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A Complicated Environment: The Problem with Extending Victims' Rights to Victims of Environmental Crimes

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A Complicated Environment: The Problem with Extending Victims' Rights to Victims of Environmental Crimes

Andrew Atkins*

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I. Introduction

Rape. Murder. Kidnapping. Robbery. These are the types of crimes that people generally think of when they picture a crime victim. Several television shows are based around these victims, their stories, and the criminal justice system designed to protect both them and the communities they live in.¹ Since as early as 1704, victims have had their cases prosecuted in court by a local public prosecutor.² In *Berger v. United States*,³ the Court said that the prosecutor is the "representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all."⁴ This quote highlights the role of prosecutor as the *State's* representative, not the victim's. For nearly three centuries, this adversarial style of criminal prosecution reigned supreme, oftentimes leaving victims on the outside looking in.⁵ To remedy this situation, Congress passed a series of laws over the last three decades, culminating with the Crime Victims' Rights Act

1. *E.g.*, *Law & Order: Special Victims Unit* (NBC television broadcast).

2. See Mary L. Boland & Russell Butler, *Crime Victims' Rights: From Illusion to Reality*, 24 CRIM. JUST., no. 1, Spring 2009, at 4, 8–9 ("In colonial America, crime victims prosecuted their own criminal cases, in keeping with the common law in which there was no public prosecutor. But this form of justice was available only to those with resources, and was replaced as early as 1704 with local public prosecutors.").

3. *Berger v. United States*, 295 U.S. 78, 83–84 (1935) (holding that applying "section 269 of the Judicial Code, as amended, to the circumstances of this case[,] the variance was not prejudicial and hence not fatal").

4. *Id.* at 88.

5. See Erin C. Blondel, Note, *Victims' Rights in An Adversary System*, 58 DUKE L.J. 237, 239 (2008) ("[T]he adversary system fails to consider others whose interests litigation may affect.").

(CVRA)⁶ in 2004, which sought to provide crime victims with greater rights to ensure that they were not shut out of the criminal proceedings of their aggressors. When Congress passed these laws, legislators and victims' rights advocates were mainly concerned with victims of violent crimes, such as rape, murder, kidnapping, and robbery. In all likelihood, advocates of these laws had no idea that this legislation would have much more far-reaching consequences than originally intended.

Increasingly, the CVRA is being used by victims to participate in the trials of corporate defendants accused of committing environmental crimes.⁷ Victims' rights advocates assert that this new development is a natural progression to ensure the protection of victims of environmental crimes.⁸ This development has drawn the ire of many corporate defense attorneys, who question whether this was the Act's intended purpose and lament its unintended consequences on the prosecution of environmental criminals.⁹ While only a few cases have dealt with the issue, it is evident that the application of the CVRA to victims of environmental crimes will have far-reaching implications for the prosecution of environmental crimes and the ability of defense attorneys and prosecutors to plea bargain.¹⁰ Nowhere is this more apparent than with the fallout of the recent BP oil spill. Millions of gallons of oil spilled into the Gulf of Mexico and

6. Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn, *Crime Victims' Rights Act*, 18 U.S.C. § 3771 (2006).

7. See Tresa Baldas, *A New Type of Crime Victim Is Speaking Up*, NAT'L L.J., Apr. 20, 2009, at 4 ("A law that was designed to empower crime victims and give them a stronger voice in the justice system is increasingly being used as a weapon to punish companies accused of environmental crimes.").

8. See, e.g., *id.* (quoting an environmental rights advocate, who commented that environmental crime is "one of the new areas where crime victims advocates are trying to make sure victims' rights are protected" and that the CVRA "was designed to extend rights to all victims of crimes—across the board").

9. See, e.g., *id.* (quoting two former chiefs of the Department of Justice's Environmental Crimes Section who believe that the CVRA "was originally intended for fraud, murder, and drug cases, not environmental crimes" and that including victims of environmental crimes under the Act blurs "the criminal process with the traditional civil process").

10. See Judson W. Starr et al., *A New Intersection: Environmental Crimes and Victims' Rights*, 23 NAT. RESOURCES & ENV'T, no. 3, Winter 2009, at 41, 42 [hereinafter Starr et al., *A New Intersection*] ("[T]he assertion of CVRA rights by victims of the BP explosion proves that the statute has the potential to dramatically change the manner in which environmental crimes are prosecuted and the ability of prosecutors and defendants to resolve such charges through plea agreements.").

impacted millions of people across the five gulf states: Texas, Louisiana, Mississippi, Alabama, and Florida.¹¹

This Note considers the question of whether or not Congress intended for the CVRA to grant broad rights to victims of environmental crimes and whether anything should be done to remedy the problems that have arisen as a result of this interpretation. Part II of this Note surveys the history and complexities surrounding environmental crimes and the particular features that distinguish it from other disciplines of criminal law. Part III focuses on how the Crime Victims' Rights Movement unfolded and how its history influenced the development and goals of the CVRA. Part IV then turns to the text of the CVRA itself and looks to case law to examine how courts have interpreted the Act. Finally, Part V examines the numerous practical problems created by the assertion of these expansive rights and concludes that Congress should amend the CVRA to exclude victims of environmental crimes.

II. *Environmental Crimes*

A. *History of Environmental Criminal Prosecution in the United States*

When Congress enacted major environmental statutes in the 1970s, such as the Clean Air Act (CAA), Clean Water Act (CWA), and Toxic Substances Control Act (TSCA), Congress sought to achieve its pollution-reducing goals primarily through the use of civil law penalties.¹² This changed in 1982 with the establishment of the Department of Justice's (DOJ) Environmental Crimes Unit, which focused exclusively on the prosecution of environmental criminals who violated the environmental criminal programs established by Congress.¹³ A major impetus behind the creation of environmental criminal programs was the fact that some of the largest environmental polluters tended to be corporations, their employees,

11. See *Seeking Answers on Oil Spill as Questions Mount*, N.Y. TIMES, June 26, 2010, at A11 (noting that "projected eventual losses for the [five] gulf states [are] at . . . \$11.5 billion").

12. See Michael M. O'Hear, *Sentencing the Green-Collar Offender: Punishment, Culpability, and Environmental Crime*, 95 J. CRIM. L. & CRIMINOLOGY 133, 142 (2004) (stating that while these statutes included criminal enforcement provisions, they were limited to "misdemeanor-level sanctions for violators").

13. See Judson W. Starr & Yvette D. Williams, *Environmental Crimes in Perspective*, SG014 A.L.I.-A.B.A. 1, 3 (2001) [hereinafter Starr & Williams, *Environmental Crimes*] (hypothesizing that the establishment of this department was the catalyst for the increase in environmental crimes prosecutions).

or officers.¹⁴ Because civil suits do not deter corporations—which can pass monetary fines onto consumers—as well as they deter individuals, Congress realized that environmental criminal programs were necessary for these environmental regulatory programs to reach their full potential.¹⁵ "Congress understood that an environmental law program must have a punitive dimension [that goes beyond economic incentives] to deter violators effectively."¹⁶ This punitive dimension includes the social stigma attached to corporations convicted of environmental crimes,¹⁷ and also the jail time that may be served by convicted officers or directors of the corporations.¹⁸

The number of environmental criminal prosecutions escalated rapidly over the three decades since the programs' inception. In 1984, the EPA referred thirty-one matters to the DOJ for criminal prosecution, while the DOJ charged thirty-six defendants altogether.¹⁹ In 2006, the EPA initiated over 300 environmental criminal cases and charged 278 defendants.²⁰ This increase in environmental criminal prosecution has generally been met with support from the public.²¹ Indeed, even the most vehement critics of the

14. See Kathleen Brickey, *The Rhetoric of Environmental Crime: Culpability, Discretion, and Structural Reform*, 84 IOWA L. REV. 115, 140 (1998) [hereinafter Brickey, *The Rhetoric of Environmental Crime*] (conducting a study that revealed that most of the environmental criminal cases "were brought against company owners or part-owners, corporate officers, high level managers, or those who had supervisory authority or other comparable responsibility, on account of their personal involvement in the violation").

15. See Starr & Williams, *Environmental Crimes*, *supra* note 13, at 3 ("[T]he threat of incarceration undoubtedly deters other corporate officials from engaging in or countenancing similar misconduct and causes them to become more compliance-conscious.").

16. Richard J. Lazarus, *Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law*, 83 GEO. L.J. 2407, 2452 (1995).

17. See Starr & Williams, *Environmental Crimes*, *supra* note 13, at 3 (discussing the high costs corporations are paying for environmental criminal convictions, particularly "as public concern for the environment and demands for higher standards of corporate accountability grow").

18. Kathleen Brickey, *Environmental Crime at the Crossroads: The Intersection of Environmental and Criminal Law Theory*, 71 TUL. L. REV. 487, 506 (1996) [hereinafter Brickey, *Environmental Crime at the Crossroads*] ("Stated differently, jail time is one cost of business that cannot be passed on to the consumer.").

19. O'Hear, *supra* note 12, at 143.

20. Krista McIntyre, *Current Trends in Enforcement of Environmental Crimes*, 50 ADVOC. 31, 31 (2007). The dramatic increase in prosecutions resulted in a total of 154 years of incarceration and \$43 million in fines for environmental crimes. *Id.*

21. See Brickey, *Environmental Crime at the Crossroads*, *supra* note 18, at 488–89 ("Notwithstanding that environmental crime is relatively new to the criminal law lexicon and the environmental consciousness as we know it has only recently emerged, there is

environmental crimes programs concede that the programs pursue worthy goals of discouraging individuals and corporations from breaking the law.²²

B. Complexities Surrounding the Prosecution of Environmental Crimes

Despite the general support for environmental criminal prosecutions, critics question whether criminal laws should apply to environmental law in the same manner as other disciplines of law. Some scholars argue that certain characteristics of environmental law, such as its aspirational qualities, evolutionary nature, and high degree of complexity, distinguish it from other areas of the law.²³ Environmental statutes are aspirational in nature because they do not "codify existing norms of behavior, but . . . [rather] force dramatic changes in existing behavior."²⁴ Because the science surrounding environmental law changes constantly, "the solutions themselves are in a constant state of revision."²⁵ The evolutionary nature of environmental law contributes to the various statutes' high level of complexity, as "environmental laws reflect the complexities of the ecosystem itself."²⁶ These characteristics distinguish environmental law from other types of law, with some experts arguing that these distinctions make criminal law less suited for environmental applications.²⁷

widespread public support for treating culpable environmental violations as serious crimes.").

