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Of Sex Crimes and Fencelines: How Recognition of Environmental Justice Communities as Crime Victims Under State and Federal Law Can Help Secure Environmental Justice

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**Of Sex Crimes and Fencelines: How
Recognition of Environmental Justice
Communities as Crime Victims Under State
and Federal Law Can Help Secure
Environmental Justice**

JOSHUA OZYMY* & MELISSA L. JARRELL†

Environmental justice communities throughout the United States continue to face disproportionate health burdens from living near industrial sources of pollution. Such burdens were caused by historically racist public policies and continue to be perpetuated by inadequate regulatory responses at the federal and state level. State and federal law has increasingly recognized an emerging set of rights afforded to victims of crime in court proceedings. We argue that members of environmental justice communities should be viewed as crime victims and have the same rights applied as other victims of violent crime. Using case examples under the federal Crime Victims' Rights Act (CVRA) and exploring significant amendments to state constitutions in the last few years due to the Marsy's Law Movement, we argue for the emerging potential to apply these rights to environmental justice communities. We contend this move will open up a new path to reduce harm for environmental justice communities left by the failures of the regulatory state and begin to give them voice and make them whole.

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I. INTRODUCTION

As the public began to understand the scale of the horrible crimes perpetrated by serial pedophile Jeffrey Epstein, other disturbing facts regarding a sweetheart deal Epstein reached with federal prosecutors years prior came to light. Investigators found dozens of young girls that claimed to be sexually victimized by Epstein between 2002–2005. On September 24, 2007, Epstein and the United States (U.S.) Attorney's Office reached a deal to defer prosecution to the State of Florida, and he served a mere thirteen months in county jail that came with significant privileges.¹ On February 21, 2019, U.S. District Judge Kenneth Marra ruled federal prosecutors violated the Crime Victims' Rights Act (CVRA) when they failed to notify Epstein's victims of the non-prosecution agreement.² Soon after, the U.S. House of Representatives' Committee on Oversight and Reform began an investigation into professional misconduct stemming from the deferred prosecution agreement negotiated by the Secretary of Labor Andrew Acosta via the Department of Justice's (DOJ) Office of Professional Responsibility (OPR).³ The investigation into professional misconduct surrounding Epstein's plea agreement is ongoing.⁴

Judge Marra's finding reflects the increased recognition that victims of crime deserve increased representation within the American judicial system. A set of procedural rights for crime victims is available at the federal level in the form of the CVRA and the Victims' Rights and Restitution Act and is present in some form, at

1. See Julie K. Brown, *How a Future Trump Cabinet Member Gave a Serial Sex Abuser the Deal of a Lifetime*, MIAMI HERALD (Nov. 28, 2018), <https://www.miamiherald.com/news/local/article220097825.html> [https://perma.cc/CHY3-VXFZ].

2. Jane Doe 1 and Jane Doe 2's Submission on Proposed Remedies at 2, *Doe 1 v. United States*, 359 F. Supp. 3d 1201 (S.D. Fla. May 23, 2019) (No. 08-80736).

3. See Letter to Corey Amundson, Dir. and Chief Couns., Office of Pro. Resp. (Jul. 10, 2019), <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/2019-07-10.EEC%20JR%20Speier%20Schultz%20Frankel%20to%20Amundson-DOJ%20re%20Acosta%20Investigation.pdf> [https://perma.cc/59NA-NV89].

4. See, e.g., Letter from the House Comm. on Oversight and Reform to William P. Barr, Att'y Gen., U.S. DOJ (Dec. 20, 2019), <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2019-12-20.CBM%20JR%20Speier%20DWS%20Frankel%20to%20Barr-%20DOJ%20re%20Acosta%20OPR%20Investigation.pdf> [https://perma.cc/MG5Z-V93B].

the state level, in most U.S. states.⁵ In recent years, due to the Marsy's Law Movement, states are rapidly amending their constitutions to provide crime victims a more expansive and consistent set of rights.⁶

Extending a set of rights to victims of crime remedies a significant omission of law and practice in current American jurisprudence. Doing so also observes the substantive moral right victims should and used to play in court proceedings.⁷ We argue that these same sets of rights should be recognized and pursued by prosecutors and applied in the courts when it comes to victims of environmental crime, specifically members of environmental justice communities who live in close proximity to sources of stationary pollution and are often victimized without a voice or restitution for the chronic harms they endure. We argue that extending such rights to environmental justice communities in certain instances comports with federal court precedent and is consistent with the application of these rights for other crime victims within federal and state law. Current changes in state constitutions represent a significant opportunity for further developing such a precedent. Doing so will help address structural failures in the regulatory state that have not and cannot protect environmental justice communities from harm or compensate them for their injuries.

First, we discuss the problems of the regulatory response to environmental justice. Next, we discuss the movement to include rights for crime victims in federal law and state constitutions as well as federal court precedent that applies the CVRA to victims in similar instances to and for environmental justice communities. Finally, given the emerging state crime victims' amendments, we

5. Crime Victims' Rights Act, 18 U.S.C. § 3771; Victims' Rights and Restitution Act, 34 U.S.C. § 20141. There are other federal laws that protect victims, but this article focuses on CVRA herein as the most germane. *See generally* Paul G. Cassell and James R. Marsh, *The New Amy, Vicky, and Andy Act: A Positive Step Towards Full Restitution for Child Pornography Victims*, 31 FED. SENTENCING REP. 187 (2019) (in 2018 the President signed the Amy, Vicky, and Andy Child Pornography Victim Assistance Act that, among other points, changes the way that the courts award restitution in child pornography cases). *See also* Paul G. Cassell & Margaret Garvin, *Protecting Crime Victims in State Constitutions: The Example of New Marsy's Law for Florida*, 110 J. CRIM. L. & CRIMINOLOGY 99, 99–100 (2020).

6. *See About Marsy's Law*, MARSY'S LAW, <https://www.marsyslaw.us/> [<https://perma.cc/8XNQ-RHBQ>].

7. In response to the Epstein plea deal and subsequent findings that prosecutors violated the CVRA, the Courtney Wild Crime Victims' Rights Reform Act of 2019 has been introduced in the U.S. Congress. *See* H.R. 4729, 116th Cong. (2019).

analyze the potential to increase representation of environmental justice communities near industrial sources of pollution as victims of environmental crime in environmental crime prosecutions. We hope that moving in the latter direction will help change perceptions of environmental crimes as serious crimes and environmental justice communities as proper victims of these crimes that deserve certain rights as well as open up a new path for harm reduction and potential restitution and compensation for these communities.

II. ENVIRONMENTAL INJUSTICE AND THE REGULATORY RESPONSE

Low-income communities, communities of color, and indigenous communities continue to bear a disproportionate burden of harm from living near incinerators, powerplants, chemical dumps, petroleum refineries, and other industrial sources of pollution in the United States.⁸ An estimated twenty-five percent of deaths around the world can now be attributed to unhealthy environments.⁹ While these chronic, toxic exposures are disproportionate to these communities in the United States, the public, prosecutors, and the courts often fail to view intentional acts by companies that injure environmental justice communities as serious crimes.¹⁰ Environmental crimes are not treated as seriously as traditional offenses, and low-income communities of color are disproportionately affected by environmental crimes as well as toxic pollution.¹¹ Resources put forward by the federal and state governments to

8. MICHAEL J. LYNCH, ET AL., *Environmental Justice and Green Criminology*, in GREEN CRIMINOLOGY: CRIME, JUSTICE, AND THE ENVIRONMENT 189, 199 (2017).

9. *An Estimated 12.6 Million Deaths Each Year are Attributable to Unhealthy Environments*, WORLD HEALTH ORG. (Mar. 15, 2016), <https://www.who.int/news/item/15-03-2016-an-estimated-12-6-million-deaths-each-year-are-attributable-to-unhealthy-environments#:~:text=An%20estimated%2012.6%20million%20deaths%20each%20year%20are%20attributable%20to%20unhealthy%20environments,-15%20March%202016> [<https://perma.cc/QU3F-J2PK>].

10. Melissa L. Jarrell, *Environmental Crime and Injustice: Media Coverage of a Landmark Environmental Crime Case*, 6 SW. J. CRIM. JUST. 25, 28 (2009); see generally Paul Stretesky & Michael J. Lynch, *Corporate Environmental Violence and Racism*, 30 CRIME, L. & SOC. CHANGE 163 (1999) (discussing the issues relating to corporate violence and environmental justice).

11. PAUL MOHAI & BUNYAN BRYANT, *Environmental Racism: Reviewing the Evidence*, in RACE AND THE INCIDENCE OF ENVIRONMENTAL HAZARDS: A TIME FOR DISCOURSE 165–69 (1992).

investigate and prosecute environmental crimes are significantly lower than those put forth to prosecute violent crime.¹² These facts have prompted the study of and social movement for environmental justice in the U.S. over the past four decades.

The study of environmental justice may be traced to the work of Dr. Robert Bullard, a young sociologist working with his wife on a lawsuit related to the siting of a landfill in the late 1970s in Houston, Texas.¹³ Bullard's research uncovered the sinister fact that all city-owned landfills and five out of six private landfills were in predominately black neighborhoods, along with eighty percent of incinerators.¹⁴ As the country was waking up to the significant health problems caused by environmental pollution and as attention was drawn to specific events such as the Santa Barbara Oil Spill and Love Canal, Bullard found that these environmental hazards were intentionally placed in black neighborhoods and were done so without input from the affected communities.¹⁵ He and others went on to develop the framework of environmental racism and to explore it across the United States.¹⁶

Around the same time Bullard was conducting his work, Lois Gibbs brought national attention to the harms caused by living near toxic waste dumps when she organized a grassroots movement in Niagara Falls, New York.¹⁷ Those efforts led to the creation of the Superfund; however, since her community was predominately white, these efforts did not draw attention to the disproportionate siting of industrial facilities, chemical dumps, and other toxic hazards near low-income, minority communities or the significant harms they

12. See LYNCH ET AL., *supra* note 8, at 203–04.

13. Gregory Dicum, *Meet Robert Bullard, The Father of Environmental Justice*, GRIST (Mar. 15, 2006), <https://grist.org/article/dicum/> [<https://perma.cc/WJQ6-XSYC>].

14. Robert D. Bullard, *Solid Waste Sites and the Black Houston Community*, 53 SOC. INQUIRY 273, 277–83 (1983).

15. *Id.* at 275.

16. ROBERT D. BULLARD, *DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY* (1990). See ROBERT D. BULLARD ET AL., *Addressing Global Poverty, Pollution, and Human Rights*, in THE QUEST FOR ENVIRONMENTAL JUSTICE: HUMAN RIGHTS AND THE POLITICS OF POLLUTION 285–87 (2005); UNITED CHURCH OF CHRIST COMM'N FOR RACIAL JUST., TOXIC WASTES AND RACE IN THE UNITED STATES at xii–xv (1987).

