

# DEFINING “VICTIM” THROUGH HARM: CRIME VICTIM STATUS IN THE CRIME VICTIMS’ RIGHTS ACT AND OTHER VICTIMS’ RIGHTS ENACTMENTS

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## ABSTRACT

*Who qualifies as a “victim” is the foundational question for the Crime Victims’ Rights Act (“CVRA” or “Act”) and other crime victims’ rights laws. This article provides the first comprehensive exploration of this “victim” definition question. It traces how the CVRA (and many states) define “victim” as broadly covering anyone who has been harmed as the result of a crime.*

*This article begins by reviewing how the definition of “victim” has evolved in the criminal justice system since the Nation’s founding. In the last several decades, as crime victims’ rights protections have proliferated, it has become necessary to define “victim” with precision. The definition of “victim” has evolved from a person who was the target of a crime to a much broader understanding of a person who has suffered harm as the result of a crime. The CVRA provides a good illustration of the expansive contemporary definition of “crime victim”—a definition not fully appreciated by courts, prosecutors, and other actors in the federal criminal justice system. The Act defines “victim” as a person “directly and proximately harmed” by a crime, extending crime victims’ protections to many persons who may not have been the target of a crime.*

*This article then analyzes important categories of crimes—violent, property, firearms, environmental, and governmental-process crimes—where “victim” definition issues often occur. It also takes a close look at a significant recent case involving the CVRA’s crime victim definition: the Boeing 737 MAX crashes case.*

*The article concludes by arguing that legislators should adopt, and courts should enforce, a broad conception of a “crime victim” as anyone who suffers harm from a crime. This conception would ensure that victims’ rights are extended to all who need their protection.*

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The authors thank Shima Baradaran Baughman, Teneille Brown, Russell Butler, Patricia Cassell, Lingxi Chenyang, Edna Erez, Meg Garvin, Amos Guiora, Ruhan Nagra, Victor Stone, Matt Tokson, and Steven Twist for their helpful comments. The authors remain solely responsible for any errors. © 2024, Paul G. Cassell and Michael Ray Morris, Jr.

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## INTRODUCTION

In recent decades, crime victims’ rights enactments have spread across federal and state criminal justice systems,<sup>1</sup> promising victims protections throughout the criminal justice process, such as the rights to be heard at a bail hearing, to confer with a prosecutor about a plea bargain, and to provide an impact statement at sentencing. Because these rights are afforded to “crime victims,” an important foundational question is who qualifies as a victim.

This article provides the first comprehensive legal analysis of this question. The article’s thesis is that crime victims’ rights enactments originally focused only on persons targeted by a particular crime, such as the person who was the victim of a robbery or a murder. But as crime victims’ rights laws have expanded in recent decades, a broader conception of victim status has developed. Now, in America (and elsewhere), crime victim status exists if a person has been harmed as the result of a crime, even in situations where the person harmed was not the specific target.<sup>2</sup>

Expanding the conception of “victim” makes sense considering the rationale for protecting crime victims’ rights. In enacting such measures, legislators inject the victim’s voice into criminal justice processes for many reasons that relate to harm. For example, victims’ testimony about the harm they have suffered may provide useful information to a judge handling a case. Victims’ involvement in court hearings may provide useful psychological or cathartic benefits for those persons and help them heal from the harm they have suffered. And victims’ participation may increase public confidence that the outcomes of criminal proceedings reflect the harm that a guilty criminal has caused. Broadly defining the victims who are allowed to participate in criminal justice processes helps to achieve all these goals.<sup>3</sup>

This article uses the influential federal Crime Victims’ Rights Act (“CVRA” or “Act”)<sup>4</sup> as the springboard for its analysis. Adopted in 2004, the CVRA is the Nation’s preeminent crime victims’ rights protection. It expressly adopts a harm approach for defining the crime victims protected under the Act. Specifically, the CVRA defines a “crime victim” as a person “directly and proximately harmed” as a result of a federal crime.<sup>5</sup> Now that the CVRA has been in effect for nearly two decades, it has produced a body of victims’ rights caselaw that can be cataloged,

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1. See Paul G. Cassell & Margaret Garvin, *Protecting Crime Victims in State Constitutions: The Example of the New Marsy’s Law for Florida*, 110 J. CRIM. L. & CRIMINOLOGY 99, 104–05 (2019); Paul G. Cassell, *The Maturing Victims’ Rights Movement*, 13 OHIO ST. J. CRIM. L. 1, 2 (2015) [hereinafter Cassell, *Victims’ Rights Movement*]. See generally DOUGLAS EVAN BELOOF, PAUL G. CASSELL, MARGARET GARVIN & STEVEN J. TWIST, VICTIMS IN CRIMINAL PROCEDURE (4th ed. 2018) (canvassing the sources of victim participation laws).