22. See, e.g., Starr & Williams, *Environmental Crimes*, *supra* note 13, at 3 ("Although some might dispute whether the environmental crimes program has achieved its goals, few dispute that these goals are worthwhile. It is difficult to oppose a program that seeks to punish those who intentionally violate laws enacted to protect our country's health, welfare, safety, and natural resources.").

23. See Brickey, *Environmental Crime at the Crossroads*, *supra* note 18, at 497–98 ("Some scholars maintain that environmental law has distinctive features that set it apart from other specialized areas of law. Richard Lazarus, the leading proponent of this school of thought, has identified the aspirational qualities, evolutionary nature, and high degree of complexity as the most notable distinguishing attributes . . .").

24. Lazarus, *supra* note 16, at 2424. The aspirational nature of environmental law is reflected in the fact that these statutes have met few of the deadlines and goals originally set. See *id.* at 2425–26 (noting that while there has been significant improvement in the quality of our air, water, and other natural resources, the results have still fallen short of most of the targets set in the various environmental statutes).

25. *Id.* at 2426–27.

26. *Id.* at 2429.

27. See *id.* at 2426 ("[I]t does not inexorably follow that such aspirational laws are equally well suited to civil and criminal enforcement."). However, there is also a vocal group of scholars who believe that these distinctions are overstated. See Brickey, *The Rhetoric of Environmental Crime*, *supra* note 14, at 117 ("[C]ritics' proposals for structural

In addition to these particular characteristics that distinguish environmental law from other disciplines, other scholars argue that environmental criminal prosecutions may inhibit one of the most effective tools of environmental law, voluntary disclosure.²⁸ The EPA's Voluntary Disclosure Policy allows companies to disclose actual or potential violations in exchange for lesser civil fines.²⁹ From 1996 to 2001, 1,150 companies made disclosures at more than 5,400 facilities nationwide.³⁰ Despite the voluntary disclosure program's relative success, its progress is hindered by complications dealing with possible criminal charges that might arise as a consequence of the corporation's disclosure.³¹ The possibility of criminal charges forces corporations to make the difficult decision of whether to disclose a statutory violation when it could possibly lead to criminal charges against the corporation or its employees.³² Thus, despite the success that the advent of environmental criminal prosecution has had on reigning in statutory violations, it is evident that there are serious issues and concerns surrounding the prosecution of environmental criminals that distinguish environmental law from other areas of law.

III. The Crime Victims' Rights Movement

A. Historical Context of the Crime Victims' Rights Movement

The crime victims' rights movement began in the mid-1960s with the founding of victim assistance programs in California, Washington, D.C., and Missouri, which sought to assist crime victims previously left out by the criminal justice system.³³ These victims assistance programs emerged

reform of environmental criminal law are based upon mistaken factual assumptions about prosecutorial practices and problems uniquely identified with environmental prosecutions.").

28. See Starr & Williams, *Environmental Crimes*, *supra* note 13, at 7 (stating that the EPA's Voluntary Disclosure Policy was established in early 1996 to encourage companies to voluntarily disclose their statutory violations).

29. See *id.* (describing how "GTE disclosed 600 violations at 314 facilities in 21 states, yet received only a \$52,000 penalty (the economic benefit of its noncompliance)").

30. *Id.*

31. See *id.* at 11 ("From a criminal defense perspective, the EPA Voluntary Disclosure Policy provides almost no protection.").

32. See *id.* ("EPA's Policy provides individuals with no protections against criminal prosecution. Until the Policy addresses this issue, it will offer very limited incentive for companies to bring voluntary disclosures to the EPA Board.").

33. See Jon Kyl et al., *On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act*, 9 LEWIS &

due to a growing concern amongst victims' advocates that "[v]ictims of crime often do not feel their voices are heard or that their concerns are adequately addressed in the judicial process."³⁴ The crime victims' rights movement picked up steam over the next decade as more and more prominent cases developed in which crime victims and their families were shut out of the courtroom and were not notified of the case's proceedings.³⁵ Prior to the crime victims' rights movement, the criminal justice system "treat[ed] all crimes as acts committed only against the community, and consequently gave the direct victims of crime, little, if any, recognition."³⁶ Victims' advocates pointed at this "perceived imbalance in the criminal justice system . . . [and argued that] the criminal justice system had become preoccupied with defendants' rights to the exclusion of considering the legitimate interests of crime victims."³⁷

The crime victims' rights movement gained national prominence in 1981 when President Reagan established *National Victims' Rights Week* and formed the President's Task Force on Victims of Crime (Task Force) to investigate the current status of crime victims in federal courts.³⁸ After conducting extensive hearings, the Task Force issued a series of recommended reforms to the criminal justice system, including that "prosecutors assume the responsibility for keeping victims notified of all court proceedings[,] . . . that courts receive victim-impact evidence at sentencing, order restitution in most cases, and allow victims and their families to attend trials."³⁹ These reforms "are the origin of many of the

CLARK L. REV. 581, 584 (2005) (stating that the programs were aimed particularly at assisting women and young victims of sexual and domestic violence).

34. H.R. REP. NO. 108-711, at 2 (2004).

35. See Steven Joffe, Note, *Validating Victims: Enforcing Victims' Rights Through Mandatory Mandamus*, 2009 UTAH L. REV. 241, 242 (2009) (citing the 1977 murder case of Wendy Preston in Florida and the 1979 murder case of Louarna Gillis as two instances in which the adversarial system prevented the victims' survivors from attending the trial).

36. Kyl et al., *supra* note 33, at 583; see also *supra* note 4 and accompanying text (quoting the Supreme Court's interpretation of the prosecution representing the community as a whole, not merely the victim).

37. Paul G. Cassell, *Treating Crime Victims Fairly: Integrating Victims in the Federal Rules of Criminal Procedure*, 2007 UTAH L. REV. 861, 865 (2007).

38. See Kyl et al., *supra* note 33, at 584 (noting that President Reagan was "the first president to publicly acknowledge the role of the victim in the criminal justice system").

39. Cassell, *supra* note 37, at 865. The Task Force remarked that "the criminal justice system has lost an essential balance. . . . [T]he system has deprived the innocent, the honest, and the helpless of its protection. . . . The victims of crime have been transformed into a group oppressively burdened by a system designed to protect them. This oppression must be redressed." PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT 114 (1982).

reforms sought by the movement for securing crime victims' rights."⁴⁰ To achieve these reforms, the Task Force "proposed a federal constitutional amendment to protect crime victims' rights."⁴¹ It should be noted that the Task Force's extensive findings published in its Final Report make no mention of environmental crimes, but instead focus on violent crimes, such as rape, kidnapping, murder, child molestation, and armed robbery.⁴² This indicates that when the Task Force recommended federal legislation and a constitutional amendment to secure rights for crime victims, it likely did not anticipate that victims in environmental criminal cases would eventually use this legislation.

B. From Statute to Amendment and Back Again

In response to the Task Force's recommendations, victims' rights advocates worked with state government officials to enact state constitutional amendments granting crime victims greater rights.⁴³ Realizing the difficulty of passing a federal constitutional amendment, victims' rights advocates instead focused their initial efforts on passing federal legislation.⁴⁴ Their efforts were met with immediate success with Congress passing the Victim and Witness Protection Act of 1982,⁴⁵ "which gave victims the right to make an impact statement at sentencing and provided expanded restitution."⁴⁶ In the following years, Congress passed several acts expanding the protections afforded to crime victims, including the Victims of Crime Act of 1984,⁴⁷ the Victims' Rights and Restitution Act of 1990,⁴⁸ the Violent Crime Control and Law Enforcement Act of 1994,⁴⁹

40. Kyl et al., *supra* note 33, at 584.

41. Cassell, *supra* note 37, at 866.

42. See PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, *supra* note 39, at 2-3 (describing some of the testimony that was given during the Task Force's interviews of crime victims).

43. See Cassell, *supra* note 37, at 866 (describing the considerable success of this strategy with over thirty states to date adopting crime victims' rights amendments to their state constitutions).

44. See *id.* (noting the near consensus needed to pass a constitutional amendment).

45. Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1248 (1982).

46. Cassell, *supra* note 37, at 866.

47. Pub. L. No. 98-473, 98 Stat. 2170 (1984).

48. Pub. L. No. 101-647, 104 Stat. 4820 (1990).

49. Pub. L. No. 103-322, 108 Stat. 1796 (1994).

the Antiterrorism and Effective Death Penalty Act of 1996,⁵⁰ and the Victim Rights Clarification Act of 1997.⁵¹ Despite the fact that all of these laws purported to secure greater rights for crime victims, in practice, the protections they sought to afford still fell short, which was glaringly evident during the trial of Timothy McVeigh. When surviving victims of the bombing who intended to provide impact statements at sentencing sought to exercise their rights under the Victims' Rights and Restitution Act of 1990 to attend the trial, the trial judge barred them from doing so.⁵²

The failures of these statutes to guarantee crime victims' rights led to renewed efforts by victims' rights advocates to pass a constitutional amendment.⁵³ In September 1996, with the support of President Clinton, Senators Kyl and Feinstein introduced a Federal Victims' Rights Amendment in the Senate, which would grant crime victims:

[T]he rights to notice of and not to be excluded from . . . proceedings relating to the crime; to be heard if present . . . ; to notice of a release . . . or an escape; to a final disposition free from unreasonable delay; to an order of restitution from the convicted offender; to have the safety of the victim considered in determining a release from custody . . . [and] standing to assert the rights established.⁵⁴

50. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996).

51. Victim Rights Clarification Act of 1997, Pub. L. No. 105-6, 111 Stat. 12 (1997).

52. See *United States v. McVeigh*, 106 F.3d 325, 328 (10th Cir. 1997) (noting how the district court judge invoked Federal Rule of Evidence 615, citing the prejudice that may result if a testifying witness attended the trial); see also Joffe, *supra* note 35, at 244 (describing how this turn-of-events led to a renewed effort by victims' advocates to pass a federal constitutional amendment). Interestingly, Paul G. Cassell, as well as many other individuals, attributes the failure of the Victims' Rights and Restitution Act of 1990 to its codification in Title 42 of the United States Code, which deals with "Public Health and Welfare." Cassell, *supra* note 37, at 867. By placing the Act in Title 42 instead of Title 18 (which deals with "Crimes and Criminal Procedure"), the Act was overlooked by most federal judges and criminal law practitioners. *Id.* Since these rights were not listed in the Federal Rules of Criminal Procedure, most judges failed to enforce the rights provided to crime victims in the Victims' Rights and Restitution Act. *Id.*; see also H.R. REP. NO. 108-171, at 3 (2004) ("Crime victims already have a listing of rights in Title 42 of the United States Code. However, because those rights are not enumerated in the criminal code, most practitioners do not even know these rights exist.").