17. *Love Canal*, CTR. FOR HEALTH, ENV'T & JUST., <http://chej.org/about-us/story/love-canal/> [<https://perma.cc/67SL-8GKN>]. See also Eckhart C. Beck, *The Love Canal Tragedy*, EPA (Sept. 22, 2016), <https://archive.epa.gov/epa/aboutepa/love-canal-tragedy.html> [<https://perma.cc/5A5Y-9KVP>].

faced as a consequence.¹⁸ The spark for the environmental justice movement may be traced to an organized protest against a polychlorinated biphenyl landfill in Warren County, North Carolina in 1982 coordinated by a grassroots organization, The Warren County Citizens Concerned (WCCC).¹⁹ The United Church of Christ Commission on Racial Justice issued a now famous report on the socioeconomics of hazardous waste dumps in the country extending much of Bullard's earlier work.²⁰ The Indigenous Environmental Network was founded in 1990 to organize grassroots efforts and understand the impacts of environmental harms on indigenous communities.²¹ In 1991, delegates to the First National People of Color Environmental Leadership Summit adopted a declaration of seventeen principles of environmental justice.²² In 1990, EPA held the first national environmental equity workshop, then called an Environmental Equity Working group.²³ Shortly thereafter, in 1994, President Clinton passed Executive Order 12898 to compel the EPA to address environmental justice issues, which are now consolidated in the Office of Environmental Justice (OEJ).²⁴

EPA's regulatory response to environmental justice has been somewhat disappointing. Much of the goals of the OEJ are to provide stakeholder inclusion or small grants for communities or researchers

18. See *Lois Gibbs: 1990 Goldman Prize Recipient North America*, GOLDMAN ENV'T PRIZE, <https://www.goldmanprize.org/recipient/lois-gibbs/> [<https://perma.cc/Y3ZT-XBPH>]. See generally Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601–9675.

19. *A Movement is Born: Environmental Justice and the UCC*, UNITED CHURCH OF CHRIST, https://www.ucc.org/a_movement_is_born_environmental_justice_and_the_ucc [<https://perma.cc/GM22-MVQ2>].

20. UNITED CHURCH OF CHRIST COMM'N FOR RACIAL JUST., *supra* note 16.

21. *Environmental Justice Timeline*, EPA (June 2, 2017), <https://www.epa.gov/environmentaljustice/environmental-justice-timeline> [<https://perma.cc/MHN6-72E8>].

22. PRINCIPLES OF ENV'T JUST. (FIRST NAT'L PEOPLE OF COLOR ENV'T LEADERSHIP SUMMIT 1991).

23. EPA, OFFICE OF ENVIRONMENTAL JUSTICE IN ACTION (Sept. 2017), https://www.epa.gov/sites/production/files/2017-09/documents/epa_office_of_environmental_justice_factsheet.pdf [<https://perma.cc/CP5B-CDPV>].

24. *Learn About Environmental Justice*, EPA (Nov. 7, 2018), <https://www.epa.gov/environmentaljustice/learn-about-environmental-justice> [<https://perma.cc/MQE7-NTMU>].

to study environmental justice issues.²⁵ The more positive front here is that these efforts are focused on preventing future racist decisions that cause additional and disproportionate impacts to environmental justice communities.²⁶ Remedying the harm done to the millions of people living near industrial sources of pollution and determining how to properly investigate and prosecute the environmental crimes that cause such harms has proven to be a vexing policy and legal issue, even though EPA has worked to weave added enforcement in environmental justice communities into their strategic plan.²⁷

A significant problem for environmental justice communities is that neither EPA rules nor enforcement priorities focus on reducing harm in these communities. Harm reduction may or may not happen as a consequence of other enforcement efforts or new regulations, and buyouts are not a standard option. EPA has struggled to manage existing sources of stationary pollution over the past half century as opposed to regulating new sources. It has succeeded more in technology driven solutions for achieving regional goals for public health problems, such as SO₂ reductions or phasing out the use of asbestos containing materials (ACM), mandating the use of catalytic converters under the Clean Air Act (CAA), providing financial support and permitting for the development of publicly owned treatment works under the Clean Water Act (CWA), permitting for cradle-to-grave waste under the Resource Conservation and Recovery Act, and regulating specific chemicals under the Toxic Substances Control Act.²⁸ However, EPA struggles with reducing toxic substances at the level of the firm or managing the many nuances of equipment, malfunction, start-ups, shutdowns, and other processes at large industrial facilities that produce significant

25. *Environmental Justice Grants, Funding and Technical Assistance*, EPA (Nov. 25, 2020), <https://www.epa.gov/environmentaljustice/environmental-justice-grants-funding-and-technical-assistance> [<https://perma.cc/6DVX-KHVG>].

26. *EJ 2020 Priority Areas*, EPA (Aug. 2, 2019), <https://www.epa.gov/environmentaljustice/ej-2020-priority-areas#permitting> [<https://perma.cc/WX46-KKYN>].

27. *Plan EJ 2014: Incorporating Environmental Justice into Rulemaking*, EPA (Dec. 10, 2019), <https://www.epa.gov/environmentaljustice/plan-ej-2014-incorporating-environmental-justice-rulemaking> [<https://perma.cc/2W8Z-Y98K>].

28. Clean Air Act, 42 U.S.C. §§ 7541, 7312; Clean Water Act, 33 U.S.C. § 125; Resource Conservation and Recovery Act, 42 U.S.C. § 6901; Toxic Substances Control Act, 15 U.S.C. § 2601.

emissions near environmental justice communities.²⁹ Environmental justice is thus a microcosm of the most serious problems that the agency must contend. Unfortunately, EPA is least capable of managing the existing sources of stationary pollution that are known to cause health problems in environmental justice communities.³⁰

Lacking a consistent national environmental law to guide the agency, EPA's regulatory efforts by design lack sweeping effect, particularly across policy areas.³¹ A good example of why environmental justice communities are caught in this structural deficiency might be the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), also known as the Superfund. CERCLA was passed in response to the public health emergency caused by Love Canal and the need to mitigate or remove the nearby community from harm.³² EPA administers the Superfund Trust Fund and places sites on the National Priorities List (NPL), either paying to remediate orphaned sites or find responsible parties to pay for remediation at other sites.³³ Superfund is terribly inadequate to manage the scale of the environmental justice problem and is not systematically used as a tool to help these communities.³⁴

Often times, environmental justice communities cannot expect the EPA to exercise authority under major federal environmental statutes on their behalf, and therefore must rely on enforcement to

29. Thomas O. McGarity, *Hazardous Air Pollutants, Migrating Hot Spots, and the Prospect of Data-Driven Regulation of Complex Industrial Complexes*, 86 U. TEX. L. REV. 1445, 1456 (2008); Joshua Ozymy & Melissa L. Jarrell, *Upset Over Air Pollution: Analyzing Upset Events Emissions at Petroleum Refineries*, 28 REV. POL'Y RSCH. 363, 369 (2011).

30. See Joshua Ozymy & Melissa L. Jarrell, *Upset Events, Regulatory Drift, and the Regulation of Air Emissions at Industrial Facilities in the United States*, 21 ENV'T POL. 451, 455 (2012); Suzie Canales et al., *Risk Assessment or Risk Acceptance: Why the EPA's Attempts to Achieve Environmental Justice Have Failed and What They Can Do About It*, 5 ENV'T JUSTICE 59, 60 (2012).

31. Richard Arnold & Andrew B. Whitford, *Organizational Dilemmas of the U.S. EPA: Why Structure Matters for Environmental Protection*, 14 ENV'T POL. 118, 123 (2005).

32. See *supra* notes 17–18 and accompanying text.

33. *Superfund: National Priorities List (NPL)*, EPA (Oct. 7, 2020), <https://www.epa.gov/superfund/superfund-national-priorities-list-npl> [<https://perma.cc/9SLT-N78B>]; *Superfund Special Accounts*, EPA (Oct. 5, 2020), <https://www.epa.gov/enforcement/superfund-special-accounts> [<https://perma.cc/T9ML-Z5SU>].

34. See *id.*

reduce harm. Here, EPA can use civil and criminal enforcement tools. Typical civil remedies for illegal or unpermitted pollution near environmental justice communities relies on a compliance strategy focusing on negotiation and discussion to remedy a problem. Such remedies include civil penalties, injunctive relief, settlements or Administrative Orders of Consent, mitigation plans, or Supplemental Environmental Projects.³⁵ EPA really has two basic options when pursuing civil cases in that “it may seek sanctions in federal court or pursue the matter administratively.”³⁶

Criminal enforcement tools are applied for willful, chronic, or knowing violations that involve significant environmental harm and culpable conduct.³⁷ The Criminal Investigation Division (CID) housed within the Office of Enforcement and Compliance Assurance (OECA) investigates potential criminal violations of federal law.³⁸ When EPA investigators build a case, they typically approach prosecutors in the DOJ via the Environmental Crimes Section (ECS) or U.S. Attorney’s Office who may seek indictments from a grand jury or file a criminal information in U.S. District Court.³⁹ Sources of potential criminal violations often include former employees, self-reported documents and reports, and civil inspectors from other government agencies.⁴⁰

Given the costs, lowered burden of proof, and nature of most federal violations, EPA typically seeks civil remedies over criminal

35. *Basic Information on Enforcement*, EPA (July 1, 2020), <https://www.epa.gov/enforcement/basic-information-enforcement> [<https://perma.cc/G57L-BANV>].

36. Jeremy Firestone, *Agency Governance and Enforcement: The Influence of Mission on Environmental Decisionmaking*, 21 J. POL’Y ANALYSIS & MGMT. 409, 410 (2002).

37. Memorandum from Earl E. Devaney, Dir. of Off. of Crim. Enf’t, to All EPA Emp.’s Working in or in Support of the Crim. Enf’t Program 3 (Jan. 12, 1994) (on file with the EPA).

38. EPA, AMERICA’S ENVIRONMENTAL CRIME FIGHTERS 2–4 (2020), <https://www.epa.gov/sites/production/files/documents/oceftbrochure.pdf> [<https://perma.cc/TJT4-HW9V>].

39. Joel A. Mintz, *Some Thoughts on the Interdisciplinary Aspects of Environmental Enforcement*, 36 ENV’T L. REP. 10495, 10497 (2006).

40. *Id.* at 10496–97; EPA, *supra* note 38, at 5. See Joel A. Mintz, “*Treading Water*”: A Preliminary Assessment of EPA Enforcement During the Bush II Administration, 34 ENV’T L. REP. 10933 (2004).

prosecution.⁴¹ EPA investigators and prosecutors face terrific incentives to avoid taking the suit to trial.⁴² EPA investigations that lead to successful prosecution are rare.⁴³ Our own analysis of these prosecutions stemming from EPA criminal investigations from 1983–2019 yields a bit less than 2,600 total prosecutions.⁴⁴ Most of these prosecutions under major statutes, such as CERCLA, CAA, and the CWA that could target environmental communities do not seem to make mention of environmental justice as a priority, nor do we see it as an overarching strategy in how prosecutors pursue environmental crimes near environmental justice communities.⁴⁵ These criminal enforcement actions reflect EPA's emphasis on managing national level public health problems for toxic substances, such as ACM control, lead-based paint, unpermitted discharges, or storage, transport, and disposal violations.⁴⁶

We feel strongly that EPA-CID should prioritize environmental justice communities in their enforcement goals, and federal prosecutors should make use of the CVRA to have individuals in these communities recognized as environmental crime victims under

41. David M. Uhlmann, *Environmental Crime Comes of Age: The Evolution of Criminal Enforcement in the Environmental Regulatory Scheme*, 4 UTAH L. REV. 1223, 1234 (2009).

42. Evan J. Ringquist & Craig E. Emmert, *Judicial Policymaking in Published and Unpublished Decisions: The Case of Environmental Civil Litigation*, 52 POL. RSCH. Q. 7, 12 (1999).