2. See *infra* notes 127–32 and accompanying text.

3. See generally Paul G. Cassell & Edna Erez, *How Victim Impact Statements Promote Justice: Evidence from the Content of Statements Delivered in Larry Nassar’s Sentencing*, 107 MARQUETTE L. REV. \_\_ (forthcoming 2024) (discussing how victim participation in criminal proceedings promotes justice); Paul G. Cassell, *Listening to Crime Victims . . . Merciful and Others*, 102 TEX. L. REV. \_\_ (forthcoming 2024) (discussing how victim participation in criminal justice process is important).

4. 18 U.S.C. § 3771.

5. 18 U.S.C. § 3771(e)(2).

analyzed, and critiqued. This caselaw has produced an expansive conception of protected “victims” that may not be fully appreciated by courts, prosecutors, and other actors in the federal criminal justice system.

This article proceeds in four parts. Part I provides an overview of the evolving role of crime victims in the criminal justice process.<sup>6</sup> It traces how crime victims have gone from originally controlling private prosecutions to becoming the exploited and “forgotten person” in a system of public prosecutions. In recent decades, as a response to that neglect, crime victims’ rights laws have been adopted across the country.<sup>7</sup> While initially, those laws may have protected only an individual who was the target of a crime, the laws have now generally expanded to protect all who have suffered harm as the result of a crime. The CVRA is the leading example of such a law, employing a state-of-the-art definition of a victim as an individual who has been “directly and proximately harmed.”<sup>8</sup>

Part II reviews the CVRA’s victim definition. It first reviews what kinds of harms trigger victim status. It next examines the connection between a crime and a harm that constitutes “direct and proximate” harm. It finishes by considering whether creating a risk is sufficient harm to trigger victim status.

With this context in mind, Part III applies the CVRA to important categories of crimes. This part analyses the CVRA victim definition in the context of violent, property, firearms, environmental, and governmental process crimes. It concludes by reviewing the important recent case of *United States v. The Boeing Company*,<sup>9</sup> which properly and broadly interpreted the CVRA to protect family members who lost loved ones in two Boeing 737 MAX crashes caused by Boeing’s conspiracy to defraud the FAA.

In Part IV, this article concludes by proposing that legislators seeking to protect crime victims’ interests in the criminal justice process—and courts interpreting those protections—should expansively define “victims” as those who suffer any harm of any type from a crime. A “harm” approach to identifying victims ensures that crime victims’ rights are extended to all who need those rights.

## I. THE VICTIM’S ROLE IN THE CRIMINAL JUSTICE PROCESS

The victim’s role in the American criminal justice system has changed over time. Initially, crime victims were deeply involved, often bringing their own private prosecutions. But through the later part of the nineteenth century and well into the twentieth, victims were forgotten. In the last several decades, however, victims have regained an important position in these processes through the enactment of crime victims’ rights protections. These provisions have necessitated a more

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6. We use the term “criminal justice” in its aspirational sense, acknowledging that justice may not have always been provided. See Sara Mayeux, *The Idea of “The Criminal Justice System,”* 45 AM. J. CRIM. L. 55 (2018).

7. See *infra* notes 48–71 and accompanying text.

8. 18 U.S.C. § 3771(e)(2)(A).

9. *United States v. Boeing Co.*, No. 4:21-cr-0005, 2022 WL 13829875, at \*9 (N.D. Tex. Oct. 21, 2022).

precise definition of the “victims” who can assert these rights. Increasingly, crime victims’ rights laws afford protections to any person<sup>10</sup> who has suffered harm as a result of a crime.