53. See S. REP. NO. 106-254, at 9 (2000) ("It is the view of the [Senate Judiciary] Committee that a Federal amendment is the only way to ensure that victims' opportunity to participate in the criminal justice process is fully satisfied.").

54. S.J. Res. 65, 104th Cong. (1996); see also Cassell, *supra* note 37, at 868 (describing the amendment as having seven core principles, including the right to notice of proceedings, the right to be present at the proceedings, the right to be heard at the proceedings, and the right to reasonable protection).

Despite President Clinton's backing, the amendment failed to pass.⁵⁵ Over the next eight years, Senators Kyl and Feinstein continued to propose the amendment during each new session of Congress, but, despite the backing of both Presidents Clinton and Bush, the amendment failed to garner the necessary votes to pass.⁵⁶

Critics of the amendment gave several reasons for opposing it. First, they thought that an amendment was unnecessary to secure crime victims greater rights⁵⁷ and that a statute was more appropriate to secure such rights.⁵⁸ Critics also thought that an amendment could "open a Pandora's box of dangerous and unintended consequences"⁵⁹ for the criminal justice system. Among the concerns were restricting prosecutorial discretion, particularly with regard to plea bargaining, undermining fundamental constitutional rights of the accused, such as the right to a fair trial, and imposing tremendous costs on the system.⁶⁰ Finally, and most significantly, critics argued that the drafting of the constitutional amendment was problematic.⁶¹ In particular, with each introduction into the Senate, the language of the amendment changed significantly.⁶² Opponents of the amendment believed that the frequent changes to the language reflected uncertainty regarding the amendment's reach.⁶³ These criticisms are

55. See Cassell, *supra* note 37, at 868 ("The amendment failed to pass in the 104th Congress.").

56. See Kyl et al., *supra* note 33, at 589–90 (stating that the Senate Judiciary Committee passed the proposed amendment on three different occasions, but it never obtained the necessary sixty-seven votes in the Senate to pass).

57. See S. REP. NO. 108-191, at 50 (2003) ("Amendment is appropriate only when there is a pressing need that cannot be addressed by other means. No such need exists in order to protect the rights of crime victims. . . . Nothing in our current Constitution inhibits the enactment of State or federal laws that protect crime victims.").

58. See *id.* at 51 ("[S]uch an approach is significantly more flexible. It would more easily accommodate a measured approach, and allow for the 'fine tuning' if deemed necessary or desirable by Congress after the various concepts in the Act are applied in actual cases across the country.").

59. *Id.* at 58.

60. *Id.* at 63–70.

61. See *id.* at 81–86 (pointing out that key terms in the amendment, such as "victim," "violent crime," and "reasonable and timely notice" were undefined).

62. Compare S.J. Res 44, 105th Cong. (1998), and S.J. Res. 6, 105th Cong. (1997), with S.J. Res. 35, 107th Cong. (2002), and S.J. Res. 3, 106th Cong. (1999), (demonstrating the significant changes in the text and the organization of the amendment in each introduction).

63. See S. REP. NO. 108-191, at 81 (2003) ("There have been some 64 drafts of this proposed constitutional amendment and they have differed substantially. . . . The fact that this proposal changes in form and substance from year to year does not inspire confidence

important to note, particularly since they echo many of the criticisms regarding the CVRA,⁶⁴ discussed in greater detail in Part V.B.2.

In addition to these criticisms of the amendment, it is important to note the original focus of the amendment's protections. Specifically, the Judiciary Committee's Report on the constitutional amendment focused entirely on victims of violent crimes.⁶⁵ In fact, the constitutional amendment's text itself extended only to victims of violent crimes.⁶⁶ Thus, it can be gleaned from these facts that the members of the Judiciary Committee, and likely most of Congress, were most concerned with and focused on protecting victims of violent crimes when their efforts abruptly shifted from passing a constitutional amendment to passing the CVRA, as discussed below.

Ultimately, Senators Kyl and Feinstein realized that it was imprudent to expect a constitutional amendment would pass.⁶⁷ Therefore, in 2004, victims' rights advocates again turned their efforts to a federal statute that would afford crime victims the protections it failed to provide in its previous attempts.⁶⁸ On April 21, 2004, Senators Kyl and Feinstein introduced the CVRA,⁶⁹ which was signed into law by President Bush on October 9, 2004 and described as "the most sweeping federal victims'

that we have discerned the correct formula.").

64. See Starr et al., *A New Intersection*, *supra* note 10, at 48–49 (explaining how the CVRA can thwart plea agreements, delay trial proceedings substantially, and cause confusion over who qualifies as a crime victim under the Act).

65. See S. REP. NO. 106-254, at 2 (2000) ("One of the most extraordinary aspects of the several hearings the Committee has held on this issue is the broad consensus among proponents and opponents alike that violent crime victims have a deep, innate, and wholly legitimate interest in the cases that victims bring to the justice system for resolution.").

66. See *id.* at 27 (stating that "[c]rimes of violence" will include "all forms of homicide . . . , sexual assault, kidnapping, robbery, assault, mayhem, battery, extortion accompanied by threats of violence, carjacking, vehicular offenses . . . which result in personal injury, domestic violence, and other similar crimes").

67. See 150 CONG. REC. S4260-01, S4261 (2004) (statement of Sen. Feinstein) ("[A]fter numerous Judiciary Committee subcommittee hearings, committee hearings, markups, putting the victims' rights constitutional amendment out on the Senate floor in a prior session, . . . and recognizing that we didn't have the 67 votes necessary for a constitutional amendment—both Senator Kyl and I . . . decided that we should compromise.").

68. See Cassell, *supra* note 37, at 869 ("After it had become clear that the necessary super-majority votes were not available to amend the Constitution, victims' advocates turned their attention to enactment of a comprehensive victims' rights statute.").

69. See Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act, 18 U.S.C. § 3771 (2006) (attempting to protect the rights of crime victims during and after court proceedings and passing by a count of 393 votes to 14 votes in the House and by unanimous vote in the Senate).

rights law in the history of the nation."⁷⁰ Part IV of this Note studies the CVRA by examining its legislative history, statutory language, and relevant case law.

IV. *The Crime Victims' Rights Act*

A. *Legislative History of the Crime Victims' Rights Act*

The legislative history of the CVRA is limited due to the absence of any committee hearings on the statute in either the Senate⁷¹ or the House of Representatives.⁷² The Senate did not even publish a committee report on the CVRA.⁷³ While the House of Representatives did publish a committee report on the bill,⁷⁴ it does not provide much guidance, neglecting even to define a "crime victim."⁷⁵

The statute was abruptly introduced in Congress after the sponsors of the CVRA, Senators Feinstein and Kyl, failed to garner the necessary votes for a constitutional amendment that would ensure the rights of crime victims.⁷⁶ The statute attempted to incorporate as many of the provisions of the constitutional amendment as possible.⁷⁷ By looking at the CVRA, it is evident that it was first intended as a constitutional amendment, since "the

70. Kyl et al., *supra* note 33, at 583.

71. See 150 CONG. REC. S4260-01, S4272 (statement of Sen. Leahy) ("Given the Republican leadership's insistence on proceeding to the constitutional amendment today, there was not as much time as I would have liked to develop the statutory alternative that we vote on today, and no time to hold hearings to improve the bill in Committee.").

72. See H.R. REP. NO. 108-711, at 5 (2004) ("No hearings were held in the Committee on the Judiciary on H.R. 5107.").

73. See *United States v. Atl. States Cast Iron Pipe Co.*, 612 F. Supp. 2d 453, 460 (2009) ("[T]here was no Senate Committee report on the CVRA.").

74. Justice for All Act of 2004, H.R. 5107, 108th Cong. (2004).

75. See *id.* ("The House Committee report was silent on the meaning of that term, [referring to the definition of a victim under the Act] . . ."). See generally H.R. REP. NO. 108-711 (describing the underlying reasons for the necessity of the bill, but providing little guidance as to its application, focusing instead primarily on other portions of the bill dealing with DNA evidence and technology).

76. See 150 CONG. REC. S4260-01, S4261 (statement of Sen. Feinstein) ("[A]fter numerous Judiciary Committee subcommittee hearings, committee hearings, markups, putting the victims' rights constitutional amendment out on the Senate floor in a prior session, . . . and recognizing that we didn't have the 67 votes necessary for a constitutional amendment—both Senator Kyl and I . . . decided that we should compromise.").

77. See *id.* at S4264 (statement of Sen. Kyl) ("The legislation, as I will describe in a moment, will attempt to accomplish as much as possible the same goals the constitutional amendment which has been pending before us would have accomplished.").

CVRA reads more like an amendment than a statute, with sweeping statements of rights and no discussion of how those rights should be implemented."⁷⁸

Despite their brevity, the floor statements of Senators Feinstein, Kyl, and Leahy do provide some framework as to the intentions of the statute. While the floor statements were generally broad and did not provide much guidance in terms of specific situations in which the CVRA should be utilized, the senators did anticipate cases in which a large number of victims might be affected.⁷⁹ The CVRA's sponsors also likely intended that a wide swath of crime victims should be protected under the Act.⁸⁰ It is interesting to note, however, that the floor statements focus entirely on the stories of murder victims when they depict the types of individuals that the CVRA was intended to protect.⁸¹ In fact, Scott Campbell, Stephanie Roper, Wendy Preston, Louna Gillis, and Nila Lynn, the namesakes of the CVRA, were all brutally murdered.⁸² 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. It can also be gleaned from the legislative history of the CVRA that the bill's sponsors intended the statute to be a work in progress and that future amendments or clarifications would likely be necessary.⁸³

78. Blondel, *supra* note 5, at 258.

79. See 150 CONG. REC. S4260-01, S4270 (statement of Sen. Feinstein) ("It is a tragic reality that cases may involve multiple victims and yet that fact is not grounds for eviscerating the rights in this bill. Rather that fact is grounds for the court to find an alternative procedure to give effect to this bill.").