43. SUSTAINABLE ENVIRONMENTAL LAW: INTEGRATING NATURAL RESOURCE AND POLLUTION ABATEMENT LAW FROM RESOURCES TO RECOVERY 141 (Celia Campbell-Mohn et al. eds., 1993). See John F. Cooney, *Multi-Jurisdictional and Successive Prosecution of Environmental Crimes: The Case for a Consistent Approach*, 96 J. CRIM. L. & CRIMINOLOGY 435, 447–448 (2006). See generally *About the Office of Enforcement and Compliance Assurance (OECA)*, EPA (Dec. 27, 2016), https://19january2017snapshot.epa.gov/aboutepa/about-office-enforcement-and%09compliance-assurance-oeca_.html [<https://perma.cc/2WQ2-YEPM>].

44. Joshua Ozymy et al., *Persistence or Partisanship: Exploring the Relationship between Presidential Administrations and Criminal Enforcement by the U.S. Environmental Protection Agency, 1983-2019*, PUB. ADMIN. REV. (forthcoming 2021).

45. Joshua Ozymy & Melissa L. Jarrell, *Illegal Discharge: Exploring the History of Charging and Sentencing Patterns in U.S. Clean Water Act Criminal Prosecutions*, FORDHAM ENV'T L. REV. (forthcoming Spring 2021); Joshua Ozymy & Melissa L. Jarrell, *Exploring the History of Charging and Sentencing Patterns in U.S. Clean Air Act Criminal Prosecutions*, 60 NAT. RES. J. (forthcoming Spring 2021).

46. Joshua Ozymy & Melissa L. Jarrell, *Failure to Notify: Exploring Charging and Sentencing Patterns in Superfund Criminal Prosecutions*, 50 ENV'T L. REP. 10723 (2020); see generally Joshua Ozymy & Melissa L. Jarrell, *EPA's Criminal Prosecution and Punishment of Environmental Crimes*, 50 ENV'T L. REP. 10452 (2020).

federal law. Given the vast majority of enforcement actions that are undertaken by state environmental agencies and prosecutors, the use of crime victims' rights amendments at the state level offers another powerful set of opportunities to remedy the regulatory failures plaguing environmental victims in enforcement activities and their lack of representation in court. About fifteen percent of EPA-CID criminal investigations that resulted in prosecution since 1983 ended up being prosecuted for state-level environmental offenses, and there are many others not captured in federal databases that represent opportunities for stronger criminal enforcement that protect environmental justice communities at the state level as well.⁴⁷ Next, we discuss what such rights may mean in federal and state law before discussing the movement to expand the rights of crime victims at the state and federal level in the United States.

III. THE EVOLUTION OF CRIME VICTIMS' RIGHTS

The idea that crime victims should be guaranteed certain procedural rights has seen a resurgence in American jurisprudence over the last four decades. Earlier concepts of victims' rights emphasized the rights of individuals only via clans, groups, or other kinship ties rather than as individuals.⁴⁸ The concept of individuals as victims and the idea that they deserved restitution or to be made whole from those that wronged them evolved with the need for a transactional approach to justice that examined the rights of the crime victim relative to the criminal offender.⁴⁹ Building on European traditions, in Colonial America it was common for victims of crime to play some role in court proceedings, but over time their role diminished and the role of the prosecutor became ascendant.⁵⁰ Private prosecutions were common in the U.S. and survived in some form into the 1800s.⁵¹ Alternatively, as noted in *Kenna v. U.S. District Court*, in the modern U.S. system of justice, crime victims

47. Joshua Ozymy et al., *supra* note 44.

48. STEPHEN SCHAFER, VICTIMOLOGY: THE VICTIM AND HIS CRIMINAL 6–7 (1977).

49. Mario M. Cuomo, *The Crime Victim in a System of Criminal Justice*, 8 J. C.R. & ECON. DEV. 1, 3 (1992).

50. William F. McDonald, *Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim*, 13 AM. CRIM. L. REV. 649, 649–650 (1976).

51. Douglas E. Beloof, *Weighing Crime Victims' Interests in Judicially Crafted Criminal Procedure*, 56 CATH. U. L. REV. 1135, 1138 (2007).

have been treated like good Victorian Children in that they should be seen but not heard.⁵²

In 1965, California passed the first state law to compensate victims of violent crime.⁵³ New York state passed a similar scheme the following year and instituted the Crime Victims Compensation Board, now administered by the state Office of Victim Service (OVS).⁵⁴ At the federal level, the DOJ houses the Office for Victims of Crime (OVC), established in 1988, to manage a series of programs to assist and potentially compensate victims through the Crime Victims Fund (CVF).⁵⁵

Reimagining a role for crime victims in court proceedings and the movement it created might be traced to a decision handed down by the U.S. Supreme Court in *Linda R.S. v. Richard D.*⁵⁶ The petitioner sought to enjoin prosecutors in Texas to prosecute the father of her child for failure to provide child support under Texas law, but was unsuccessful because the Texas statute only recognized children born in wedlock.⁵⁷ The Supreme Court agreed with the District Court's ruling and affirmed the more established view at the time that a private citizen cannot compel a private prosecution.⁵⁸ The Court further affirmed in *Leke v. Timmerman* that the decision

52. *Kenna v. U.S. Dist. Ct. for the Cent. Dist. of Cal.*, 435 F.3d 1011, 1013 (9th Cir. 2006). *Kenna* construed a statutory right to be heard applied to victims to make oral statements at sentencing. For related case history, see NATIONAL CRIME VICTIM LAW INSTITUTE, FUNDAMENTALS OF VICTIMS' RIGHTS: A SUMMARY OF 12 COMMON VICTIMS' RIGHTS 3–4 (2011).

53. *Crime Victims' Rights in America: A Historical Overview*, OFF. FOR VICTIMS OF CRIME (Apr. 2005), https://www.ncjrs.gov/ovc_archives/ncvrvw/2005/pg4b.html [<https://perma.cc/6T2T-QR4N>].

54. N.Y. EXEC. LAW § 622 (McKinney 2020); *About OVS*, N.Y. STATE, <https://ovs.ny.gov/about-ovs> [<https://perma.cc/EU66-TTG3>]; Cuomo, *supra* note 49, at 1, 5–6.

55. *About OVC*, OFF. FOR VICTIMS OF CRIME, <https://ovc.ojp.gov/about-ovc> [<https://perma.cc/LM8Y-HVPC>]; *Crime Victims Fund*, OFF. FOR VICTIMS OF CRIME, <https://ovc.ojp.gov/sites/g/files/xyckuh226/files/pubs/crimevictimsfundfs/index.html> [<https://perma.cc/HD3H-5FGS>].

56. *See Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973).

57. *Id.* at 615 (“The Texas courts have consistently construed this statute to apply solely to the parents of legitimate children and to impose no duty of support on the parents of illegitimate children.”).

58. *Id.* at 619; *History of Victims' Rights*, NAT'L CRIME VICTIM L. INST., https://law.lclark.edu/centers/national_crime_victim_law_institute/about_ncvli/history_of_victims_rights/ [<https://perma.cc/8HVT-8MBP>].

to prosecute a criminal offense lies solely with the prosecutor and cannot be completed by a private citizen.⁵⁹

The Crime Victim Rights Movement (CVRM) was well underway after *Linda R.S.* Organized as a diverse movement within the broader Civil Rights Movement, CVRM crossed typical ideological boundaries to fuse the interests of civil rights advocates on the political left with law-and-order supporters on the political right. Seeking to redress the absent role of victims in criminal proceedings, the ultimate goal of the CVRM was to balance the rights of the victim in criminal proceedings against the rights of defendants and sought to affect legislative change at the federal level paired with a state-centric strategy prompting successive waves of constitutional amendments.⁶⁰

The Movement received national attention in 1981, when President Reagan declared April 19 to be “National Victims’ Rights Week.”⁶¹ In December 1982, the Final Report of the President’s Task Force on Victims of Crime was issued.⁶² Subsequent congressional efforts resulted in the passage of the federal Victims of Crime Act (VOCA) in 1984, which established the OVC and the CVF in partnership with state governments to compensate crime victims and help victims manage the tangible costs incurred from surviving a crime.⁶³ The Supreme Court began recognizing victims’ rights more gradually in the coming years, specifically in *Payne v. Tennessee*, which held that victim impact statements were admissible during the sentencing phase of a trial and in death penalty cases.⁶⁴ The Federal Rules of Criminal Procedure were amended in 1991 to include victim impact statements in

59. *Leeke v. Timmerman*, 454 U.S. 83, 85–86 (1981).

60. See Paul G. Cassell, *Balancing the Scales of Justice: The Case for and Effects of Utah’s Victims’ Rights Amendment*, 1994 UTAH L. REV. 1373, 1382 (1994).

61. David L. Roland, *Progress in the Victim Reform Movement: No Longer the “Forgotten Victim”*, 17 PEPP. L. REV. 35, 35–36 (1989).

62. LOIS HAIGHT HERRINGTON ET AL., PRESIDENT’S TASK FORCE ON VICTIMS OF CRIME (Dec. 1982), <https://www.ncjrs.gov/pdffiles1/ovc/87299.pdf> [<https://perma.cc/LZ2S-5FGL>].

63. 34 U.S.C. § 20101; *Victims of Crime Act*, RAINN, <https://www.rainn.org/articles/victims-crime-act> [<https://perma.cc/J52T-V66R>].

64. *Payne v. Tennessee*, 501 U.S. 808, 817–18, 824–25 (1991). The precedent set in *Payne* amended a previous ruling in *South Carolina v. Gathers*, 490 U.S. 805 (1989), which held that victim impact statements are admissible only if it relates to the direct circumstances of a crime. In *Booth v. Maryland*, 482 U.S. 496 (1987), the Court ruled it unconstitutional for juries to hear evidence in the form of how a murder affected the victim’s family in the case.

presentencing reports, which further expanded the role of victims in criminal proceedings.⁶⁵

The Victim's Rights and Restitution Act and CVRA are the primary federal statutes that outline the federal government's responsibilities to victims of crime.⁶⁶ Both Acts ensure that relevant federal officials will attempt to identify victims of crime, inform victims of relevant services to which they may be entitled under law, including emergency medical, counseling, or restitution, reasonably protect victims from a suspected offender, provide updates and information regarding the status of the case during investigation and prosecution stages, and share post-trial information, such as scheduling of parole, any release of custody, or death of the offender.⁶⁷ The CVRA sets forth a series of eight basic rights to which crime victims are entitled under federal law.⁶⁸

The CVRA moves crime victims into a more active role in federal criminal proceedings.⁶⁹ It requires prosecutors to consider the interest of crime victims in that they should be reasonably protected from the accused, informed of their rights and the process of court

65. Susan E. Gegan & Nicholas Ernesto Rodriguez, *Victims' Roles in the Criminal Justice System: A Fallacy of Victim Empowerment?*, 8 ST. JOHN'S J. LEGAL COMMENT. 225, 228 (1992). For a further discussion of integrating the rights of crime victims into the rules of federal criminal procedure, see Paul G. Cassell, *Recognizing Victims in the Federal Rules of Criminal Procedure: Proposed Amendments in Light of the Crime Victims' Rights Act*, 2005 B.Y.U. L. REV. 835 (2005) and Paul G. Cassell, *Treating Crime Victims Fairly: Integrating Victims into the Federal Rules of Criminal Procedure*, 2007 UTAH L. REV. 861, 863 (2007).

66. There has been push for a Victims' Rights Amendment to the U.S. Constitution, but the difficulties of such a process have enjoined the CVRM to center their efforts on constitutional change in the States. For a defense and criticism, compare Paul G. Cassell, *The Victims' Rights Amendment: A Sympathetic, Clause-by-Clause Analysis*, 5 PHX. L. REV. 301 (2012), with Robert P. Mosteller, *The Unnecessary Victims' Rights Amendment*, 1999 UTAH L. REV. 443 (1999).