### A. *The Victim’s Evolving Role in the Criminal Justice Process*

#### 1. Victims as Private Prosecutors

At our country’s founding, crime victims played an important part in criminal prosecutions, often bringing their own “private” prosecutions. The United States inherited criminal justice practices from England. The result was that in colonial America, as in England, victims often personally investigated crimes committed against them.<sup>11</sup> After identifying the perpetrator, the victim would then hire legal counsel and arrange to have the offender prosecuted.<sup>12</sup> In this system of private prosecution, identifying who was a “victim” with a sufficient stake to prosecute was largely self-regulating. A primary goal of the system was to compensate victims for losses they suffered from the crime, and so restitution was a principal sentencing outcome.<sup>13</sup>

Because victims were often prosecutors in criminal proceedings, identifying separate “victim” interests was largely unnecessary. But the term “victim” was well known at the country’s founding. The term “victim” came from the Latin *victima*, a word used to describe animals sacrificed in religious ceremonies.<sup>14</sup> From there, the term developed to describe a person or living thing who was harmed by a wrong.<sup>15</sup> By the time the Constitution was drafted, the term “victim” was understood to broadly mean “a sacrifice,” “[s]omething slain for a sacrifice,” or “something destroyed.”<sup>16</sup>

The term “victim”—in this broad sense of someone harmed—has a long history in American court decisions. The first use of the term “victim” appeared in a published federal court decision, *Chisholm v. Georgia*, in which the Supreme Court referred to history predating the Constitution when “individuals had been victims to the oppression of States.”<sup>17</sup> A few years later, in *Marbury v. Madison*, the Court

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10. This article generally assumes that a person is an individual and does not explore the question of whether business and governmental entities can also claim victim protection. Cf. 1 U.S.C. § 1 (defining “person” as including business entities as well as individuals). Similarly, this article does not examine interesting issues surrounding animals as victims. See Melissa L. Jarrell, Joshua Ozymy & William L. Sandel, *Where the Wild Things Are: Animal Victimization at the Intersection of Wildlife Law and Environmental Law*, 3 CONTEMP. JUST. REV. 319, 319 (2017); Douglas E. Beloof, *Crime Victims’ Rights: Critical Concepts for Animal Rights*, 7 ANIMAL L. 19 (2001).

11. See, e.g., 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, 484–85 (2005); William F. McDonald, *Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim*, 13 AM. CRIM. L. REV. 649 (1976).

12. Jonathan Barth, *Criminal Prosecution in American History: Private or Public*, 67 S.D. L. REV. 119, 124–34 (2022).

13. McDonald, *supra* note 11, at 652–53; see also Barth, *supra* note 12, at 137 (noting importance of restitution).

14. See Andrew Nash, Note, *Victims by Definition*, 85 WASH. U. L. REV. 1419, 1421 (2008).

15. *Id.* at 1423.

16. *Victim*, JOHN WALKER, A CRITICAL PRONOUNCING DICTIONARY (1st ed. 1791); see also *Victim*, NOAH WEBSTER, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1st ed. 1828) (defining victim as a “living being sacrificed to some deity” or “something destroyed” or “something sacrificed in the pursuit of an object”).

17. *Chisholm v. Georgia*, 2 U.S. 419, 423 (1793).

discussed bills of attainder, wondering whether, should such a bill be passed, “must the court condemn to death those victims whom the constitution endeavors to preserve?”<sup>18</sup> In *The Antelope*, the Court observed that the “African slave trade is contrary to the law of nature” and asked, “[c]an those who have themselves renounced this law, be permitted to participate in its effects by purchasing the beings who are its victims?”<sup>19</sup>

During the first half of the nineteenth century, victims played the critical role of prosecutors in the criminal justice system. One of the most thorough studies of private prosecution in the United States—Professor Steinberg’s review of early prosecution practices in Philadelphia—reveals that even after the colonization of America, victims typically continued to prosecute cases themselves.<sup>20</sup> As recounted by Steinberg, in most cases, the public prosecutor “adopted a stance of passive neutrality . . . . Most of the time, he was superseded either by a private attorney or simply let the private prosecutor and his witnesses take the stand and state their case.”<sup>21</sup>

## 2. Victims as the Forgotten Person in the System

During the latter part of the nineteenth century, victims began to fade from the prominence that they had previously held.<sup>22</sup> For reasons not fully understood, public prosecutors steadily displaced the victims’ former prosecuting role.<sup>23</sup> Public prosecutors gradually assumed full control over prosecution decisions, and any separate victims’ rights in criminal proceedings essentially disappeared.