80. See *id.* (statement of Sen. Kyl) ("A 'crime victim' is defined as a person directly and proximately harmed as a result of a federal offense This is an intentionally broad definition because all victims of crime deserve to have their rights protected, whether or not they are the victim of the count charged.").

81. See *id.* at S4264 ("[T]he most frequent [circumstance] is: My mother was murdered . . . and I could not attend the trial The other circumstance . . . [is] where a crime has been committed, the perpetrator has been convicted and is in prison or jail, but unbeknown to the victim . . . the individual gets out of jail."). It is also interesting to note that every victim that the bill's sponsors invited to the floor debate was a surviving family member of an individual who had been murdered. See *id.* at S4260-01, S4265-66 (describing a victim whose wife was brutally murdered, a victim whose daughter was killed, a victim whose son and brother were killed, and another victim whose daughter was raped and murdered).

82. See Kyl et al., *supra* note 33, at 582-83 (describing how each victim listed in the title of the CVRA was murdered).

83. See 150 CONG. REC. S4260-01, S4272 (2004) (statement of Sen. Leahy) ("Fortunately, however, this is to be a statute, not a constitutional amendment, and it can be

B. Statutory Overview of the Crime Victims' Rights Act

The CVRA defines a crime victim as "a person directly and proximately harmed as a result of the commission of a Federal offense."⁸⁴ The CVRA provides crime victims with eight rights.⁸⁵ Of these rights, "[t]he right to reasonable, accurate, and timely notice of any public court proceeding,"⁸⁶ "[t]he right not to be excluded from any such public court proceeding,"⁸⁷ "[t]he right to be reasonably heard at any public proceeding,"⁸⁸ and "[t]he reasonable right to confer with the attorney for the Government in the case,"⁸⁹ are among the most troubling in the prosecution of environmental criminal defendants, as illustrated in Part IV.C. In carrying out these rights, the CVRA charges the Department of Justice with the duty of ensuring that crime victims are notified of the court proceedings and afforded the rights provided in the Act.⁹⁰ The CVRA anticipated cases involving multiple crime victims and provided that "[i]n a case where the

modified and improved. We will be able to make it better as we go along."); *id.* at S4271 ("Over time, we will be able to modify and fine-tune the statute so that it provides an appropriate degree of protection for the rights of crime victims."); *id.* at S4271 ("In addition, as Chief Justice Rehnquist and others have pointed out, statutes are more easily corrected if we find, in hindsight, that they need correction, clarification, or improvement.").

84. 18 U.S.C. § 3771(e) (2006).

85. See *id.* § 3771(a) (listing the eight rights that prosecutors must afford crime victims during and after the trials of the accused). Subsection (a) of the CVRA lists crime victims' rights as,

(1) the right to be reasonably protected from the accused; (2) the right to reasonable, accurate, and timely notice of any public court proceeding . . . involving the crime . . . ; (3) the right 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 the proceeding; (4) the right 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) the right to full and timely restitution as provided in law; (7) the right to proceedings free from unreasonable delay; and (8) the right to be treated with fairness and with respect for the victim's dignity and privacy.

Id.

86. *Id.* § 3771(a)(2).

87. *Id.* § 3771(a)(3).

88. *Id.* § 3771(a)(4).

89. *Id.* § 3771(a)(5).

90. See *id.* § 3771(c)(1) (stating that the Department of Justice and other agencies "shall make their best efforts to see that crime victims are notified of, and accorded, the rights described in subsection (a)" of the CVRA).

court finds that the number of crime victims makes it impracticable to accord all of the crime victims the right described in subsection (a), the court shall fashion a reasonable procedure . . . that does not unduly complicate or prolong the proceedings."⁹¹ Since most environmental criminal cases involve multiple crime victims, the courts hearing these cases must parse through this language to develop a "reasonable procedure."

In addition to the substantive rights granted to crime victims, a frequently litigated issue relating to the CVRA concerns who qualifies as a crime victim, which is defined in the CVRA as "a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia."⁹² Due to the lack of guidance provided in the CVRA's text regarding who qualifies as a victim, courts considering the issue have been forced to look to case law concerning other crime victims' rights statutes for assistance.⁹³

C. Case Law Concerning the Crime Victims' Rights Act

Since the enactment of the CVRA, more than fifty district and appellate decisions have considered a wide range of issues regarding victims' rights under the Act, such as "the definition of who is a 'victim'; rights to information and notice; rights to confer, be present, and be heard; rights to restitution; and the rights to fairness, respect, dignity, and privacy."⁹⁴ Many of these cases interpreting the CVRA involve underlying offenses related to drugs, fraud, or murder.⁹⁵

91. *Id.* § 3771(d)(2).

92. *Id.* § 3771(e).

93. *See, e.g.,* *United States v. Atl. States Cast Iron Pipe Co.*, 612 F. Supp. 2d 453, 460 (D.N.J. 2009) ("[O]ne of the chief sponsors of the bill, Sen. John Kyl, has explained that 'the CVRA's definition of a crime victim is based on the federal restitution statutes,' citing the Victim and Witness Protect Act . . . and the Mandatory Victims Restitution Act . . .").

94. Boland & Butler, *supra* note 2, at 8–9.

95. *See* Starr et al., *A New Intersection*, *supra* note 10, at 41 ("Many of the relatively few judicial decisions analyzing the CVRA over the past four years have arisen in the context of drug, fraud, and murder cases, involving a discrete universe of victims.").

1. Defining a Crime Victim Under the CVRA

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. In *United States v. Atlantic States Cast Iron Pipe Co.*,⁹⁶ an industrial company operating a cast iron pipe foundry in New Jersey and four of its supervisor-level employees were convicted of conspiring to violate the CWA and CAA and obstructing proceedings conducted by the Occupational Safety and Health Administration (OSHA) after several employees "sustained serious or fatal injuries at work."⁹⁷ The issue before the district court was whether the "six individuals, [who were] employees who sustained serious or fatal injuries at work during the relevant period, qualify as crime victims under the CVRA because of the OSHA-related convictions in the case."⁹⁸ To answer this question, the district court focused on the definition of a victim under the CVRA.⁹⁹ The district court noted that the legislative history on the meaning of the term was scant, but that the definition of a crime victim in the CVRA was based on the definition of a crime victim in the Victim and Witness Protection Act (VWPA) and the Mandatory Victims Restitution Act (MVRA).¹⁰⁰ Thus, the district court decided to utilize the definition of a crime victim provided in these statutes to aid its interpretation.¹⁰¹ The definition of a crime victim in these statutes is:

[A] person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered, including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, a person directly

96. *Atl. States Cast Iron Pipe Co.*, 612 F. Supp. 2d at 545–46 (holding that the individuals at question did not qualify as crime victims under the CVRA).

97. *Id.* at 455–56.

98. *Id.* at 457.

99. *See id.* at 460–73 (exploring the definition of a victim under the CVRA).

100. *See id.* at 460 (noting how Senator Kyl, a co-sponsor of the bill, stated that the definition of a crime victim was based on these acts); *see also id.* at 534 ("[I]t is clear that the definitions of 'victim' under the CVRA, the MVRA, and the VWPA have been aligned by Congress to identify a common core group of persons who have powerful and enforceable rights under those statutes.").

101. *See id.* at 462 ("The Court is of the view that based on the text, origin and limited legislative history of the CVRA[,] . . . the definition of 'victim' under CVRA will be interpreted consistent with existing and evolving case law under the VWPA and MVRA.").

harmed by the defendant's criminal conduct in the course of the scheme, conspiracy or pattern.¹⁰²

The court found that the term "directly and proximately harmed" serves a two-fold purpose. "First, it defines who qualifies as a 'victim' under the statute. Second, it provides a rule for determining what losses may be claimed as restitution; i.e., only those losses 'directly and proximately' caused by defendant's criminal conduct."¹⁰³ The main issue was whether the conspiracy to evade the CAA, CWA, and OSHA was the direct and proximate cause of the injuries to the victims.¹⁰⁴ The prosecution argued that "the continuing deception of OSHA not only involved the coverup after the injuries but in large measure was responsible for the injuries themselves."¹⁰⁵ The court noted that the CVRA

instructs the district court to look at the offense itself only to determine the harmful effects the offense has on parties. . . . [A] party may qualify as a victim, even though it may not have been the target of the crime, as long as it suffers harm as a result of the crime's commission.¹⁰⁶

Despite this broad interpretation of a crime victim, the court still held that the six employees injured during the proscribed conspiracy period were not crime victims under the CVRA.¹⁰⁷ The court found that only OSHA was directly and proximately harmed by the conspiracy because the conspiracy began after the victims in question were injured.¹⁰⁸ Extending victim status to the victims in this case "would likely require notice to all Atlantic States workers, and all contractors' workers, injured at the facility during the alleged conspiracy period."¹⁰⁹ The court noted that "[t]he conduct that allegedly harmed one or more of the six named workers may have been in violation of OSHA workplace standards . . . , and that appears

102. 18 U.S.C. § 3663(a)(2) (2006).

103. *United States v. Atl. States Cast Iron Pipe Co.*, 612 F. Supp. 2d 453, 470 (D.N.J. 2009).

104. *See id.* at 532 ("The issue that requires resolution in this opinion is whether the six named workers, or their representatives, have statutory crime victim status under the CVRA.").

105. *Id.* at 542.

106. *Id.* at 535–36 (quoting *In re Stewart*, 552 F.3d 1285, 1289 (11th Cir. 2008)).

107. *See id.* at 532 ("We hold that, in this case, the six named workers are not statutory crime victims under the CVRA of the offenses of conviction.").

108. *See id.* at 541–42 ("Each of the substantive convictions, against only particular defendants, was an obstruction or false statement during the OSHA investigation *after* the worker in question had been injured.").

109. *Id.* at 543.

to be the actual basis of the government's argument in this motion."¹¹⁰ Nevertheless, the court found that "[s]uch conduct . . . was not conduct proscribed by the obstruction and false statement substantive offenses and conspiracy objectives of which each of these defendants was convicted, and we perceive no 'direct and proximate' causal link between those offenses of conviction and the injuries sustained by the six named workers."¹¹¹ This case highlights the lack of guidance that Congress provided for courts to determine who qualifies as a crime victim and therefore the difficulty the courts have in determining which individuals are directly and proximately harmed by a federal offense such that they obtain victim status under the CVRA.

