in the environmental crime context, as knowing endangerment prosecutions are relatively common in environmental

Tier-1 violation, and thus more likely to involve criminal prosecution.¹⁵³ Moreover, evidence suggests that local investigators are fully cognizant of the impact environmental crimes have on individuals.¹⁵⁴

[Y]ou've got something that's very insidious. You got something that is out there and the only difference between a major violator in the environmental area and the current murderer, or rapist, or robber is the impact of what they do. In order to commit a homicide in the state of California a person has to die within a year from the results of the injury or [precipitating] event. In environmental crime, a person may well die, but it's probably not going to be within that one year from an exposure from a contamination from a working environment, which is really a criminally negligent occurrence. Something that somebody deliberately made the decision to continue, a particular practice which is illegal because it's been found to be detrimental to people's health as well as to the environment, as well as to everything around.

Although the benefits for the victims, espoused earlier, clearly are not present here, it may be that the consideration of the impacts on individuals and seeking justice through traditional prosecutorial means is the best solution when there are non-conventional or “victimless” victims of environmental crimes.

IV. RECOMMENDATIONS

Over the past several decades, the traditional criminal law has placed emphasis on the importance of victims' rights. Criminal prosecutions of environmental crimes should follow this trend by incorporating victim concerns into factors prosecutors consider when bringing criminal charges. My chief recommendation is simply to include victims' interests as another factor to consider when deciding whether or not to bring criminal prosecutions for environmental offenses. Part II and Part III, , outline how those factors should be weighed, specifically with respect to the identity of the victim. Second, I recommend that revised legislation and policy can be utilized to include victims who

¹⁵³ Environmental Protection Agency, (Oct. 2011).

¹⁵⁴ Michael L. Benson, , 28 W. St. U. L. Rev. 87, 112 (2001) (quoting an investigator from the Los Angeles Police Department's Hazardous Materials Unit).

deserve, or seek, inclusion in the criminal process—but otherwise are barred from participation because of narrow definitions of victims. Finally, I suggest what victim inclusion in the environmental crimes process might look like.

First, as discussed, there are numerous benefits that victims of environmental crimes might receive if they participated in the criminal prosecution process. The availability of these benefits is limited by the identification of the victim. Easily identifiable victims of environmental crimes are very similar to traditional crime victims, and thus benefit the most from inclusion in the criminal process. Easily identifiable victims' interests should weigh heavily in a government attorney's decision whether or not to bring criminal charges for environmental violations. It is less clear that environmental crime victims identified via statistical probabilities have the same benefits available to them. However, the fact that some of these victims seek to participate in the process may serve as a proxy for this determination. Government attorneys should provide notice to statistically probable victims about any proceedings, allow for comment in order to understand these victims' interests, and weigh these considerations against