Just as victims receded into the background, so too was the term “victim” rarely used in published criminal decisions. During the nineteenth century, most criminal prosecutions were state prosecutions.<sup>24</sup> State decisions rarely discussed victims’ rights or the meaning of the term “victim.”<sup>25</sup> One detailed discussion was an 1860 California Supreme Court opinion, which reviewed whether using the word “victim” in jury instructions prejudiced a defendant convicted of murder.<sup>26</sup> In reversing the conviction, the court explained that “[w]hen the deceased is referred to as ‘a victim,’ the impression is naturally created that some unlawful power or dominion had been exerted over his person.”<sup>27</sup>

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18. *Marbury v. Madison*, 5 U.S. 137, 179 (1803).

19. *The Antelope*, 23 U.S. (10 Wheat.) 66, 66, 121 (1825) (discussing rights of enslaved persons).

20. ALLEN STEINBERG, *THE TRANSFORMATION OF CRIMINAL JUSTICE: PHILADELPHIA 1800-1890*, at 56–78 (1989).

21. *Id.* at 82.

22. See Barth, *supra* note 12, at 119 (noting that a “great deal of confusion and mystery surrounds the history of American criminal prosecution”); see also *id.* at 168–74 (reviewing history); STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* 15 (2015).

23. See, e.g., Abraham Goldstein, *Defining the Role of the Victim in Criminal Prosecution*, 52 *MISS. L.J.* 515, 518 (1982) (attributing victim exclusion to historical misunderstanding). See generally BELOOF ET AL., *supra* note 1, at 16–23 (discussing various reasons why American criminal justice might have evolved to exclude victims).

24. See Barth, *supra* note 12, at 149.

25. See Nash, *supra* note 14, at 1422.

26. *People v. Williams*, 17 Cal. 142, 147 (1860).

27. *Id.* See generally Nash, *supra* note 14, at 1422 (tracing the history of the term “victim” and its connotations).



As the country moved into the twentieth century, the criminal justice system evolved to the point where the victim was "the forgotten [person] of the system."<sup>28</sup> Thus, through the first half of the century, the issue of defining "victim" was not often litigated. A handful of cases obliquely considered whether an individual was an accomplice to a crime rather than a victim.<sup>29</sup> Besides that—and, of course, testifying as prosecution witnesses at trials—victims were essentially absent from criminal cases and reported opinions.<sup>30</sup>

### 3. The Return of the Victim in Criminal Justice

One reason that victims were unmentioned in criminal cases was that restitution had disappeared from its previously important role in the process.<sup>31</sup> However, as dissatisfaction with the criminal justice system developed in the 1960s and 1970s, reformers searched for alternatives to traditional carceral sentences, again increasing interest in restitution and compensation.<sup>32</sup> Thus, in the latter half of the twentieth century, victims once again began to play an important part in the criminal justice system.

As crime victim restitution and compensation statutes came into play, determining who were the "victims" entitled to use them became important. But this definitional issue was seemingly an afterthought. A comprehensive 1982 survey of restitution laws found that while most states authorized criminal restitution of some type,<sup>33</sup> the statutes and regulations surprisingly suffered from an "extreme . . . lack of precision in defining eligible recipients."<sup>34</sup> For example, New York's restitution statute allowed awards to be made but failed to specify who could receive them.<sup>35</sup> Other states simply used the otherwise undefined term of "aggrieved party" to decide who could receive restitution.<sup>36</sup>

As courts and legislatures developed experience with restitution and compensation provisions, definitions of the "victims" entitled to payments began to appear. For example, a 1980 decision by the Oregon Court of Appeals considered whether

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28. McDonald, *supra* note 11, at 650 (concluding that in "contemporary criminal justice the victim serves only as a means to an end, namely a piece of evidence to be used by the state to obtain a conviction"); accord Barth, *supra* note 12, at 175 (noting that "[b]y the early twentieth century, the victim was almost entirely cut off from criminal proceedings").

29. See, e.g., *Westenrider v. United States*, 134 F.2d 772 (9th Cir. 1943) (finding that in prosecution for fraudulently obtaining construction loan, owner of property was the "victim"); *Commonwealth v. Sierakowski*, 35 A.2d 790, 793 (Pa. Super. Ct. 1944) (explaining that a woman submitting herself to doctor for an abortion is not an "accomplice" or "particeps criminis" but is regarded rather as a "victim").

30. See *Beloof & Cassell*, *supra* note 11, at 494–98.

31. See Alan T. Harland, *Monetary Remedies for the Victims of Crime: Assessing the Role of the Criminal Courts*, 30 UCLA L. REV. 52, 58–59 (1982).