A Texas district court case involving the leakage of emissions from a CITGO refinery also recently considered the definition of a crime victim under the CVRA.¹¹² In this case, CITGO was "convicted of two felony counts for operating two tanks as oil/water separators without the required emission control equipment in violation of the CAA."¹¹³ At the trial, witnesses testified that they could smell emissions from the tanks in the surrounding community.¹¹⁴ At issue in this case was what is necessary for a victim to be found directly and proximately harmed by the leak.¹¹⁵ The prosecution argued that the victims in question "suffered one or more of the following adverse health effects: burning eyes, burning nose, sore throat, burning lungs, dizziness, vomiting, nausea, fatigue, headaches and skin rashes"¹¹⁶ after the chemical leak and "that the symptoms experienced by the victim/witnesses are precisely the type of adverse health effects one would suffer if exposed to chemicals."¹¹⁷ Defense counsel, on the other hand, argued that these symptoms "are compatible with a wide array of other causes, including allergies, asthma, bacterial infections and viral

110. *Id.* at 545.

111. *Id.*

112. *United States v. CITGO Petroleum Corp.*, Cr. No. C-06-563, 2007 WL 4577400 (S.D. Tex. Dec. 21, 2007).

113. Starr et al., *A New Intersection*, *supra* note 10, at 43.

114. *Id.*

115. *See id.* ("In such a case, will every resident who could smell the odors in the surrounding area of the refinery be a 'victim' under the CVRA with respect to the CAA criminal violation, or will some additional injury be required?").

116. Response of the United States to CITGO's Memorandum in Support of its Motion to Exclude the Testimony of the Alleged Victims at 2, *United States v. CITGO Petroleum Corp.*, Cr. No. C-06-563 (S.D. Tex. Dec. 21, 2007), 2008 WL 3433352 [hereinafter Response of United States to CITGO].

117. *Id.* at 3.

infections. There is simply no evidence that such symptoms were caused by chemical exposure in this case; in fact, . . . not a single witness was diagnosed with chemical exposure by their treating physician."¹¹⁸ Defense counsel also noted that the emissions might have come from a source other than the two tanks under investigation.¹¹⁹ Thus, the defense believed that "[t]he government is left with nothing beyond subjective and unsupported 'beliefs' that the witnesses' complained of symptoms were caused by CITGO's Tanks 116 and 117."¹²⁰ Therefore, the court must determine whether merely smelling the gas is enough to qualify an individual as a victim, or if some further damage must be demonstrated to gain victim status under the CVRA. The Texas district court has not ruled on whether any individual who smelled the leak obtains crime victim status or if proving some further injury is necessary.¹²¹ In any event, it is important to note, "an unintended consequence of the CVRA may be a significant delay in proceeding to sentencing and final resolution of the criminal matter"¹²² while the district court considers questions like these.

In *United States v. W.R. Grace*,¹²³ the district court reviewed the question of whether individuals exposed to asbestos were proximately harmed such that they had standing under the CVRA.¹²⁴ In this case, the government's indictment charged W.R. Grace and seven of its executives with criminal conduct arising out of its vermiculite operation in Libby, Montana.¹²⁵ Among the charges were conspiring "knowingly to release

118. CITGO's Reply Memorandum in Support of its Motion to Exclude the Testimony of the Alleged Victims at 2, *United States v. CITGO Petroleum Corp.*, Crim. No. CR-06-563 (S.D. Tex. Dec. 21, 2007), 2008 WL 3924711 [hereinafter CITGO's Reply Memorandum].

119. *See id.* ("[C]oncluding that two tanks within all of refinery row were the only possible source of emissions belies logic, common sense and the government's own evidence. For instance, . . . reports conclusively establish that the amount of benzene recorded did not change whether or not Tanks 116 and 117 were . . . measured . . .").

120. *Id.* at 6.

121. *See Starr et al., A New Intersection, supra* note 10, at 43 ("As of this writing, the district court has not yet set a sentencing date and the parties have filed additional briefs on the causation issue (i.e., whether CITGO's conduct was the direct and proximate cause of the harm suffered by the victims).").

122. *Id.*

123. *See United States v. W.R. Grace*, 597 F. Supp. 2d 1157, 1166 (D. Mont. 2009), *vacated*, 2009 WL 5697923 (D. Mont. Feb. 27, 2009) (holding that there were no identifiable victims with the right to participate under the CVRA).

124. *Id.*

125. *See United States v. W.R. Grace*, 504 F.3d 745, 749 (9th Cir. 2007) ("From 1963 until the early 1990s, W.R. Grace . . . mined and processed . . . vermiculite ore outside of Libby, Montana. In response to ongoing serious health problems suffered by Libby residents, the government obtained an indictment charging W.R. Grace and seven of its

asbestos, a hazardous air pollutant, into the ambient air, thereby knowingly placing persons in imminent danger of death or serious bodily injury."¹²⁶ Given the difficulty in determining who has been exposed to asbestos and at what levels, it was uncertain at the time of trial who was proximately harmed to qualify as a victim under the Act.¹²⁷ The district court found that there were no identifiable victims as defined by the CVRA.¹²⁸ However, on appeal, the Ninth Circuit instructed the district court to vacate its decision, finding that "[t]he district court erred in denying petitioners' motions to accord rights to victim-witnesses based on its finding that the thirty-four victim-witnesses identified by the United States as prospective victims do not meet the meaning of 'crime victim' set forth in the Crime Victims' Rights Act."¹²⁹ These cases illustrate the difficult inquiry courts must undertake at the beginning of environmental criminal cases to identify which individuals qualify as victims under the CVRA and how subsequent appeals of these decisions can lead to extensive delays in the criminal proceedings.

2. Other Ramifications of the CVRA on Environmental Criminal Prosecutions

In addition to the problem of attempting to identify which individuals are victims in an environmental criminal case, there are many other obstacles that must be overcome during the criminal proceedings. The first case that examined the rights of victims of environmental crimes under the CVRA involved an explosion at a Texas oil refinery owned and operated by BP Products North America, Inc. that resulted in fifteen people dying and over 170 suffering physical injury.¹³⁰ Following internal investigations by

executives . . . with criminal conduct arising from Grace's vermiculite operation . . .").

126. *Id.*

127. See Opening Brief of the United States and Petition for Writ of Mandamus at 10, *United States v. W.R. Grace*, 504 F.3d 745 (9th Cir. 2007) (Nos. 06-30472, 06-30524), 2007 WL 984191, at *10 ("[M]ore victims are expected to be discovered in the years to come due to the long delay that frequently occurs between exposure and the manifestation of symptoms.").

128. See *United States v. W.R. Grace*, 597 F. Supp. 2d 1157, 1166 (D. Mont. 2009), *vacated*, 2009 WL 5697923 (D. Mont. 2009) ("[T]here are no identifiable victims, as the Act defines them, of the federal offenses alleged in the Superseding Indictment.").

129. *In re Parker*, Nos. 09-70529, 09-70533, 2009 WL 5609734, at *1 (9th Cir. Feb. 27, 2009).

130. *United States v. BP Prods. N. Am.*, No. H-07-434, 2008 WL 501321, at *1 (S.D. Tex. Feb. 21, 2008).

BP and investigations by the federal government, over four thousand claims were filed on behalf of the victims and their families.¹³¹ Half of these claims settled for over \$1.6 billion.¹³²

In addition to these civil suits, the federal government also initiated a two-year criminal investigation against BP, which culminated in BP pleading guilty to violating the Clean Air Act, being placed on probation for three years,¹³³ and paying a \$50 million fine,¹³⁴ the largest criminal fine ever assessed for a CAA violation¹³⁵ and the most significant criminal offense that could be charged.¹³⁶ Notably, the federal government, with permission from the district court judge, did not notify the victims in the case about the proposed plea agreement until after it was reached, stating "the large number of victims in the case [and] . . . extensive press coverage of the explosion and subsequent events"¹³⁷ would likely prejudice BP if it was learned that it was negotiating a plea agreement.¹³⁸

When the prosecution announced the plea agreement to the public and set a date for a hearing on the proposed agreement, several of the victims of the accident appealed to the trial court, asking it to reject the proposed plea agreement for violating, among other things, the victims' rights under the

131. *Id.*

132. *Id.*

133. See Government's Response to Victim's Brief at 9–10, *United States v. BP Prods. N. Am.*, No. H-07-434, 2008 WL 501321 (S.D. Tex. Feb. 21, 2008) (4:07-cr-00434) [hereinafter Government's Response to Victims Brief] ("The conditions of probation are designed to protect the public from further crimes by BP resulting from violations regarding process safety because they specifically address BP's criminal conduct that caused the . . . explosion that resulted in the deaths of 15 employees and injuries of at least 170 employees."). BP's probation required that it "implement numerous process safety and environmental improvements at its Texas City Refinery, at significant cost to BP." Starr et al., *A New Intersection*, *supra* note 10, at 42.

134. See *id.* at *3 ("On October 24, 2007, the United States and BP Products signed a plea agreement . . . [P]lead[ing] guilty to a criminal information charging it with two violations of the Clean Air Act, . . . [Requiring it] to pay a \$50 million fine and to be placed on supervised release for three years.").

135. Starr et al., *A New Intersection*, *supra* note 10, at 41.

136. See *United States v. BP Prods. N. Am.*, No. H-07-434, 2008 WL 501321, at *5 (S.D. Tex. Feb. 21, 2008) ("[T]he victims acknowledged that BP Products had pleaded guilty to the most significant criminal offense that could be charged.").

137. *Id.* at *1.

138. See *id.* at *2 ("Any suggestion of an admission of criminal responsibility by BP Products North America, Inc., prior to the actual signing of a plea agreement would serve to prejudice BP . . . and could impair the plea negotiation process and may prejudice the case in the event that no plea is reached.").