67. 34 U.S.C. § 20141.

68. Melissa L. Jarrell & Joshua Ozymy, *Real Crime, Real Victims: Environmental Crime Victims and the Crime Victims' Rights Act (CVRA)*, 58 CRIME L. & SOC. CHANGE 373, 374–75 (2012).

69. One of the initial points of contention in implementing the CVRA was the presence of any pre-trial rights conveyed to victims by the Act. The DOJ's Office of Legal Counsel put out a memo arguing that the CVRA grants no pre-trial rights when it comes to federal investigations. The sponsor of the bill, Senator Jon Kyl, sent a letter to the Attorney General stating that pre-trial rights under the CVRA should protect victims throughout the criminal justice process. See Paul G. Cassell et al., *Crime Victims' Rights During Criminal Investigations? Applying the Crime Victims' Rights Act Before Criminal Charges are Filed*, 104 J. CRIM. L. & CRIMINOLOGY 59, 63, 80–83 (2014).

proceedings, included in related proceedings, heard in court, and provided restitution by law.⁷⁰ At the same time it pushed for passage of federal legislation, the CVRM worked to have a series of similar procedural protections put in place by state legislatures through constitutional amendments.⁷¹ This process succeeded first in 1982 with California; at present, many states have adopted victims' rights amendments in their state constitutions, and all fifty states have added statutory victims' rights.⁷²

IV. ENVIRONMENTAL JUSTICE COMMUNITIES AS CRIME VICTIMS

The accomplishments of the CVRM over the past decades have enshrined a series of procedural rights for crime victims within criminal proceedings at the state and federal levels. This is a significant achievement for American jurisprudence. The boundaries of who qualifies as a victim and how these rights are enforced is still evolving within the courts and the states, with the latter updating their constitutions to clarify and expand the rights of crime victims in response to pressure from the CVRM. This evolution represents a unique opportunity to explore the legal context for how environmental justice communities can, in certain instances, be considered crime victims under state and federal law. A continued move in this direction represents an excellent opportunity to expand the available rights to a significant segment of crime victims in the United States that often experience significant and chronic harm. It is also an opportunity to address a public policy issue that the regulatory and legal systems have generally failed to grapple with over the last four decades. Below, we consider the CVRA's legal implications at the federal level and then discuss implications for the states.

70. 18 U.S.C. § 3771(a).

71. Cassell & Garvin, *supra* note 5, at 104–105.

72. *Id.*; Paul G. Cassell, *Introduction: The Maturing Victims' Rights Movement*, 13 OHIO STATE J. CRIM. L. 1, 2 (2015). See Douglas E. Beloof & Paul G. Cassell, *The Crime Victim's Right to Attend the Trial: The Reascendant National Consensus*, 9 LEWIS & CLARK L. REV. 481 (2005) for an early article on the right of victims to attend trial, and OFF. FOR VICTIMS OF CRIME, *supra* note 53, for a more expansive timeline of crime victims' rights leading up to the CVRA in the U.S.

A. Enforcing Rights in Federal Court

The first pressing question for regarding anyone as a victim under federal and state law is whether an individual qualifies as a victim for purposes of asserting a particular right during each stage of a legal case.⁷³ For individuals in federal cases, the CVRA defines victim as a “person directly or proximately” harmed in the commission of an offense.⁷⁴ Direct causation embodies a “but for” cause; it asks: but for this conduct, would the harm have occurred?⁷⁵ Proximate causation considers whether “the harm is a reasonably foreseeable consequence of the criminal conduct.”⁷⁶ A defendant must commit a criminal act and a victim must be injured directly as a result of that act or proximately, in that they were harmed as a reasonable and foreseeable consequence of the crime in question.⁷⁷ The CVRA protects victims who are directly or proximately harmed physically, emotionally, or financially in the commission of a federal offense.⁷⁸

A few criminal prosecutions of federal environmental crimes illustrate the victimhood qualification at work under the CVRA, as well as other rights crime victims have asserted in federal court to clarify rights under the Act.⁷⁹ In *United States v. BP Products*, an explosion at British Petroleum’s (BP) Texas City refinery on March 23, 2005, killed fifteen workers and injured approximately 170

73. See Meg Garvin et al., *Fundamentals of Victims’ Rights: An Overview of the Legal Definition of Crime “Victim” in the United States*, VICTIM L. BULL. (Nat’l Crime Victim L. Inst., Or.), Nov. 2011, at 1–2, for definitional purposes regarding much of the following discussion.

74. 18 U.S.C. § 3771(e).

75. Garvin et al., *supra* note 73, at 2.

76. *Id.*

77. *Id.*

78. *Rights of Victims*, U.S. DEP’T OF JUST. (May 28, 2020), <https://www.justice.gov/enrd/rights-victims> [<https://perma.cc/4GHR-UFVH>].

79. See *Who is a Victim of Crime*, CANADA DEP’T OF JUST. (Dec. 6, 2016), <https://www.justice.gc.ca/eng/cj-jp/victims-victimes/rights-droits/who-qui.html> [<https://perma.cc/EL4D-ZFSB>], for a comparison with the Canadian Government’s definition of a crime victim as, “a person who has suffered physical or emotional harm, property damage, or economic loss as a result of a crime. The rights are available to a victim who is in Canada or who is a Canadian citizen or permanent resident.” *Id.* Crime Victims’ rights include similar rights under the CVRA such as information, protection, participation, restitution, and a complaint process if they feel their rights have been violated.

others.⁸⁰ The company was prosecuted criminally for knowing violations of the CAA stemming from releases that caused death and injury. On March 12, 2009, BP was sentenced to 36 months' probation and was required to pay a fifty million dollar fine.⁸¹ After reaching a plea agreement, prosecutors asked the district court for permission to notify those individuals directly injured by BP and their families after the issuance of a public press release.⁸² The court agreed, citing the impracticalities of notifying so many victims and the potential for prejudicial media coverage.⁸³ These individuals, acknowledged by the court, were allowed to submit victim impact statements and speak at the hearing.⁸⁴ The victims filed a petition for writ of mandamus with the Fifth Circuit Court of Appeals, arguing that the post-press release violated their rights to timely notification under the CVRA.⁸⁵ The Court agreed but denied the writ, finding that the CVRA petition was subjected to discretionary mandamus review.⁸⁶

W.R. Grace and Company mined vermiculite ore near Libby, Montana from the 1960s–1990. Over time, a significant number of residents that worked in or lived near the mine developed chronic and debilitating injuries, including mesothelioma, asbestosis, lung

80. *United States v. BP Prod. N. Am. Inc.*, 610 F. Supp. 2d 655, 655, 660 (S.D. Tex. 2009); *BP America Refinery Explosion*, U.S. CHEM. SAFETY BD., <https://www.csb.gov/bp-america-refinery-explosion/> [<https://perma.cc/659P-R2CV>].

81. *BP Prod. N. Am. Inc.*, 610 F. Supp. 2d at 655, 660. BP also entered into a consent decree to pay about \$180 million to cover pollution control updates, civil fines, and a supplemental environmental project in addition to the criminal penalty. *BP Products to Pay Nearly \$180 Million to Settle Clean Air Violations at Texas City Refinery*, U.S. DEP'T OF JUST. (Feb. 19, 2009), <https://www.justice.gov/opa/pr/bp-products-pay-nearly-180-million-settle-clean-air-violations-texas-city-refinery> [<https://perma.cc/84YC-3LPK>].

82. Jarrell & Ozymy, *supra* note 68, at 376.

83. *Id.*

84. *Id.*; see also Michael M. O'Hear, *Plea Bargaining and Victims: From Consultation to Guidelines*, 91 MARQUETTE L. REV. 323 (2007); see generally Douglas E. Beloof, *Dignity, Equality, and Public Interest for Defendants and Crime Victims in Plea Bargains: A Response to Professor Michael O'Hear*, 91 MARQUETTE L. REV. 349 (2007) (discussing the importance of consulting crime victims during the plea-bargaining process).

85. *In re Dean*, 527 F.3d 391, 393–96 (5th Cir. 2008).

86. Jarrell & Ozymy, *supra* note 68, at 376. See Paul G. Cassell, *Protecting Crime Victims in Federal Appellate Courts: The Need to Broadly Construe the Crime Victims' Rights Act's Mandamus Provision*, 87 DENV. L. REV. 599 (2010), for a discussion of the mandamus provision in the CVRA.

carcinoma, and other lung diseases related to asbestos exposure.⁸⁷ W.R. Grace was subjected to numerous civil suits over the role its operations played in what was later labeled a public health crisis by the EPA.⁸⁸ By 2001, the company declared bankruptcy, and on February 7, 2005, it was indicted for the knowing release of asbestos into the ambient air and the improper disposal of asbestos as well as impeding the government's investigation and cleanup efforts.⁸⁹ In *United States v. W.R. Grace & Co.*, prosecutors planned to call thirty-four victims to testify, but the district court ruled that there were no victims that could be directly identified in the case or that could attend trial.⁹⁰ The victims appealed to the Ninth Circuit to be recognized under the CVRA and attend trial, and the Court granted the writ, allowing them to attend, and some testified during proceedings.⁹¹ Each of the thirty-four individuals qualified as victims because they lived near or around Libby during the alleged criminal conspiracy that took place between 1976–2002 and were directly or proximately harmed by the company's vermiculite materials that contained asbestos during that time.⁹² The exposure placed them in imminent danger of serious bodily injury or death because of the significantly increased risk of asbestos-related disease as a result of

87. See *United States v. W.R. Grace & Co.*, 429 F.3d 1224, 1230 (9th Cir. 2005); Patricia A. Sullivan, *Vermiculite, Respiratory Disease, and Asbestos Exposure in Libby, Montana: Update of a Cohort Mortality Study*, 115 ENV'T HEALTH PERSP. 579, 580, 584 (2007).

88. Beth Swantek, *Libby, Montana Asbestos Disaster: 20 Years Later*, MESOTHELIOMA CANCER NETWORK (Dec. 18, 2019), <https://www.asbestos.net/blog/libby-montana-asbestos/> [https://perma.cc/3FQV-E99N]; Tristan Scott, *W.R. Grace Civil Suits Have Been in the Courts for Decades*, MISSOULIAN (Feb. 15, 2009), https://missoulian.com/news/local/w-r-grace-civil-suits-have-been-in-the-courts/article_773024bb-c63a-5374-93cf-5e4f263a8137.html [https://perma.cc/JAH7-RKWC].

89. See Press Release, U.S. Dep't of Just., *W.R. Grace and Executives Charged with Fraud, Obstruction of Justice, and Endangering Libby, Montana Community* (Feb. 7, 2005), https://www.justice.gov/archive/opa/pr/2005/February/05_enrd_048.htm [https://perma.cc/H3RQ-VEHW]; *WR Grace Exits Bankruptcy After 13 Years, Was it Worth the Wait? You Decide*, WORTHINGTON & CARON, PC, <https://www.worthingtoncaron.com/News/2014/November/WR-Grace-Exits-Bankruptcy-After-13-Years-Was-it.aspx> [https://perma.cc/4CUY-MJBR].