32. See Note, *Victim Restitution in the Criminal Process: A Procedural Analysis*, 97 HARV. L. REV. 931, 931–32 (1984).

33. Harland, *supra* note 31, at 64–77.

34. *Id.* at 78.

35. *Id.* at 78 n.164 (citing N.Y. PENAL LAW § 65.10(2)(g) (McKinney 1981)).

36. *Id.* at 78 n.165 (citing, e.g., FLA. STAT. ANN. §§ 945.091(5)(a), 947.181(1) (West 1982); KAN. STAT. ANN. § 21-4610(4) (1981); KY. REV. STAT. ANN. § 533.030(3) (Bobbs-Merrill Supp. 1982); NEB. REV. STAT. § 29-2219(j) (1979); UTAH CODE ANN. § 77-35-17 (LexisNexis 1978)).

a defendant who had stolen the guitar of a professional musician could be required to pay restitution to the musician and a pawnshop where the guitar had been pawned.<sup>37</sup> The Oregon legislature had recently amended the state's restitution statute to define a "victim" as "any person whom the court determines has suffered pecuniary damages as a result of the defendant's criminal activities" but not including "any co-participant in the defendant's criminal activities."<sup>38</sup> The court noted that the legislature had intended to provide restitution to anyone who had suffered "special damages . . . arising out of the facts or events constituting the defendant's criminal activities" and awarded restitution to both the musician and the pawnshop (who had paid money to the defendant) as the theft's "victims."<sup>39</sup>

In addition to restitution and compensation issues, more broadly defined crime victims' rights began to come into play. The victim's absence from criminal processes conflicted with "a public sense of justice keen enough that it [] found voice in a nationwide 'victims' rights' movement."<sup>40</sup> Victims' advocates—who hailed from diverse backgrounds, including those concerned about women's rights, civil rights, and "law and order"—urged giving more attention to victims' concerns, including protecting victims' rights to be notified of court hearings, to attend those hearings, and to be heard at appropriate points in the process.<sup>41</sup> Similar developments also occurred internationally.<sup>42</sup>

The victims' rights movement received considerable momentum in 1982 when the President's Task Force on Victims of Crime ("Task Force") reviewed the treatment of victims.<sup>43</sup> In a report issued that year, the Task Force concluded that the criminal justice system "has lost an essential balance . . . . [T]he system has deprived the innocent, the honest, and the helpless of its protection. . . . The victims of crime have been transformed into a group oppressively burdened by a system designed to protect them. This oppression must be redressed."<sup>44</sup>

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37. *State v. Lewis*, 619 P.2d 684, 685–86 (Or. Ct. App. 1980).

38. *Id.*

39. *Id.*

40. *Payne v. Tennessee*, 501 U.S. 808, 834 (1991) (Scalia, J., concurring) (internal quotation marks omitted). See generally Douglas E. Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289, 289 (1999); Paul G. Cassell, *Balancing the Scales of Justice: The Case for and Effects of Utah's Victims' Rights Amendment*, 1994 UTAH L. REV. 1373, 1373 (1994) [hereinafter *Balancing the Scales*].

41. See Shirley S. Abrahamson, *Redefining Roles: The Victims' Rights Movement*, 1985 UTAH L. REV. 517, 543–47 (1985). See generally Douglas E. Beloof, *The Third Wave of Victims' Rights: Standing, Remedy, and Review*, 2005 BYU L. REV. 255, 257 (2005); *Balancing the Scales*, *supra* note 40, at 1380–400.

42. See, e.g., HUM. RTS. WATCH, MIXED RESULTS: U.S. POLICY AND INTERNATIONAL STANDARDS ON THE RIGHTS AND INTERESTS OF VICTIMS OF CRIME 3–8 (2008), <https://www.hrw.org/report/2008/09/23/mixed-results/us-policy-and-international-standards-rights-and-interests-victims> [<https://perma.cc/8HFD-A8FY>] (discussing the many "international human rights instruments [that] address or touch on [crime] victims' rights"); Marie Manikis, *Imagining the Future of Victims' Rights in Canada: A Comparative Perspective*, 13 OHIO ST. J. CRIM. L. 163, 164 (2015) (examining the evolution of Canadian victims' rights laws).

43. LOUIS H. HERRINGTON, OFF. FOR VICTIMS OF CRIME, FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME (1982), <https://www.ojp.gov/pdffiles1/ovc/87299.pdf>.

44. *Id.* at 114.