CVRA.¹³⁹ In particular, the victims alleged four violations of the CVRA had occurred "stemming from the government's motion to defer notifying the victims of the proposed plea agreement until after the negotiations had concluded."¹⁴⁰

In defense of its decision not to notify the victims of the plea agreement, the prosecution noted that "[t]he CVRA is silent on when notice of plea negotiations is appropriate"¹⁴¹ and "[g]iven the absence of specific statutory language mandating victim consultation in advance of the plea[,] . . . the government's obligation to confer [with the victims] on the possible details of the plea agreement was not 'clear and indisputable' [such that the Court of Appeals may intervene]."¹⁴² While the district court rejected the victims' claim that the *ex parte* proceeding violated their rights under the CVRA, the Fifth Circuit disagreed.¹⁴³ Specifically, the appellate court found that the number of victims in this case, two hundred, was not so large as to make it impracticable for the prosecutors to notify them regarding the proposed plea agreement.¹⁴⁴ Furthermore, the appellate court stated that potential media bias was not a valid reason to circumvent the requirements of the CVRA.¹⁴⁵ This ruling by the appellate panel struck a blow to the rights of environmental criminal defendants. Given the number

139. See *id.* at *5 ("[T]he victims focused on three challenges: the fine was too low; the probation conditions were too lenient; and certain CVRA requirements had been violated.").

140. *Id.* at *6. The specific allegations were: the *ex parte* procedure was not authorized by the CVRA and it violated the victims' rights; even if the *ex parte* procedure was authorized, there was no "adequate factual information" to support total deprivation of the victims' rights; the *ex parte* procedure should have been disclosed to the victims as soon as the need for it disappeared; and "[t]he use of the *ex parte* procedure violated the victims' right to confer about the plea bargain and the plea bargain reached by the government should therefore be rejected." *Id.*

141. Government's Surreply to Victim's Reply to Government's Response to Victim's Motion Filed Pursuant to the Crime Victims Rights Act at 5, *United States v. BP Prods. N. Am.*, No. H-07-434, 2008 WL 501321 (S.D. Tex. Feb. 21, 2008) (4:07-cr-00434) [hereinafter Government's Surreply to Victim's Reply].

142. Government's Response to Victim's Brief, *supra* note 133, at 3.

143. *In re Dean*, 527 F.3d 391, 394 (5th Cir. 2008) ("With due respect for the district court's diligent efforts to do justice, we conclude that, under the specific facts and circumstances of this case, it was contrary to the provisions of the CVRA for the court to permit and employ the *ex parte* proceedings that have taken place . . .").

144. See *id.* at 395 ("[W]here there were fewer than two hundred victims, all of whom could be easily reached, it is not reasonable to say that notification and inclusion were 'impracticable.' . . . [N]otification itself would [not] have been too cumbersome, time-consuming, or expensive . . .").

145. See *id.* ("In passing the Act, Congress made the policy decision—which we are bound to enforce—that the victims have a right to inform the plea negotiation process by conferring with prosecutors before a plea agreement is reached.").

of victims in the BP case and the amount of publicity surrounding the accident, it is unlikely that many prosecutors will be able to circumvent the required procedures of the CVRA under the Fifth Circuit's interpretation.¹⁴⁶

V. *Where Does This Leave Us?*

A. *Determining Congress's Intent*

On balance, it seems unlikely that Congress intended for the CVRA to be used against corporate defendants in environmental criminal cases. The Task Force's report on violations of crime victims' rights focused on victims of the most egregious violent crimes.¹⁴⁷ The Judiciary Committee Report on the proposed constitutional amendment focused exclusively on the stories of victims of violent crimes without so much as mentioning environmental crimes.¹⁴⁸ The constitutional amendment originally proposed to protect crime victims encompassed only victims of violent crimes.¹⁴⁹ The importance of the proposed constitutional amendment's particular focus is highlighted by Congress's quick transition from constitutional amendment to statute and the similarities in language and structure between the proposed amendment and the CVRA.¹⁵⁰ Similarly, the legislative history of the CVRA also indicates the sponsors' focus on victims of violent crimes. The CVRA's namesake includes only victims of violent crimes and the floor statements for the CVRA focused exclusively on victims of violent crimes, without mentioning victims of environmental crimes.¹⁵¹ Taken together, a clear pattern emerges, indicating that Congress

146. See Starr et al., *A New Intersection*, *supra* note 10, at 42 ("[T]he assertion of CVRA rights by victims of the BP explosion proves that the statute has the potential to dramatically change the manner in which environmental crimes are prosecuted and the ability of prosecutors and defendants to resolve such charges through plea agreements.").

147. See *supra* note 42 and accompanying text (demonstrating how the Task Force's Report focused on victims of violent crimes).

148. See *supra* note 65 and accompanying text (describing some of the most egregious examples of victims of violent crimes being shut out of the court proceedings).

149. See *supra* note 66 and accompanying text (explaining how the constitutional amendment would only protect certain victims of violent crimes).

150. See *supra* notes 76–77 and accompanying text (describing how the CVRA was a response of the proposed constitutional amendment failing to pass and how the CVRA sought to accomplish the same goals intended by the amendment).

151. See *supra* notes 81–82 and accompanying text (recounting the floor statements of Senators Kyl and Feinstein, co-sponsors of the CVRA, which focused exclusively on victims of violent crimes).

did not intend for the CVRA to be used by victims of environmental crimes. While scholars disagree over the application and usefulness of legislative intent,¹⁵² nevertheless, statutes "are directives from the legislature that We the People have elected and that our Constitution has charged with issuing such directives. [Thus, it seems appropriate that] [c]itizens, agencies, and judges should . . . also apply those directives in a manner consistent with the expectations of their authors."¹⁵³ While Congress's intent is not necessarily determinative on the matter of whether the CVRA should encompass victims of environmental crimes, it is a factor that should be considered in any analysis. Because it is evident that Congress did not originally anticipate for victims of environmental crimes to utilize the CVRA, the next question is whether the Act should be amended to reflect this intent.

B. Determining Who Qualifies as a Victim

1. How to Define Harm

The CVRA arose as a result of victims' rights advocates and Congress recognizing the harm that the criminal justice system imparted on crime victims.¹⁵⁴ While widespread recognition of this harm arose recently, determining who has been "harmed" by a particular act is not a new inquiry. John Stuart Mill examined the issue in his essay, *On Liberty*,¹⁵⁵ in which he stated "the sole end for which mankind are warranted . . . in interfering with the liberty of action of any of their number is self-protection. . . . [T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."¹⁵⁶ Legal philosophers used Mill's theory, known as the "harm principle," from 1960–1980 to justify when the government could enforce certain moral

152. See, e.g., Patricia Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983) ("[C]onsistent and uniform rules for statutory construction and use of legislative materials are not being followed today. It sometimes seems that citing legislative history is still, as my late colleague Harold Leventhal once observed, akin to 'looking over a crowd and picking out your friends.'").

153. WILLIAM N. ESKRIDGE, JR. ET AL., LEGISLATION AND STATUTORY INTERPRETATION 222 (2d ed. 2006).

154. See *supra* Part III (describing the historical context of the emergence of the CVRA).

155. JOHN STUART MILL, *ON LIBERTY* (Elizabeth Rapaport ed., 1978) (1859).

156. *Id.* at 9.

behavior on its citizens.¹⁵⁷ In addition to being used by legal philosophers, the harm principle spilled over into criminal law scholarship and the rhetoric of criminal law itself.¹⁵⁸ During this period, "[t]he harm principle was used to exclude certain categories of activities from legal enforcement"¹⁵⁹ and to classify other crimes that should be punished.¹⁶⁰ For instance, "[i]n the case of prostitution, the drafters retained the criminal sanction specifically because of the potential harm in the spread of syphilis and gonorrhea. . . . [However,] [i]n the case of consensual homosexual activity, the drafters rejected criminal responsibility on the ground of lack of harm."¹⁶¹

Over time, the harm principle evolved, leading legal scholars and legislators to punish behavior that previously went unpunished.

Today, . . . harm is no longer . . . a necessary condition because non-trivial harm arguments are . . . made about practically every moral offense. As a result, . . . we no longer focus on the existence or non-existence of harm. Instead, we focus on the types of harm, the amounts of harms, and the balance of harms.¹⁶²

In determining which harms should be regulated, "it is the legislator himself, using his own fallible judgment rather than spurious formulas and 'measurements,' who must compare conflicting interests and judge which are most important."¹⁶³ This new interpretation of the harm principle is used to "justify laws against prostitution, pornography, public drinking, drugs, and loitering, as well as regulation of homosexual and heterosexual conduct, on the basis of harm to others."¹⁶⁴ For instance, proponents of pornography regulation and prohibition focus on the harm pornography

157. See Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109, 131 (1999) ("Gradually, over the course of the 1960s, '70's, and '80's, Mill's famous sentence began to dominate the legal philosophic debate over the enforcement of morality. Harm became the critical principle used to police the line between law and morality within Anglo-American philosophy of law.").

158. See *id.* at 137–39 ("Most of the leading criminal law scholars either adopted the harm principle or incorporated it in their writings. . . . The harm principle was also reflected in the definition of crimes, especially moral offenses and public decency crimes [in the Model Penal Code].").

159. *Id.* at 114.

160. See *id.* at 139 ("With regard to each moral offense, the drafters specifically discussed harm.").

161. *Id.*

162. *Id.*

163. *Id.* at 182.

164. *Id.* at 139.

causes to "the women who are used to make the pornographic material[,] . . . the women who are assaulted by consumers of pornography[, and the fact that it] . . . supports and promotes a general climate of discrimination against women."¹⁶⁵ These harms must be balanced with the harms created by the regulation of pornography, namely restrictions on free speech.¹⁶⁶

2. *Balancing the Interests: The Problems Created by Defining a Victim Broadly*

In essence, the CVRA is the product of legislators balancing various harms. Victims' rights advocates noted the harm caused to victims who were frequently shut out of the criminal proceedings of the accused.¹⁶⁷ Until recently, legislators likely thought that the possible harms that might result from granting victims' expanded rights, such as the defendant's right to a fair trial and the added financial and time burden on the prosecution (which consequently harms the public), outweighed the harm caused to victims. After decades of lobbying by crime victims' rights advocates, Congress finally decided that the harm to victims outweighed the potential harm to the defendant and the criminal justice system.¹⁶⁸ Thus, it can be seen that affording crime victims greater rights is not simply a matter of recognizing that they have been left out of the legal process in the past. It is important to consider all of the interests at stake, including the rights of the defendant, the victim, and the public, when crafting a solution.

It is evident that the application of the CVRA to environmental criminal cases causes a flurry of potentially significant problems for defendants and prosecutors. Most prominently, in many environmental criminal cases, it is difficult to determine who is a victim.¹⁶⁹ The nature of these cases often makes it impossible for prosecutors to identify who the

165. *Id.* at 141.