90. Jarrell & Ozymy, *supra* note 68, at 377.

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

92. Petition for Writ of Mandamus at 16, *In re United States*, No. 09-70533 (9th Cir. Feb. 24, 2009); *see also* Petition for Writ of Mandamus at 22–26, 51, *In re Parker*, No. 09-70529 (9th Cir. Feb. 23, 2009).

the defendant depositing vermiculite across their own properties and in numerous locations in the town.⁹³ Nevertheless, on May 8, 2009, the company was acquitted of the charges.⁹⁴

Arguably, in *BP Products*, it was easier to identify victims directly or proximately harmed by a federal crime. An explosion caused immediate death and injury, which exposed the underlying criminal activity. *W.R. Grace* was less immediate and more relevant to environmental justice communities, even though Libby, Montana is a predominantly Anglo community. The town is in close proximity to a major source of chronic pollution. Residents were exposed to the pollution through the ambient air and through ground and water contamination via asbestos-containing products. Residents were also exposed by working at the facility. There are strong and known connections between specific asbestos exposure and certain physical ailments, and the community had an exceedingly high level of these ailments in the population.⁹⁵ EPA spent some \$600 million in clean-up costs after placing Libby on the NPL in 2002, recently turning the clean-up over to the Montana Department of Environmental Quality.⁹⁶

While the victims received standing and the right to be heard and considered in court proceedings, *W.R. Grace* was found not guilty.⁹⁷ Nevertheless, many victims could receive medical and social services via Medicare.⁹⁸ The mine was also closed years prior due to

93. See *id.* See also Marcia Coyle, *Trial Judge in W.R. Grace Case Erred when Excluding 34 Potential Government Witnesses*, NAT'L L. J. (Mar. 3, 2009), <https://www.law.com/nationallawjournal/almID/1202428733003/?slreturn=20201108231046> [<https://perma.cc/79PB-XLYH>].

94. Jarrell & Ozymy, *supra* note 68, at 377.

95. Samantha Lampert Naik et al., *Mortality from Asbestos-Associated Disease in Libby, Montana, 1979-2011*, 27 J. EXPOSURE SCI. & ENV'T EPIDEMIOLOGY 207, 207 (2017).

96. Tim Povtak, *EPA Leaving Libby Asbestos Superfund Site to Montana*, ASBESTOS.COM (Nov. 11, 2019), <https://www.asbestos.com/news/2019/11/11/asbestos-cleanup-libby-ending/> [<https://perma.cc/V2RR-X2HE>].

97. See Jarrell & Ozymy, *supra* note 68, at 376–77; Kirk Johnson, *Chemical Company is Acquitted in Asbestos Case*, N.Y. TIMES (May 8, 2009), <https://www.nytimes.com/2009/05/09/us/09grace.html> [<https://perma.cc/V9EX-S27X>].

98. Robert Pear, *Deep in Health Bill, Very Specific Beneficiaries*, N.Y. TIMES (Dec. 20, 2009), <https://www.nytimes.com/2009/12/21/health/policy/21healthcare.html> [<https://perma.cc/4N95-R36B>] (the Patient Protection and Affordable Care Act (i.e., Obama Care) contained a provision to help extend coverage in public health emergencies under Medicare, which was targeted with Libby in mind).

the government pursuing criminal charges against W.R. Grace. As such, in this particular context, the right to reasonable protection from a suspected offender is a difficult right for the government to enforce, unless the federal government was willing to relocate residents to remove them from further harm. In the context of the government declaring a public health emergency and spending \$600 million in on-going cleanup efforts, it does not seem unreasonable to consider buying out residents to protect them from known harms.

Unite States v. CITGO is a strong application of the CVRA to an environmental justice community.⁹⁹ In this case, the government alleged the company operated two oil-water separators without the required emissions controls.¹⁰⁰ The tanks emitted volatile organic compounds (VOCs) including benzene, a known carcinogen, into the air for about nine years.¹⁰¹ CITGO operated two petroleum refineries in the area, and the case targeted the East Plant, which bordered an environmental justice community in Corpus Christi, Texas.¹⁰² CITGO was charged under the CAA and the Migratory Bird Treaty Act (MBTA) for the illegal emissions and the illegal taking of migratory birds that died near the tanks.¹⁰³

On June 27, 2007, a jury convicted CITGO of knowingly operating the tanks without the required emissions controls.¹⁰⁴ At pre-sentencing, over three hundred individuals living in the nearby neighborhoods filled out victim impact statements, but the judge excluded them from testifying or entering statements at sentencing because there was insufficient proof of evidence of victimization linking CITGO's crime with the health effects described by the residents.¹⁰⁵ Prior to sentencing, attorneys representing the victims filed a writ of mandamus with the Fifth Circuit Court, arguing that the victims should be included as crime victims under the CVRA and

99. See *United States v. CITGO Petroleum Corp.*, 893 F. Supp. 2d 848, 853–54 (S.D. Tex. 2012).

100. *Id.* at 852; see also *United States v. CITGO Petroleum Corp.*, 801 F.3d 477, 480 (5th Cir. 2015).

101. See *CITGO Petroleum Corp.*, 893 F. Supp. 2d at 852.

102. *Id.* at 852–53.

103. *CITGO Petroleum Corp.*, 801 F.3d at 478.

104. *Id.* at 480–81. See Erwin Serba, *UPDATE 2-Citgo Found Guilty of Violating U.S. Clean Air Act*, REUTERS (June 27, 2007, 2:12 PM), <https://www.reuters.com/article/trial-citgo-idUKN2735127220070627> [<https://perma.cc/4EYJ-T4S4>].

105. *CITGO Petroleum Corp.*, 893 F. Supp. 2d at 850.

be able to testify at sentencing.¹⁰⁶ Ultimately, the Fifth Circuit ruled that the lower court must reconsider its decision.¹⁰⁷ Subsequently, the lower court recognized ninety victims under the CVRA who were then allowed to provide oral testimony at sentencing.¹⁰⁸ The judge acknowledged that living near the refineries is likely linked to poor health but decided not to award restitution to the victims.¹⁰⁹

In light of the cases cited above, we return to the CVRA to summarize procedural rights along with examples of remedies taken by victims and examples for environmental justice communities, as outlined in Table 1. The CVRA provides victims the right to be informed of court proceedings, to participate in court proceedings, to confer with attorneys for the government, and to be treated with fairness and dignity.¹¹⁰ Examples of the remedies that victims have are to file a writ of mandamus if they feel their rights under the CVRA have been violated, to submit victim impact statements, or to participate in giving oral testimony during trial and at sentencing.¹¹¹ Victims have, as in *BP*, asserted their right to object to plea bargains or confer with attorneys for the government before such agreements are agreed to in a case,¹¹² or, as in *CITGO*, claimed their rights were violated because the court did not recognize them as victims or allow them to testify at sentencing.¹¹³ In *W.R. Grace*, victims asserted that they should be allowed to give oral testimony during the trial.¹¹⁴ It remains to be seen if environmental crime victims will continue to seek more expansive rights under the CVRA and if the courts will grant them such rights.

106. *Id.* at 851; see also *In re Allen*, 701 F.3d 734, 735 (5th Cir. 2012).

107. *Id.*

108. *CITGO Petroleum Corp.*, 893 F. Supp. 2d at 854; *United States v. CITGO Petroleum Corp.*, No. C-06-563, 2014 WL 1758276, at *2 (S.D. Tex. Apr. 30, 2014).

109. *CITGO Petroleum Corp.*, 2014 WL 1758276, at *6–11; *United States v. Citgo Petroleum Corp.*, No. C-06-563, 2011 WL 1337101, at *4 (S.D. Tex. Apr. 5, 2011).

110. *Rights of Environmental Crime Victims*, DEP'T OF JUST. (May 28, 2020), <https://www.justice.gov/enrd/rights-victims> [<https://perma.cc/HH68-SV7Y>].

111. *Jarrell & Ozymy*, *supra* note 68, at 375–77; *Cassell*, *supra* note 86, at 599.

112. *United States v. BP Prods. N. Am. Inc.*, 610 F. Supp. 2d 655, 680 (S.D. Tex. 2009); *In re Dean*, 527 F.3d 391, 394 (5th Cir. 2008); *Cassell et. al.*, *supra* note 69, at 73–74.

113. *CITGO Petroleum Corp.*, 893 F. Supp. 2d at 851.

114. See *supra* notes 91–93 and accompanying text.

Table 1. Rights, Remedies, and Environmental Justice Victim Examples Covered under the CVRA

<i>Procedural Rights</i>	<i>Examples of Remedies</i>
To be Reasonably Protected from the Accused	Victim Impact Statements
To Receive Timely Notice of Proceedings	Oral Testimony
Not to be Excluded from Public Court Proceedings	Writ of Mandamus
To be Reasonably Heard at any Public Proceeding	Object to Plea Bargains
To Confer with the Attorney for the Government	Seek Restitution from Offender
Full and Timely Restitution	Seek Compensation from the State
Proceedings Free of Unreasonable Delay	Pre-Trial Consultation with Prosecutors
Treated with Fairness and Dignity	
<i>Environmental Justice Victim Examples</i>	
Workers and Families Injured in an Explosion or Acute Release	
Property Owners with Pecuniary Damages	
Environmental Justice Communities with Pecuniary and/or Health Claims	

In *BP*, *W.R. Grace*, and *CITGO*, the courts affirmed a series of rights guaranteed to federal crime victims under the CVRA. We can construct three possible scenarios for environmental justice communities as crime victims from these cases. The first is the example of individual workers and their families who were harmed by industrial facilities, as in *BP*. As in *W.R. Grace*, the second example may be property owners who suffer pecuniary damage from a company as the result of pollution or environmental hazards that damage their property. In *CITGO*, we see the example of individuals living near a major stationary source of pollution who are chronically harmed by knowing violations of federal law that result in systemic health problems.

Critics worry that victims asserting their rights will delay proceedings or complicate the process of prosecutors negotiating pleas.¹¹⁵ These claims have been answered in great part by victims asserting reasonable rights to be acknowledged, informed, and heard in criminal justice proceedings in legal cases.¹¹⁶ As the cases discussed above have shown, victims asserting their rights did not unduly burden prosecutors or delay proceedings.

CITGO is an excellent example of best practices when prosecuting a corporate environmental crime with victims that were proximately harmed by the actions of the defendant. Federal prosecutors put victims at the center of the prosecution and made their victimization a central component of their legal strategy. By making victims central to the case, federal prosecutors helped victims assert their procedural rights and strengthened their own case. Prosecuting environmental crimes in practice is as much about public recognition of such crimes as real crimes with equivalent impacts to street crime as determining who qualifies as a victim or finding a defendant guilty. In *CITGO*, if there were no victims in the nearby environmental justice community, *CITGO* could still have knowingly emitted carcinogenic emissions into the ambient air for nine years,¹¹⁷ but to a jury that likely sounds more like a regulatory

115. See, e.g., Andrew Atkins, Note, *A Complicated Environment: The Problem with Extending Victims' Rights to Victims of Environmental Crimes*, 67 WASH. & LEE L. REV. 1623, 1644-52 (2010); see also Tresa Baldas, *Is Crime Victims' Rights Law Being Misused in Environmental Cases?*, LAW.COM (Apr. 28, 2009), <https://www.law.com/corpocounsel/almID/1202430128532/?sreturn=20201008003142> [<https://perma.cc/M4PX-RP8L>] (describing criticisms and discussion of using the CVRA in environmental crime prosecutions).

116. See Paul G. Cassell, *Barbarians at the Gate? A Reply to the Critics of the Victims' Rights Amendment*, 1999 UTAH L. REV. 479, 506 (1999) (providing a thorough defense of the necessity of enshrining victims' rights in the U.S. Constitution).