The Task Force advocated multiple reforms, such as requiring prosecutors to notify victims of all court proceedings and bringing victims’ views regarding bail, plea bargains, sentences, and restitution to the court’s attention.<sup>45</sup> The Task Force also urged that courts allow victims and their families to attend trials (even if they would be called as witnesses), deliver victim impact statements at sentencing, and generously award restitution.<sup>46</sup> In its most sweeping recommendation, the Task Force proposed that Congress should adopt and send to the states for ratification a federal constitutional amendment protecting crime victims’ rights “to be present and to be heard at all critical stages of judicial proceedings.”<sup>47</sup>

### *B. Modern Victims’ Rights Protections and “Victim” Definitions in the States*

The President’s Task Force’s recommendations marked the starting point for modern victims’ rights provisions. After release of the recommendations, victims’ rights advocates began to secure victims’ rights protections in many state constitutions and legislative codes.<sup>48</sup> And these enactments also increasingly contained definitions of the “victims” who could claim those protections.

While the Task Force had urged a federal constitutional amendment to protect crime victims, advocates for crime victims’ rights recognized the difficulty of amending the Constitution. So instead of pursuing a federal amendment, crime victims’ advocates turned their attention to amending state constitutions. The enactment of state victims’ rights amendments began with California in 1982,<sup>49</sup> followed by Rhode Island in 1986.<sup>50</sup> In the ensuing decades, victims’ rights advocates had considerable success with this “states first” strategy,<sup>51</sup> with about thirty-five states adding victims’ rights amendments to their state constitutions.<sup>52</sup> In addition to these state constitutional amendments, all fifty states enacted statutory protections for victims’ rights.<sup>53</sup>

These state constitutional amendments and statutes often defined the “victims” who were entitled to exercise their rights.<sup>54</sup> Generally speaking, victim status could be defined in two different ways. One way identified a victim in terms of harm suffered from a crime—or the harmful-effects approach.<sup>55</sup> The other, potentially

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45. *Id.* at 63.

46. *Id.* at 72–73.

47. *Id.* at 114.

48. See U.S. DEP’T OF JUST., CRIME VICTIMS’ RIGHTS IN AMERICA: A HISTORICAL OVERVIEW (2005), [https://www.ncjrs.gov/ovc\\_archives/ncvrvw/2005/pg4b.html](https://www.ncjrs.gov/ovc_archives/ncvrvw/2005/pg4b.html).

49. *Id.*; CAL. CONST. art. I, § 28.

50. R.I. CONST. art. I, § 23.

51. See S. REP. NO. 108-191, at 3 (2003).

52. See Cassell, *supra* note 3, at 2.

53. See Beloof, *supra* note 41, at 257.

54. See generally PEGGY M. TOBOLOWSKY, DOUGLAS E. BELOOF, MARIO T. GABOURY, ARRICK L. JACKSON & ASHLEY G. BLACKBURN, CRIME VICTIM RIGHTS AND REMEDIES 17–18 (3d ed. 2016).

55. See *infra* note 65.

narrower way, identified a victim as being the specific object of the crime—or the target-of-the-crime approach.<sup>56</sup>

An example of how the two approaches might lead to different results comes from a recent case, *United States v. The Boeing Company*.<sup>57</sup> There, Boeing admitted that it engaged in a conspiracy to deceive the Federal Aviation Administration (“FAA”) about the safety of its new 737 MAX aircraft.<sup>58</sup> Arguably, as a result of that conspiracy, two such planes crashed, killing all passengers and crew aboard.<sup>59</sup> Under a target-of-the-crime approach, it is possible to argue that the “victim” of Boeing’s crime was only the FAA. On the other hand, under a harmful-effects approach, if Boeing’s lies to the FAA led to the two plane crashes, then those killed were “victims,” and their representatives could step into their shoes to assert those victims’ rights. Over time, the harmful-effects approach has become ascendant, as reflected in the leading legal dictionary, *Black’s Law Dictionary*. In its sixth edition in 1990, *Black’s* defined “victim” as “[t]he person who is the object of a crime or tort, as the victim of a robbery is the person robbed.”<sup>60</sup> In its seventh edition in 1999, *Black’s* dropped the object-of-the-crime definition in favor of exclusively defining “victim” in terms of harm. The seventh edition defined “victim” solely as “[a] person harmed by a crime, tort, or other wrong.”<sup>61</sup> Since then, this harmful-effect definition has been the exclusive definition in *Black’s*.<sup>62</sup>