166. *See id.* ("The 'appropriate liberal response' to pornography today, I would suggest, is the free speech argument—not the harm principle.")

167. *See supra* Part III.A (discussing the reasons behind the emergence of the Crime Victims' Rights Movement).

168. *See supra* Part III.B (discussing several of the statutes which Congress passed in order to secure crime victims greater rights).

169. *See supra* Part IV.C.1 (providing examples in various cases in which the courts struggle to define who qualifies as a victim to receive the protections provided for in the CVRA).

victims are.¹⁷⁰ Difficulty in identifying who qualifies as a victim in turn results in significant delays in the prosecution.¹⁷¹ Mini-trials must be held to decide who qualifies as a victim under the CVRA, placing a substantial financial and time burden on the DOJ and, ironically, violating one of the protections afforded under the CVRA, namely, "the right to proceedings free from unreasonable delay."¹⁷² Involving victims in the process also hinders the DOJ's ability to secure plea agreements with corporate defendants, which it has traditionally relied on to encourage cooperation with corporate defendants.¹⁷³ Plea agreements are an integral aspect of the criminal justice system, since state and federal prosecutors simply do not have the resources to try every case they receive.¹⁷⁴ Inclusion of crime victims in environmental criminal cases will also likely lead to significant delays in the prosecution once the crime victims are identified.¹⁷⁵ In addition to delays, victim participation in environmental criminal cases may also lead to discrimination against the defendant, as noted by the prosecutor in *United States v. BP Products North America* because these cases are likely to attract substantial media attention.¹⁷⁶ Finally, the CVRA may inhibit the success of the EPA's Voluntary Disclosure Policy, which plays an important role in the prosecution of environmental violations by

170. See, e.g., *supra* notes 123–29 and accompanying text (explaining the difficulty involved in identifying the victims of an asbestos leak because the symptoms occur over an extended period of time and are often difficult to differentiate from symptoms of other illnesses).

171. See Starr et al., *A New Intersection*, *supra* note 10, at 49 ("Moreover, *CITGO* reveals that the CVRA will most likely lead to further litigation during the sentencing phase of the prosecution over who is a 'crime victim.'").

172. 18 U.S.C. § 3771(a)(7) (2006).

173. See Starr et al., *A New Intersection*, *supra* note 10, at 49 ("In the context of prosecutions for environmental crimes, [thwarting the plea agreement process] . . . would be a great loss to society as a whole. It would risk not only the guaranteed, if limited, victory for the government, but also the resources saved by avoiding litigation . . .").

174. See GEORGE R. DEKLE, SR., *PROSECUTION PRINCIPLES: A CLINICAL HANDBOOK* 66 (Thomson/West 2007) ("[B]y the early 1980's . . . prosecutors were regularly making plea offers to the defense. Whether plea offers by the prosecution are advisable or inadvisable, laudable or blameworthy, they are a fact of life in the modern courtroom.").

175. See Starr et al., *A New Intersection*, *supra* note 10, at 49 ("[D]elay will be inevitable in environmental criminal cases with many victims who assert the CVRA in either opposing a plea agreement or advocating their rights during the sentencing phase of the trial.").

176. See *supra* notes 137–38 and accompanying text (discussing the bias that might occur as a result of letting victims speak at the sentencing of a major environmental criminal defendant).

encouraging companies to voluntarily disclose them.¹⁷⁷ Under the CVRA's current construction and interpretation, these flaws could potentially grow as more victims begin using the CVRA to participate in the cases of environmental criminal defendants. Given the problems created by the current construction of the CVRA and the potential for these problems to grow, serious consideration should be given to amending the CVRA in order to better balance the harms to victims, the public, and defendants.

C. Possible Solutions

I have identified three potential solutions to the problems created by the CVRA for environmental criminal prosecutions: leave the CVRA alone or tweak it; limit the number of victims who may participate in an environmental criminal prosecution; or exclude all victims of environmental crimes from the rights provided by the CVRA. Adopting any of these solutions necessarily requires that the various harms, namely the harm to the victim, the harm to the defendant, and the harm to the public, be re-allocated appropriately. The preferred solution ultimately comes down to a preference as to which harms should be prevented.

1. Leave It Alone or Tweak It

As currently constructed, the CVRA allows prosecutors and judges to decide whether to provide victims of environmental crimes with rights under the Act on a case-by-case basis.¹⁷⁸ The most prominent benefit here is the amount of flexibility that it provides. This method allows for the court to weigh the various harms in a given case and then fashion a reasonable solution that balances these harms in an appropriate manner. In theory, adopting a case-by-case approach allows for victims to participate in certain cases when the court feels it would not unduly harm the defendant or burden the prosecution. In reality, courts are reluctant to bar victims from the criminal proceedings of environmental criminals even

177. See *supra* notes 28–32 and accompanying text (describing the importance of the EPA's Voluntary Disclosure Policy in securing voluntary disclosures of environmental violations from corporations).

178. See *supra* note 91 and accompanying text (describing how the CVRA allows the court to prescribe a reasonable procedure when the number of victims involved makes it impracticable to afford all of the rights outlined in the CVRA).

where there is a chance that failing to do so will impede plea bargaining or prejudice the defendant.¹⁷⁹

In this solution, all of the harm is allocated to the defendant and the public, with the victim assuming none of the harm.¹⁸⁰ While this approach is likely palatable to many, particularly crime victims' rights advocates, it is important to note that at the time victims are identified under the CVRA, the defendant has not yet been convicted.¹⁸¹ Although the evidence in many cases might indicate that the defendant is guilty, an important aspect of the criminal justice system is innocent until proven guilty and it therefore seems unfair for the defendant to assume all of the harm.¹⁸² Given the noted harms to environmental criminal defendants created by the current interpretation of the CVRA, this approach seems unjust. Thus, there is likely a better solution that more adequately addresses the problems created by the current construction of the CVRA.

Another major criticism of the CVRA is that it lacks any guidance on how prosecutors and courts should go about providing victims with the rights described in the Act.¹⁸³ Although the CVRA allows courts to fashion

179. See *supra* Part IV.C.2 (discussing how the Fifth Circuit in *United States v. BP Products North America* determined that notifying and including 200 victims in the plea bargaining process was not impracticable).

180. The harm assumed by the defendant and the public includes prejudice to the defendant, delays in the criminal proceedings, and the hindering of plea agreements upon which the DOJ often relies. See Starr et al., *A New Intersection*, *supra* note 10, at 49 ("[W]here a large number of victims are given notification of and access to complex and fragile negotiations, negative publicity may combine with a drawn-out timetable to thwart a plea agreement."); *supra* note 171 and accompanying text (suggesting that delay is inevitable if the CVRA is applied to environmental criminal prosecutions); *supra* note 173 and accompanying text (discussing how the CVRA could hinder the negotiation of plea agreements with environmental criminal defendants).

181. See *United States v. W.R. Grace*, 597 F. Supp. 2d 1157, 1161 (D. Mont. 2009), *vacated*, 2009 WL 5697923 (D. Mont. Feb. 27, 2009) ("Whether there are crime victims under the Act does not depend on whether the person the government has accused of committing a federal offense is innocent or guilty."); see also *id.* ("That syllogism—which renders the CVRA inapplicable to this or any other criminal case unless and until the defendant is proved guilty beyond a reasonable doubt—produces an absurd result that I must presume Congress did not intend."). In determining whether a victim was proximately or directly harmed by the accused, it is irrelevant whether or not the accused is eventually convicted, because the outcome of the trial does not affect the status of the victim.

182. See Sierra Elizabeth, *The Newest Spectator Sport: Why Extending Victims' Rights to the Spectators' Gallery Erodes the Presumption of Innocence*, 58 DUKE L.J. 275, 275 (2008) ("A criminal defendant in the United States is innocent until proven guilty and has a Sixth Amendment right to a fair trial and an impartial jury.").

183. See *supra* note 78 and accompanying text (discussing how the CVRA provides broad, sweeping rights without any indication of how these rights should actually be implemented).

a "reasonable procedure" when multiple victims are involved,¹⁸⁴ it provides no guidance on how to do so.¹⁸⁵ As seen in *United States v. BP Products North America*, discussed in Part IV.C.2, without any guidance on how to implement the victims' rights, some courts have interpreted this flexibility narrowly, tying the prosecutor's hands and leaving him little discretion to weigh the various harms in cases involving multiple, unidentifiable victims.¹⁸⁶ Also absent from the CVRA are any protections afforded to defendants,¹⁸⁷ which suggests that the rights of defendants were an afterthought in the construction of the CVRA. Therefore, it is not even apparent from the text of the CVRA that a reasonable procedure entails protecting a defendant's rights.¹⁸⁸ To remedy this situation, Congress could amend the CVRA to specifically state that the extension of victims' rights shall in no case infringe upon a defendant's rights. A trial judge could then use a weighing test to properly distribute the harms to ensure that victim involvement will not harm the defendant or the public.

Despite the merits of this tweaking of the CVRA, it would likely result in the continued delay of criminal proceedings of environmental criminals, since it is inevitable that extensive litigation would continue to occur to determine whether an individual should be given victim status and how much participation should be allowed.¹⁸⁹ These delays would also likely lead to continued media attention, which may prejudice the defendant and thwart a plea agreement. Thus, despite its merits, this solution would probably continue to cause the same problems inherent in the current system, distributing the brunt of the harm on the public and the defendant.

184. See 18 U.S.C. § 3771(d)(2) (2006) ("In a case 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 court shall fashion a reasonable procedure to give effect to this chapter that does not unduly complicate or prolong the proceedings.").

185. See *supra* note 78 and accompanying text (stating that the CVRA fails to articulate how the rights it provides should be implemented).

186. See *supra* notes 143–45 and accompanying text (rejecting the prosecution's bid to wait until after the plea agreement was in place to inform the victims).

187. In the CVRA, "the accused" is mentioned only twice and in neither case does it suggest that the accused has any rights. See 18 U.S.C. § 3771(a) ("A crime victim has the following rights: (1) The right to be reasonably protected from the accused. (2) The right to reasonable, accurate, and timely notice of any public court proceeding . . . involving the crime or of any release or escape of the accused.").

188. *Id.*

189. See *supra* note 171 and accompanying text (discussing how determining who is a "crime victim" causes delays in the criminal prosecution).