117. See e.g., Press Release, U.S. Dep't of Just., Koch Pleads Guilty to Covering Up Environmental Violations at Texas Oil Refinery (Apr. 9, 2001), <https://www.justice.gov/archive/opa/pr/2001/April/153enrd.htm#:~:text=WASHINGTON%2C%20D.C.%20%2D%20Koch%20Petroleum%20Group,refinery%20in%20Corpus%20Christi%2C%20Texas.&text=The%20company's%20West%20Plant%20refinery,benzene%2C%20a%20hazardous%20air%20pollutant> [<https://perma.cc/CK2Z-VGNC>] (showing previous prosecution of Koch Industries, which was similar to *CITGO*). Koch Industries owns two refineries near *CITGO* in Corpus Christi, Texas. On September 9, 2000, Koch and Koch Petroleum were indicted under violations of CERCLA and NESHAP standards as well as for false statements. *Id.* The company failed to install required emissions control devices at its West Plant refinery to properly control benzene emissions that were vented from two oil-water separators. *Id.* On April 9, 2001, the company pled guilty and was sentenced to 60 months of

violation than a serious crime with significant consequences. As with street crime, for the courts, juries, and the general public to properly understand the serious impacts on human health and the environment caused by environmental crimes, particularly corporate environmental crimes, and for them to realize the known and negative health effects environmental justice communities experience by living in close proximity to industrial sources of pollution, victims' rights under the CVRA need to be protected and promoted consistently in environmental crime prosecutions, such as in *CITGO*.¹¹⁸

B. Enforcing Rights in State Courts

The greatest potential for environmental justice communities to be properly considered crime victims under the law today will likely come from amending state constitutions to include specific and enforceable rights for crime victims. While there is legal precedent for these communities under the CVRA, the potential is limited to what federal prosecutors are willing to take on and push for in federal environmental crime prosecutions. The number of these prosecutions have a certain upper limit, even if EPA and DOJ's organizational missions bend properly towards considering environmental justice communities as a priority in criminal enforcement actions. The vast majority of environmental enforcement actions come at the state level, and the potential for states to expand their criminal enforcement efforts to prioritize environmental justice communities is great if they choose to realize it.

The movement to enshrine crime victims' rights in state constitutions has been accelerating rapidly under the Marsy's Law Movement over the past few years. This has brought significant attention to the need to adequately balance the rights of victims in criminal prosecution with the rights of the defendant, to update older crime victims' rights amendments, or to push for amendments where none exist. Today all fifty states provide some statutory protections for crime victims, but there remain significant problems on a number

probation; the company was also required to pay \$10 million in criminal fines as well as \$10 million in community projects. *Id.*

118. Melissa L. Jarrell, *Environmental Crime and Injustice: Media Coverage of a Landmark Environmental Crime Case*, 6 S.W. J. CRIM. JUST. 25, 39 (2009).

of fronts with state protections.¹¹⁹ The goal of the Movement is to remedy these problems inherent in older constituent amendments that may be unclear, lack proper enforcement mechanisms, or remain too limited in scope. In a general sense, these rights boil down to the right to information, to be present at relevant criminal justice proceedings, to due process in terms of notice and the opportunity to be heard, to restitution or compensation for losses suffered as a result of a crime, to protection, and to privacy.¹²⁰ These basic rights are more or less consistent with those found in the CVRA.

We catalog states that have passed their own Marsy's Law in Table 2 below.¹²¹ Beginning with Illinois in 2014, a total of fourteen states have passed a Marsy's Law to date via state constitutional amendment procedures, with two invalidated and one invalidated pending a court ruling, leaving eleven states in total that have enshrined the law in their state constitution. Since Illinois's passage six years ago, the effort has been followed by Montana, North Dakota, and South Dakota in 2016. While Montana voters approved the measure on November 8, 2016, the Montana Supreme Court invalidated the amendment a year later on November 1, 2017, citing an improper process in ratification.¹²² The big push for the law came in 2018, when voters approved amendments in a series of states including Florida, Georgia, Kentucky, Nevada, North Carolina, and Oklahoma. The following year, Pennsylvania approved a Marsy's Law for the state, followed by Wisconsin in 2020.

119. Cassell & Garvin, *supra* note 5, at 100–01, 106 (referencing a 2008 a survey of victims by the Government Accountability Office, which found that a quarter of respondents were unaware they had the right to notice of court hearings).

120. *History of Victims' Rights*, NAT'L CRIME VICTIM L. INST. (2011), https://law.lclark.edu/centers/national_crime_victim_law_institute/about_ncvli/history_of_victims_rights [<https://perma.cc/PUX8-TVPU>].

121. For data used in Tables 2–4 and the discussion herein, see *Marsy's Law for All*, BALLOTPEDIA, https://ballotpedia.org/Marsy%27s_Law_for_All [<https://perma.cc/EN5S-E596>]; *State Efforts, MARSY'S LAW*, <https://www.marsyslaw.us/states> [<https://perma.cc/AZF7-ZDU4>]; *Issues: Constitutional Amendments*, NAT'L CTR. FOR VICTIMS OF CRIME, <https://members.victimsofcrime.org/our-programs/public-policy/amendments> [<https://perma.cc/9AE6-KTJM>]; and *State Victim's Rights Amendments*, NAT'L VICTIMS' CONST. AMEND. PASSAGE (2012), <http://www.nvcap.org/states/pennsylvania.htm> [<https://perma.cc/Q33Z-6MLR>] (passage pending in Pennsylvania).

122. *Montana Supreme Court Strikes Down Marsy's Law as Unconstitutional – ACLU Lawsuit Voids CI-116*, ACLU (Nov. 1, 2017), <https://www.aclu.org/press-releases/montana-supreme-court-strikes-down-marsys-law-unconstitutional-aclu-lawsuit-voids-ci> [<https://perma.cc/9ZBJ-QUV3>].

Since it first passed in California in 2008, the Marsy's Law Movement has gained significant ground across the U.S., as evidenced by the significant number of states noted above following suit.¹²³ The amended state constitutions now grant more substantive procedural rights to crime victims. In Kentucky, a majority of voters supported ratification of the amendment in November 2018, but on June 12, 2019, the Kentucky Supreme Court invalidated the amendment, citing errors in the process stemming from the one-sentence summary of the law on the ballot.¹²⁴ A new constitutional amendment has passed the legislature and is awaiting a vote by the general public. The Pennsylvania amendment is also currently awaiting a court ruling. A judge, citing improper procedure, issued a preliminary injunction preventing a final vote count.¹²⁵

123. See, e.g., CAL. CONST. art. I, § 28; *Marsy's Law*, CAL. DEP'T. OF CORR. & REHAB., <https://www.cdcr.ca.gov/victim-services/marsys-law/> [https://perma.cc/V7WC-CA7P].

124. *Kentucky Constitutional Amendment 1, Marsy's Law Crime Victims Rights Amendment* (2020), BALLOTPEDIA, [https://ballotpedia.org/Kentucky_Constitutional_Amendment_1,_Marsy%27s_Law_Crime_Victims_Rights_Amendment_\(2020\)](https://ballotpedia.org/Kentucky_Constitutional_Amendment_1,_Marsy%27s_Law_Crime_Victims_Rights_Amendment_(2020)) [https://perma.cc/P6NH-D7J4].

125. The ACLU challenged the Pennsylvania measure in court arguing the amendment was "too broad" to pass as a single amendment. See Katie Meyer, *Pa. Voters Approve Marsy's Law by Wide Margin, but Legal Challenge Could Block It*, WHYY (Nov. 6, 2019), <https://whyy.org/articles/pa-voters-approve-marsys-law-by-wide-margin-but-legal-challenge-could-block-it/> [https://perma.cc/A8HL-E27B].

Table 2. States that have Passed a Marsy's Law Amendment

<i>State</i>	<i>Status</i>	<i>Year Passed</i>
California	Enacted	2008
Florida	Enacted	2018
Georgia	Enacted	2018
Illinois	Enacted	2014
Kentucky	Approved but Invalidated	2018
Montana	Approved but Invalidated	2016
Nevada	Enacted	2018
North Carolina	Enacted	2018
North Dakota	Enacted	2016
Ohio	Enacted	2017
Oklahoma	Enacted	2018
Pennsylvania	Pending Court Ruling	2019
South Dakota	Enacted	2016
Wisconsin	Enacted	2020

The Florida law, in particular, grants very specific rights on important fronts, such as a right to “full and timely restitution in every case and from each convicted offender for all losses suffered, both directly and indirectly, by the victim as a result of the criminal conduct.”¹²⁶ We catalog these rights in Table 3.¹²⁷ The structure and language of the Florida amendment comports well with the CVRA and parallels many other states. Much of the language is not new and reflects an emerging pattern across the states.¹²⁸ The categories in Table 3 represent the general rights guaranteed to crime victims by the Florida constitution, but there are more specific procedural rights guaranteed to victims.¹²⁹ For victims of environmental crimes, particularly environmental justice communities, the definition of a

126. Cassell & Garvin, *supra* note 5, at 129-30 (quoting FLA. CONST. art. 1 § 16(b)(9)).

127. *See id.* at 109-34.

128. *Id.* at 134.

129. *See generally* FLA. STAT. § 960.001 (2019). Other victims' rights include examples such as the right for minors who are victimized to not attend the same school as the offender and/or to require the offender to attend a different school. *Id.* Victims of sexual offenses are afforded the right upon request to have a victim advocate present during any deposition of the victim or during a forensic medical examination. *Id.*

victim is a standard one and does not preclude environmental crime victims from being considered crime victims under state law.¹³⁰

Table 3. Crime Victims' Rights Guaranteed by the Florida Marsy's Law

<i>Right</i>	
I.	Notice of Case Proceedings
II.	Attend Court Hearings
III.	To be Heard at Relevant Proceedings
IV.	Proceedings Free from Reasonable Delay
V.	Reasonable Protection
VI.	Protection of Privacy and Dignity
VII.	Restitution
VIII.	Clear Definition of a Victim
IX.	Enforcement Provisions

We catalog the states that have passed previous constitutional amendments prior to this Movement in Table 4. A total of twenty-four states have added constitutional amendment protection for victims' rights in criminal procedures. One of the earliest was Rhode Island, which passed in November 1986. The amendment enshrined the right to dignity and respect, compensation from the perpetrator of the crime and/or the state, and the right to address the court prior to sentencing regarding the impact of the perpetrator's conduct on them as a victim.¹³¹ Michigan passed a crime victims' rights amendment in November 1988 followed by Texas in November 1989. More expansive than Rhode Island, Michigan's amendment mirrored many of the CVRA protections and includes the right to be treated with fairness and respect, to timely disposition of the case, to be reasonably protected from the accused, to notification of court

130. See Cassell & Garvin, *supra* note 5, at 131–32. A victim is defined as “a person who suffers direct or threatened physical, psychological, or financial harm as a result of the commission or attempted commission of a crime or delinquent act or against whom the crime or delinquent act is committed.” FLA. CONST. art. 1 § 16(e). This definition parallels the state of California's definition of a crime victim. See CAL. CONST. art. I, § 28(e) (“As used in this section, a ‘victim’ is a person who suffers direct or threatened physical, psychological, or financial harm as a result of the commission or attempted commission of a crime or delinquent act.”).