Today, the most frequent way “victim” is defined is “in terms of the harm caused to the victim by the crime.”<sup>63</sup> California, the first state to amend its constitution to protect victims’ rights, defined “victim” 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.”<sup>64</sup> A majority of the other states have followed suit, adding constitutional amendments or statutes that include similar definitions of “victim” as an individual suffering harm. These states currently include (in addition to California) Connecticut, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, Vermont, Virginia, and Wyoming.<sup>65</sup>

56. See *infra* note 67.

57. *United States v. Boeing Co.*, No. 4:21-cr-0005, 2022 WL 13829875, at \*1 (N.D. Tex. Oct. 21, 2022). The case is discussed in more detail, *infra*, in notes 437–78 and accompanying text.

58. *Id.* at \*3.

59. *Id.*

60. *Victim*, BLACK’S LAW DICTIONARY (6th ed. 1990); see *United States v. Terry*, 142 F.3d 702, 710 (4th Cir. 1998) (discussing this point).

61. *Victim*, BLACK’S LAW DICTIONARY (7th ed. 1999).

62. *Victim*, BLACK’S LAW DICTIONARY (11th ed. 2019).

63. See TOBOLOWSKY ET AL., *supra* note 54, at 16; see also *United States v. Mathews*, 874 F.3d 698, 706 (11th Cir. 2017).

64. CAL. CONST. art. I, § 28(e).

65. See, e.g., IDAHO CODE ANN. § 19-5306(5)(a) (West 2023) (defining “victim” as “an individual who suffers direct or threatened physical, financial or emotional harm as the result of the commission of a crime . . . .”); 725 ILL. COMP. STAT. ANN. 120/3(a) (2023) (defining “victim” as “any natural person determined by the prosecutor or the court to have suffered direct physical or psychological harm as a result of a violent crime perpetrated or

Other states have used the target-of-the-crime approach for defining the term “victim,” which recognizes victim status only for those whom a crime has been committed against. For example, Alabama defines “victim” simply as “[a] person

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attempted against that person or direct physical or psychological harm”); IND. CODE ANN. § 35-40-4-8 (West 2023) (defining “victim” as “a person that has suffered harm as a result of a crime that was perpetrated directly against the person”); KAN. STAT. ANN. § 74-7333(b) (West 2023) (defining “victim” as “any person who suffers direct or threatened physical, emotional or financial harm as the result of the commission or attempted commission of a crime against such person”); KY. REV. STAT. ANN. § 421.500(1)(a) (West 2023) (defining “victim” as “an individual directly and proximately harmed as a result of” a crime); MICH. COMP. LAWS ANN. § 18.351(k) (West 2023) (defining “victim” as “a person who suffers a personal injury as a direct result of a crime”); MINN. STAT. ANN. § 611A.01(b) (West 2023) (defining “victim” as “a natural person who incurs loss or harm as a result of a crime, including a good faith effort to prevent a crime”); NEV. CONST. art. I, § 8A (defining “victim” as “any person directly and proximately harmed by the commission of a criminal offense under any law of this State”); N.H. REV. STAT. ANN. § 21-M:8-k(I)(a) (2023) (defining “victim” as “a person who suffers direct or threatened physical, emotional, psychological or financial harm as a result of the commission or the attempted commission of a crime”); N.J. CONST. art. I, ¶ 22 (defining “victim” as “a person who has suffered physical or psychological injury or has incurred loss of or damage to personal or real property as a result of a crime”); N.Y. EXEC. LAW § 621.5 (McKinney 2023) (defining “victim” as “a person who suffers personal physical injury as a direct result of a crime”); N.D. CONST. art. I, § 25(4) (defining “victim” 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 against whom the crime . . . is committed”); OR. CONST. art. I, § 42(6)(c) (defining “victim” as “any person determined by the prosecuting attorney or the court to have suffered direct financial, psychological or physical harm as a result of a crime”); S.C. CONST. art. I, § 24(c)(2) (defining “victim” as “a person who suffers direct or threatened physical, psychological, or financial harm as the result of the commission or attempted commission of a crime against him”); VT. STAT. ANN. tit. 13, § 5301(4) (West 2023) (defining “victim” as “a person who sustains physical, emotional, or financial injury or death as a direct result of the commission or attempted commission of a crime”); VA. CODE ANN. § 19.2-11.01(B) (West 2023) (defining “victim” as “a person who has suffered physical, psychological, or economic harm”); WYO. STAT. ANN. § 7-21-101(a)(iii) (West 2023) (defining “victim” as “an individual who has suffered direct or threatened physical, emotional or financial harm as the result of the commission of a crime”).