2. *Limit the Number of Victims of Environmental Crimes Who May Participate Under the CVRA*

An alternative to the case-by-case approach would be to establish a bright line test limiting the number of victims who may participate in an environmental criminal case. In a case where the number of victims exceeds this limit, only a certain number of victims would be allowed to participate under the CVRA. While this solution might deny victims' rights in particular situations, its simplicity would reduce delays in the criminal proceedings since the number of participating victims would be limited. This solution also allows for victims to participate in the criminal proceedings without causing much harm to the defendant. With only a few victims, it is not too burdensome for the prosecutor to coordinate with the victims, and the case is also less likely to draw intense media attention that might prejudice the defendant.

The biggest obstacle with this solution is determining the number of victims that may participate in an environmental criminal case. In order to come up with an appropriate solution, extensive consultation with prosecutors at the DOJ, defense attorneys, judges, and victims' rights activists should be conducted. These parties could look at case law governing the CVRA and similar statutes, such as the VWPA and MVRA, to identify the number of victims that have previously been permitted to participate in criminal proceedings. Other factors that could be considered are the possible burden on the prosecution and the potential for prejudice against the defendant.

Unfortunately, under this solution the question of who qualifies as a victim in an environmental criminal case must still be determined. Thus, while delays in the sentencing and plea agreement phases would likely be reduced under this solution, separate "mini-trials" would still be necessary to determine who qualifies as a victim. Additionally, if the number of victims exceeds the cap, the prosecution then must determine which of the victims will be allowed to participate and which victims will be denied. It is also possible that even if the number of victims allowed to participate in the trial is capped, prejudice to the defendant might still result in certain situations. So despite the fact that the defendant and the public bear less harm in this solution than currently, the burden borne by the defendant and the public still outweighs the victim's burden.

3. *Exclude All Victims of Environmental Crimes from the CVRA*

By now it should be apparent that in order to avoid the inefficiencies and prejudice to the defendant caused by the CVRA in environmental criminal cases, a more radical approach is necessary. Therefore, the most viable option is to develop a bright line test that categorically excludes all victims of environmental crimes from the CVRA. The most compelling attribute of this bright line test is its simplicity. Once a case is identified as involving an environmental crime, little additional analysis is needed, which saves the public time and money. This solution also eliminates any potential harm that might result to environmental criminal defendants, since victims will be given no rights to participate in the criminal proceedings.

To implement this solution effectively, Congress should amend the CVRA to exclude victims of environmental crimes. Congress passed the CVRA as a statute—as opposed to a constitutional amendment—because its members anticipated that statutory amendments would be necessary at some point in the future, so it makes sense that Congress should affect this change.¹⁹⁰ A statutory amendment also seems logical because the CVRA is being amended in part to reflect its legislative intent. While this solution does indeed seem radical at first blush, excluding all victims of environmental crimes seems appropriate as Congress likely did not originally intend for the CVRA to apply to victims of environmental crimes.¹⁹¹ Given the unique characteristics that distinguish environmental

190. See *supra* note 58 and accompanying text (discussing how the proposed constitutional amendment to secure victims' rights was eventually tabled because a statute would allow Congress to amend the statute if it was eventually deemed necessary).

191. See *supra* Part V.A (discussing how Congress focused on victims of violent crimes when constructing the CVRA). Another variation of this solution would be to limit the application of the CVRA to victims of violent crimes. This seems logical since the constitutional amendment originally proposed, before Congress resorted to passing the CVRA instead, was designed to protect only victims of violent crimes, and the legislative history regarding the CVRA focused entirely on victims of violent crimes. See *supra* note 66 and accompanying text (explaining how the proposed constitutional amendment extended protections only to victims of violent crimes); *supra* Part V.A (describing how the CVRA was named after four murder victims, and the floor statements of the co-sponsors of the CVRA focused on victims of violent crimes). If Congress's intent was for the CVRA to apply only to victims of violent crimes, perhaps it would be best to amend the Act so that it more accurately reflects this intent, as opposed to merely excluding victims of environmental crimes. However, this Note does not focus on other nonviolent crimes and it is uncertain what impact this change would have. In any event, it is important to remember that certain characteristics of environmental law distinguish it from other areas of the law. See *supra* Part II.B (describing specific traits that differentiate environmental law from other disciplines). Thus, despite Congress's intent for the CVRA to apply only to victims of violent crimes, there is added justification to exclude victims of environmental crimes.

law from other areas of the law,¹⁹² it seems natural to carve out an exception to the CVRA.

Despite its benefits, this approach assigns most of the harm to one party, the victim. Consequently, this solution will likely draw the ire of victims' rights advocates, who will argue that it is unjustifiable to tell a victim that while he ordinarily would have the right to participate in the criminal proceedings because he was the victim of an environmental crime, he has no right to participate. Unfortunately, the adoption of any of the solutions in this Note will result in one party assuming more harm than the others.¹⁹³ Thus, the preferred solution ultimately comes down to a matter of choice: Favor the victim or favor the defendant and the public.

While seemingly an unpopular choice, the interests of the defendant and the public outweigh the victim's interests. The costs incurred by the public as a result of the participation of crime victims in the prosecution of environmental criminal defendants are well-documented in this Note,¹⁹⁴ but these inefficiencies alone are not enough to tip the balance.¹⁹⁵ However, when coupled with the potential prejudice to defendants, these interests do outweigh the victim's. Despite the legitimate interest that victims have in participating in the prosecution of the accused, the defendant's rights should still prevail. Our criminal justice system's predilection for the rights of defendants is evident in the Bill of Rights, which guarantees the defendant's right to due process of law;¹⁹⁶ notice of charges against him; assistance of counsel; the right to confront adverse witnesses; and a fair, speedy, and public trial by a jury drawn from the community.¹⁹⁷ "The number of amendments in the Bill of Rights devoted to protecting defendants from government authority demonstrates the Framers' concern for ensuring the adversary process is fair."¹⁹⁸ While Congress had the opportunity to codify the rights of victims along with the rights of

192. See *supra* notes 23–27 and accompanying text (describing how environmental law's aspirational qualities, evolutionary nature, and high degree of complexity distinguish it from other areas of the law).

193. See *supra* Part V.C (noting how each solution will result in one party assuming more harm than the others).

194. See *supra* Part V.B.2 (citing delays in the prosecution and the difficulty in securing plea agreements as two of the costs incurred by the public).

195. Even though Congress made a policy decision understanding that the CVRA would likely result in increased prosecutorial costs, this alone is likely not enough to exclude victims of environmental crimes from the Act.

196. U.S. CONST. amend. V.

197. *Id.* amend. VI.

198. Blondel, *supra* note 5, at 247.

defendants in the Bill of Rights, it passed a statute instead.¹⁹⁹ Given the Framers' concern for protecting the rights of defendants and the dangerous potential for prejudicing defendants in environmental criminal prosecutions, the defendant's interests outweigh the victim's in environmental criminal prosecutions.

It is also important to note that victims are not completely shut out of the courtroom under this solution. Victims of environmental crimes could still bring civil lawsuits against the defendant "and get any harm remedied and get compensation."²⁰⁰ Considering the fact that all of the environmental criminal cases utilizing the CVRA to date involve corporate defendants,²⁰¹ most victims in these cases will be able to make recoveries in civil suits against the defendants. In many circumstances,²⁰² the victim's case is simplified by the doctrine of negligence per se, which allows victims to establish negligence by demonstrating a violation of a federal statute,²⁰³ which occurred in each of the criminal cases analyzed in this Note.

While victims of environmental crimes understandably might want more than monetary compensation for their suffering, their exclusion from the criminal proceedings does not mean that criminal charges against the defendant will be dropped. It simply means that an experienced prosecutor must understand that his or her decision to prosecute or reach a plea agreement with the defendant affects not only the defendant and the public, but also the victims in the case. Considering this adversarial form of criminal prosecution has existed in North America since 1704,²⁰⁴ prosecutors should be able to fulfill their duties to the public and the victims regardless of victim input. In any event, the fair and timely prosecution of environmental criminal defendants likely requires that the

199. See *supra* Part III.B (describing Congress's decision to pass a statute instead of a constitutional amendment to protect victims' rights).

200. Baldas, *supra* note 7, at 4.

201. See *supra* Part IV.C (noting that all of the cases involving environmental crimes that invoke the CVRA to date involve corporate defendants).

202. See David N. Zeehandelaar, *The Relationship Between Statutory and Tort Law: The Effects of a Statutory Violation on a Negligence Lawsuit*, SP059 A.L.I.-A.B.A. 875, 880 (2009) (stating that courts in California, Connecticut, Indiana, Kansas, Mississippi, New York, and Ohio have expressly provided that a violation of a federal environmental statute constitutes negligence per se and that it is probable that many more states will find so as well).

203. DAN B. DOBBS, *THE LAW OF TORTS* 315 (2000) (explaining how courts utilize negligence per se to "apply the standard or rule of conduct from a nonprescriptive statute" to demonstrate negligence).

204. Boland & Butler, *supra* note 2, at 8-9.

victims of these crimes take a back seat throughout the criminal proceedings.

VI. Conclusion

Crime victims play an important role in society and in the criminal justice system, and their presence should not be marginalized unnecessarily. However, it is important to note that crime victims are not the only participants in the criminal trial of the accused, and their rights should not be granted at the expense of the defendant's rights or the criminal justice system's efficiency. Nowhere is this more apparent than in the context of environmental crimes, where the complicated nature of the crimes provides greater opportunities for delays in proceedings, prejudice to the defendants, and increased costs and time on the prosecution.²⁰⁵ This observation is not meant to belittle the concerns of victims of environmental crimes. However, it is evident that environmental law is different than any other area of the law,²⁰⁶ and therefore the utilization of the CVRA by victims of environmental crimes results in consequences not foreseen by its drafters.²⁰⁷ Additionally, by preventing victims of environmental crimes from participating in these trials, they are not completely shut out of the courtroom as they could continue to utilize the civil law process to obtain remedies and be made whole. Therefore, in order to avoid extensive harm to environmental criminal defendants and the public, the CVRA should be amended to exclude victims of environmental crimes from the Act.

205. See *supra* Part IV.C (identifying several environmental criminal cases in which these issues sprung up).

206. See *supra* Part II.B (discussing how certain characteristics distinguish environmental law from other areas of the law).

207. See *supra* Part IV.A (noting how the legislative history of the CVRA focused on victims of violent crimes).