131. R.I. CONST. art. 1, § 23.

proceedings, to attend trial, to confer with prosecution, to make a statement at sentencing, to restitution, and to full information about the conviction, sentencing, imprisonment, and release of the accused.¹³²

The Texas amendment included many similar protections for fair treatment, reasonable protection, notification, conferral with prosecution, restitution, and offender information. The right to attend public proceedings was conditional upon whether the court would find the victim's testimony to be materially affected by other testimony at trial, as was the right of the state to define the term "crime victim."¹³³ The current Texas Code of Criminal Procedure defines a crime victim as "a person who is the victim of the offense of sexual assault, kidnapping, aggravated robbery, trafficking of persons, or injury to a child, elderly individual, or disabled individual or who has suffered personal injury or death as a result of the criminal conduct of another."¹³⁴ Reading the Code of Criminal Procedure shows how these rights have been conditioned over time and why the necessity of updated, expansive, and clear rights is needed in many states via a democratic process.¹³⁵

Another wave of crime victims' rights amendments swept the states in the early 1990s including Arizona (1990), New Jersey (1991), Kansas (1992), Colorado (1992), Missouri (1992), Idaho (1994), Maryland (1994), and Utah (1994). The state amendment process fizzled out by the end of the 1990s with Nebraska (1997), Mississippi (1998), Louisiana (1998), and Tennessee (1998). The exception was Oregon, which updated a previous amendment in 2008 that originally passed in 1999. That same year, California was the first to pass a Marsy's Law amendment. Oregon's amendment guaranteed many similar rights to the CVRA, but clarified a few important points, including the right to be consulted regarding any plea bargain involving any violent felony, the application of all rights to all criminal and juvenile court delinquency proceedings, and the definition of a victim as "any person determined by the prosecuting attorney or the court to have suffered direct financial, psychological

132. MICH. CONST. art. 1, § 24.

133. TEX. CONST. art. 1, § 30.

134. TEX. CODE CRIM. PROC. ANN. art. 56.01 (West 2020).

135. These earlier efforts constitute the "first wave" of state constitutional changes. See Paul G. Cassell, *supra* note 72, at 2–4.

or physical harm as a result of a crime and, in the case of a victim who is a minor, the legal guardian of the minor.”¹³⁶

Table 4. States with a Crime Victims’ Rights Constitutional Amendment

<i>State</i>	<i>Status</i>	<i>Year Passed</i>
Alabama	Enacted	1994
Alaska	Enacted	1994
Arizona	Enacted	1990
Colorado	Enacted	1992
Connecticut	Enacted	1996
Idaho	Enacted	1994
Indiana	Enacted	1996
Kansas	Enacted	1992
Louisiana	Enacted	1998
Maryland	Enacted	1994
Michigan	Enacted	1988
Mississippi	Enacted	1998
Missouri	Enacted	1992
Nebraska	Enacted	1997
New Mexico	Enacted	1992
New Jersey	Enacted	1991
Oregon	Enacted	2008
Rhode Island	Enacted	1986
South Carolina	Enacted	1996
Tennessee	Enacted	1998
Texas	Enacted	1989
Virginia	Enacted	1996
Utah	Enacted	1994
Washington	Enacted	1989

In Table 5 we catalog the states that have neither passed a constitutional amendment protecting the rights of crime victims nor passed a Marsy’s Law amendment. In our analysis, we find that a dozen states lack protection from crime victims by constitutional

136. OR. CONST. art. 1, §§ 42(1)(f), 42(2), 43(3)(a).

amendment. Arkansas, Delaware, Hawaii, Iowa, Maine, Massachusetts, Minnesota, New Hampshire, New York, Vermont, West Virginia, and Wyoming only have some protection by statute.¹³⁷

Table 5. States with no Marsy's Law or Constitutional Amendment

<i>State</i>
Arkansas
Delaware
Hawaii
Iowa
Maine
Massachusetts
Minnesota
New Hampshire
New York
Vermont
West Virginia
Wyoming

Table 6 catalogs states that currently do not have a Marsy's Law amendment, that are moving in that direction, or that have recently passed an amendment. Kentucky voters went to the polls on November 3, 2020 to vote on whether to approve the amendment and did so with 63% voting yes in support of the amendment.¹³⁸ In Iowa, both legislative chambers approved a resolution in support of putting an amendment before voters in 2019, and if both chambers approve the same version of the resolution, the amendment will move forward.¹³⁹

137. See sources cited *supra* note 121. Residents of Washington D.C. cannot pass a constitutional amendment for victims' rights. They only have rights guaranteed in the U.S. Constitution. The rights of crime victims are noted in D.C. CODE § 23-1901 (2020). *But cf.* 18 U.S.C. § 3371(b) (residents of the District of Puerto Rico are afforded rights under the CVRA).

138. *Kentucky Constitutional Amendment 1, Marsy's Law Crime Victims Rights Amendment (2020)*, *supra* note 124.

139. See James Lynch, *Crime Victims' Rights Amendment Moves Ahead in Iowa Legislature*, THE COURIER (Feb. 28, 2019), <https://wcfcourier.com/news/local/govt-and-politics/crime-victims-rights-amendment-moves-ahead-in-iowa->

The Idaho legislature passed a bill in support of a Marsy's Law amendment in 2019, but the measure initially failed to pass the senate.¹⁴⁰ For the third attempt across legislative cycles, a joint resolution was needed to place it on the 2020 ballot, which did not occur.¹⁴¹ In both Iowa and Idaho, there appears to be sufficient support in both legislatures and pressure by the Movement to expect a Marsy's Law amendment to go before voters and receive support in the near future. Maine legislators have not yet passed a Marsy's Law amendment.¹⁴² The Mississippi House introduced a Marsy's law measure on February 17, 2020, which passed by a good margin, but the bill died in committee in June and will not make it before voters as a proposed constitutional amendment in the November 2020 election cycle.¹⁴³ It is difficult to speculate if the measure will pass the legislature and be supported by a majority of voters in the next few legislative cycles. Further, on January 3, 2018, New Hampshire passed a joint resolution to introduce a Marsy's Law amendment.¹⁴⁴

legislature/article_97d197a9-f5de-59b0-b344-21f571b46bfd.html
[https://perma.cc/H5UN-22CY].

140. Savannah Cardon, *Updated Version of Marsy's Law Fails Senate, Still Alive in the House*, IDAHO PRESS (Mar. 7, 2019), https://www.idahopress.com/news/local/updated-version-of-marsys-law-fails-senate-still-alive-in-the-house/article_b0d3a71c-133e-5a27-98d0-f3791e225b0a.html [https://perma.cc/47UC-WEF3].

141. See Gretel Kauffman, *Marsy's Law Passes Idaho Senate with Support from Magic Valley Lawmakers*, MAGICVALLEY.COM (Feb. 18, 2019), https://magicvalley.com/news/local/govt-and-politics/marsys-law-passes-idaho-senate-with-support-from-magic-valley-lawmakers/article_c3bae638-f5b0-5d18-ab5d-52103616667d.html [https://perma.cc/3T5Q-UW7C]; *2020 Proposed Ballot Initiatives*, IDAHO SEC'Y OF STATE'S OFF., <https://sos.idaho.gov/elect/inits/2020/index.html> [https://perma.cc/VGC3-4RLS] (providing a list that excludes a Marsy's law amendment from the proposed ballot initiatives in 2020).

142. Elise Romas, *An Explanation of Marsy's Law*, NBC15 (Apr. 1, 2020), <https://www.nbc15.com/content/news/An-explanation-on-Marsys-Law-569299651.html> [https://perma.cc/Z58U-HFRA] (listing Maine among the few states that have recently rejected Marsy's Law); Steve Mistler, *Maine Lawmakers Push for Bill to Codify Victims' Rights in State Constitution*, ME. PUB. (Apr. 5, 2017), <https://www.mainepublic.org/post/maine-lawmakers-push-bill-codify-victims-rights-state-constitution> [https://perma.cc/5V69-H35A].

143. *Mississippi Marsy's Law Crime Victims Rights Amendment (2020)*, BALLOTPEDIA, [https://www.ballotpedia.org/Mississippi_Marsy%27s_Law_Crime_Victims_Rights_Amendment_\(2020\)](https://www.ballotpedia.org/Mississippi_Marsy%27s_Law_Crime_Victims_Rights_Amendment_(2020)) [https://perma.cc/XJ7G-V6DF]; see also H. R. Con. Res. 35, 2020 Leg., Reg. Sess. (Miss. 2020).

144. *New Hampshire Marsy's Law Crime Victims Rights Amendment (2018)*, BALLOTPEDIA,

Although supported in the Senate 20-to-3, the bill was killed in the House by a large margin despite support from Governor Sununu.¹⁴⁵ Additionally, a Marsy's Law amendment for Tennessee was expected to receive a vote in the 2020 legislative cycle, which was cut short due to the Covid-19 pandemic.¹⁴⁶ Nevertheless, the strong voter support for the previous victims' rights amendment in 1998 and current legislative support makes the possibility of legislative passage and voter support in the next few legislative cycles likely.¹⁴⁷

Table 6. Current Marsy's Law Efforts in the States

<i>State</i>	<i>Current Status</i>	<i>Future Approval</i>
Idaho	In the Legislature	Likely
Iowa	In the Legislature	Likely
Kentucky	Recently Approved	Approved
Maine	Failed to Pass the Legislature	Unknown
Mississippi	Failed to Pass the Legislature	Unknown
New Hampshire	Failed to Pass the Legislature	Unknown
Tennessee	In the Legislature	Likely

V. CONCLUSION

The greatest leap forward for environmental justice communities in the legal system appears to be acknowledging how much direct and proximate harm is caused in corporate crime cases and identifying qualifying victims. There is already precedent in federal law for such action and significant potential at the state level now and in the coming years. *W.R. Grace* and *CITGO* helped establish that living in close proximity to industrial sources of pollution has negative ramifications for your health and that individuals in neighboring communities can be physically harmed.

[https://www.ballotpedia.org/New_Hampshire_Marsy%27s_Law_Crime_Victims_Rights_Amendment_\(2018\)](https://www.ballotpedia.org/New_Hampshire_Marsy%27s_Law_Crime_Victims_Rights_Amendment_(2018)), [<https://perma.cc/J5LD-YXG7>].

145. *Id.*; see also *CACR22R General Status*, GEN. CT. OF N.H., http://www.gencourt.state.nh.us/bill_Status/bill_status.aspx?lsr=2844&sy=2018&soption=&txtsessionyear=2018 [<https://perma.cc/QA27-QP8C>].

146. See Jason Hall, *Abbreviated Legislative Session Delays Passage of Marsy's Law This Year*, FOX 17 (May 26, 2020), <https://fox17.com/news/local/abbreviated-legislative-session-delays-passage-of-marsys-law-this-year> [<https://perma.cc/5GU2-BTBU>].

147. *Id.*

As the government noted in their writ in *W.R. Grace*, the status of a crime victim is not limited to those who manifest physical symptoms of injury and whose physical injury constitutes an element of a federal offense.¹⁴⁸ The more difficult step now in federal court proceedings is asserting the extent of the harm caused and the just compensation that is required in situations such as *W.R. Grace* or *CITGO*. In *CITGO*, in his reappraisal of qualifying victims under the CVRA, the judge noted that it is difficult to measure how much the victims were harmed by the defendant's crimes, but it is reasonable to assume that living near heavy industry has negative health implications.¹⁴⁹ This issue is less problematic when applied to *BP*, where company negligence was found to have an immediate effect in the form of death and injury.¹⁵⁰ The company's previous actions showed a significant pattern of underinvesting in maintenance and repairs as well as the safety of workers.¹⁵¹ In certain instances, it

148. "Each of the 34 victim-witnesses suffered harm as a result of their asbestos exposure directly and proximately caused by the conspiracy, knowing endangerment, and the obstruction of justice offenses alleged in the Superseding Indictment." Petition for Writ of Mandamus at 18, *In re United States*, No. 09-70533 (9th Cir. Feb. 24, 2009).

149. See *United States v. CITGO Petroleum Corp.*, 893 F. Supp. 2d 848, 853–54 (S.D. Tex. 2012).

150. In *BP*, victims filed a motion to ask the courts to increase the penalty against the company, arguing \$50 million was an insufficient penalty given the company's history of patterned criminal behavior. The company had a history of underinvesting in maintenance and repairs over the years and had been the defendant in a series of prosecutions for environmental crimes for similar behaviors. Later, the company was found to be guilty of gross negligence, along with Transocean and Haliburton, for their role in causing Deepwater Horizon. The company paid a \$4 billion criminal penalty in the case and faced substantial litigation that caused them to sell off significant corporate assets to pay litigation costs and damages. The company completed their sale of the same Texas City Refinery in 2013. Perhaps victims should have been included in discussions with prosecutors prior to the settlement to facilitate a more substantial penalty for the sake of justice and deterrence. See Laura Walter, *BP Texas City Victims Demand Higher Fines*, EHS TODAY (Nov. 25, 2007), <https://www.ehstoday.com/safety/article/21905920/bp-texas-city-victims-demand-higher-fines> [<https://perma.cc/3U8D-WW2A>]; *BP Completes Sale of Texas City Refinery*, BP (Feb. 1, 2013), <https://www.bp.com/en/global/corporate/news-and-insights/press-releases/bp-completes-sale-of-texas-city-refinery-and-related-assets-to-marathon-petroleum.html> [<https://perma.cc/QT5W-SBKK>].

151. BP paid a \$50 million criminal fine and was ordered to serve 36 months' probation. The company settled a civil suit to provide injunctive relief as a monitoring and control system for benzene wastes costing \$161 million, a \$12 million fine, and \$6 million for a supplemental air control project, as well as to settle a series of civil suits from the families of the injured workers, and to settle claims made by the Occupational Safety and Health Administration. *United States v. BP Products*

may be more troublesome to pinpoint the cause and effect of, or the proper outcome for, the chronic harm caused by illegal emissions over many years from an industrial complex or a vermiculite mine. However, in other instances, it might not seem hard at all.

In their writ in *W.R. Grace*, the prosecution noted that in no other environmental crime have so many people been sickened or killed.¹⁵² It seems unreasonable to assume that the defendant was not responsible for blanketing Libby with vermiculite, and there was no question that some 200 people out of a town of 2,600 were sickened as the result of asbestos contamination. The outcome of the criminal prosecution did not hinge on the connection between asbestos exposure and disease, which is well-documented, or that the company was widely responsible for exposing the town to asbestos. The government failed to convince a jury that the company knew of the asbestos health hazards and knowingly conspired to cover it up. Mesothelioma litigation remains a significant cottage industry for trial lawyers. The courts have found in favor of plaintiffs many times over the past decades on personal injury and wrongful death grounds stemming from a company or manufacturer's failure to warn

N. Am. Inc., 610 F. Supp. 2d 655, 660 (S.D. Tex. 2009); *BP Texas City Clean Air Act Settlement*, EPA (Apr. 4, 2017), <https://www.epa.gov/enforcement/bp-texas-city-clean-air-act-settlement> [<https://perma.cc/FTW6-2Y7L>]; *Texas City Violations and Settlement Agreements*, U.S. DEP'T OF LAB., <https://www.osha.gov/dep/bp/bp.html> [<https://perma.cc/BT2K-TBHN>]; Press Release, U.S. Dep't of Just., BP Exploration [Alaska] Sentenced for Environmental Crime: Court Orders \$500,000 Fine and Establishment of Nationwide Environmental Management System (Feb. 1, 2000), <https://www.justice.gov/archive/opa/pr/1999/September/437enr.htm> [<https://perma.cc/2Y5U-HC6K>] (A \$500,000 fine, 60 months' probation, and a \$15 million monitoring plan was assessed at sentencing. BP was ordered to pay \$20 million in fines and restitution, a \$125 special assessment fee, and serve 36 months' probation. The company settled civil claims by prosecutors and the state of Alaska of about \$280 million and agreed to injunctive relief that included the appointment of an independent monitor and a pipeline management system.); Plea Agreement at 15–16, *United States v. BP Exploration (Alaska), Inc.*, No. 3:07-cr-00125RRB (D. Alaska Oct. 25, 2007); *BP North Slope Clean Water Act Settlement*, EPA (Sept. 22, 2016), <https://www.epa.gov/enforcement/bp-north-slope-clean-water-act-settlement> [<https://perma.cc/D555-EDHG>] (Transocean was sentenced to pay a \$400 million criminal fine, serve five years' probation, and agreed to a \$1 billion civil penalty. Halliburton was sentenced to pay a \$200,000 fine and serve three years' probation and agreed to pay \$1 billion in damages to avoid further litigation in the Deepwater Horizon criminal prosecution.); Joint Memorandum in Support of Proposed Guilty Plea at 11, *United States v. BP Exploration & Prod. Inc.*, No. 12-292-SSV-DEK (E.D. La. Jan. 16, 2013); see generally Cooperation Guilty Plea Agreement, *United States v. Transocean Deepwater Inc.*, No. 13-001-JTM-SS (E.D. La. Jan. 3, 2013).

152. See Petition for Writ of Mandamus at 1, 7–8, *In re United States*, No. 09-70533.

employees or consumers about the significant danger of exposure to asbestos. For example, in 2017 there were 4,450 asbestos lawsuits filed in the United States.¹⁵³

The federal government assumed much of the cost for remediation and health monitoring when the defendant in *W.R. Grace* was found not guilty. In *CITGO*, the defendant was found guilty, but the court was unable to make the proper linkages to determine how much responsibility *CITGO* would bear for emitting carcinogenic substances into the ambient air for some nine years in the neighboring community, and the case was reversed upon appeal.¹⁵⁴ Making these connections is a significant hurdle for victims to overcome in order to assert their right to full and timely restitution under the CVRA or state environmental crime protections.

EPA-CID investigators and federal prosecutors should change their enforcement strategy to prioritize harms against environmental justice communities and apply the CVRA more frequently. The same could and should be used at the state level. Congress could seek to enhance and expand the scope of the Crime Victims Fund beyond its roughly \$6 billion balance, as these payouts are limited to crime-related medical costs such as counseling, medical, funeral, burial costs, or lost wages.¹⁵⁵ Either government itself must foot the bill to protect these communities via mechanisms to significantly reduce toxic emissions or through buyouts to remove

153. KCIC, ASBESTOS LITIGATION: 2017 YEAR IN REVIEW (2018), <https://www.kcic.com/asset/pdf/KCIC-2017-AsbestosReport.pdf> [<https://perma.cc/9WGM-WCRZ>]. See Gordon Gibb, *The W.R. Grace Trial: Did Mesothelioma Win, or Lose?*, LAWYERS & SETTLEMENTS.COM (May 18, 2009), https://www.lawyersandsettlements.com/features/asbestos_mesothelioma/mesothelioma-cancer.html, [<https://perma.cc/J9AJ-N7GC>]; Curtis Weyant, *Mesothelioma Lawsuit*, CONSUMER SAFETY (Aug. 20, 2020), <https://www.consumersafety.org/product-lawsuits/mesothelioma/> [<https://perma.cc/JP84-EY64>].

154. The Fifth Circuit Court of Appeals reversed and remanded the *CITGO* case in 2015. The court argued the open-air equalization tanks were not oil-water separator tanks regulated under the CAA, and the takings charges under the MBTA were limited to intentional or deliberate takings. Commercial activity that caused the indirect caused the death of the migratory birds did not qualify as illegal taking according to the court. *United States v. CITGO Petroleum Corp.*, 801 F.3d 477, 494 (5th Cir. 2015).

155. *Crime Victims Fund*, OFF. FOR VICTIMS OF CRIME, <https://ovc.ojp.gov/sites/g/files/xyckuh226/files/pubs/crimevictimsfundfs/intro.html> [<https://perma.cc/F27F-U37X>].

them from harm, or it must allow the harm and pay for remediation or medical costs.

Morally and politically, all of these solutions seem unsatisfying. Either federal or state prosecutors need to radically ramp up their efforts to protect the spectrum of rights guaranteed to environmental justice communities under applicable laws when they are victims of environmental crimes, give them a voice, protect them from the accused, and work to have guilty parties pay damages to make them whole, as is the case with any other victim of a violent crime that is protected by these same statutes.

The criminal enforcement and prosecution of federal environmental laws have their limits. EPA-CID employed about 145 criminal investigators in 2019, down from 154 in 2015.¹⁵⁶ In FY 2015, the number of employees that performed full-time enforcement work in any capacity fell to a mere 2,880 personnel.¹⁵⁷ EPA's nominal budget has mostly increased over time, but adjusted for inflation, it is as low as it was in the 1980s during the hostile Reagan Era when Anne Gorsuch attempted to destabilize the agency's enforcement efforts.¹⁵⁸ Of equal importance is not just resources, but the desire to focus the mission of EPA-CID, DOJ-ECS, and other relevant governmental entities towards better enforcement and prosecution of stationary sources of pollution near environmental justice communities.¹⁵⁹

Perhaps the greatest potential for environmental justice communities to find legal recognition as crime victims will come in the U.S. Although all states have some statutory protections for crime victims or constitutional amendments, the Marsy's Law

156. PUB. EMPLS. FOR ENV'T RESP., EPA CID AGENT COUNT, https://www.peer.org/wp-content/uploads/2019/11/11_21_19-Federal_Pollution_EPA_CID_Agent_Count.pdf [<https://perma.cc/676B-ZXY6>]. See Joshua Ozymy & Melissa L. Jarrell, *Wielding the Green Stick: Criminal Enforcement at the EPA Under the Bush and Obama Administrations*, 24 ENV'T POL. 38, 40, 42–43 (2015).

157. Joel A. Mintz, *Running on Fumes: The Development of New EPA Regulations in an Era of Scarcity*, 46 ENV'T L. REP., 10510, 10511 (2016).

158. Joshua Ozymy et al., *supra* note 44.

159. See also Margaret Garvin & Douglas E. Beloof, *Crime Victim Agency: Independent Lawyers for Sexual Assault Victims*, 13 OHIO STATE J. CRIM. L. 69, 72 (2015). Another proposal is to incorporate structural changes in the criminal justice system to give victims greater agency at the federal level than currently exist. One idea is the creation of a version of the Special Victim Counsel (SVC) that is integrated into the military justice system to assist sexual assault victims. *Id.*

Movement seeks to further empower victims through clear, substantive, and enforceable language that can be added to each state's constitution. The Movement's *modus operandi* has been to seek constitutional changes to give victims access to enforceable rights. With public salience attached to the crime victims' rights agenda and clear rights imbued in state constitutions, these changes will have the intended effects: victims can stand up for their own rights and representation in criminal proceedings rather than having such rights be conditional or seen as privileges by prosecutors and doled out arbitrarily by the courts. Our hope is that the environmental justice movement will reemerge in the current fight over racial injustice in the United States and seek communion with the CVRM so that members of environmental justice communities might be able to better assert their constitutional rights, be protected from harm, and find compensation for their injuries.