Connecticut, Iowa, Maryland, Massachusetts, Missouri, Montana, and Rhode Island use analogous statutory formulations referring to harmful effects. *See* CONN. GEN. STAT. ANN. § 54-201(1) (West 2023) (defining “victim” as “a person who is injured or killed”); IOWA CODE § 915.10(3) (2023) (defining “victim” as “a person who has suffered physical, emotional, or financial harm as the result of a public offense . . . other than a simple misdemeanor . . .”); MD. CODE ANN., CRIM. PROC. § 11-104(a)(2) (West 2023) (defining “victim” as “a person who suffers actual or threatened physical, emotional, or financial harm as a direct result of a crime”); MASS. GEN. LAWS ch. 258B, § 1 (2023) (defining “victim” as “any natural person who suffers direct or threatened physical, emotional, or financial harm as the result of a commission or attempted commission of a crime . . . as demonstrated by the issuance of a complaint or indictment . . .”); MO. ANN. STAT. § 595.200(6) (West 2023) (defining “victim” as “a natural person who suffers direct or threatened physical, emotional or financial harm as the result of the commission or attempted commission of a crime”); MONT. CODE ANN. § 46-24-106(5)(a) (West 2023) (defining “victim” as “a person who suffers loss of property, bodily injury, or reasonable apprehension of bodily injury as a result of . . . the commission of an offense; . . . the good faith effort to prevent the commission of an offense; or . . . the good faith effort to apprehend a person reasonably suspected of committing an offense”); 12 R.I. GEN. LAWS ANN. § 12-28-4(b) (West 2023) (defining “victim” for purposes of victim impact statements as “one who has sustained personal injury or loss of property directly attributable to the felonious conduct of which the defendant has been convicted . . .”).

In addition, three states—Florida, Ohio, and Oklahoma—employ a harmful-effects definition combined with a target-of-the-crime definition. *See* FLA. CONST. art. I, § 16(e) (defining “victim” 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 against whom the crime . . . is committed”); OHIO CONST. art. I, § 10(d) (“[V]ictim’ means a person against whom the criminal offense . . . is committed or who is directly and proximately harmed by the commission of the offense or act”); OKLA. STAT. ANN. tit. 21, § 142A-1(1) (West 2023) (similar definition).

against whom the criminal offense has been committed.”<sup>66</sup> Some other states—including Arkansas, Alaska, Arizona, Colorado, Delaware, Georgia, Hawai‘i, Louisiana, Maine, Mississippi, New Mexico, North Carolina, South Dakota, Tennessee, Washington, and Wisconsin—use comparable definitions.<sup>67</sup>

While the harmful-effects and target-of-the-crime formulations are the most common approaches, several states have adopted unique definitions of “victim.” Nebraska defines “victim” as a person who, as a result of certain violent crimes, “has had a personal confrontation with the offender.”<sup>68</sup> Pennsylvania combines *both* of the formulations into twin requirements, defining a “direct victim” entitled to rights as an “individual against whom a crime has been committed or attempted and who as a direct result of the criminal act or attempt suffers physical or mental injury, death or the loss of earnings . . . .”<sup>69</sup> Texas defines “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 . . . has suffered personal injury or death as a result of the criminal conduct of another.”<sup>70</sup> And, most unhelpfully and circularly, West Virginia defines “victim” as “a person who is a victim of a felony . . . .”<sup>71</sup>

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66. ALA. CODE § 15-23-60(19) (2023).

67. ALASKA STAT. ANN. § 12.55.185(19)(a) (West 2023) (defining “victim” as “a person against whom an offense has been perpetrated”); ARK. CODE ANN. § 16-90-1101(8) (West 2023) (defining “victim” as “a victim of a sex offense or an offense against a victim who is a minor and a victim of any violent crime . . . .”); ARIZ. CONST. art. II, § 2.1(12)(C) (defining “victim” as “a person against whom the criminal offense has been committed”); COLO. REV. STAT. ANN. § 24-4.1-302(5) (West 2023) (defining “victim” as “any natural person against whom any crime has been perpetrated or attempted”); DEL. CODE ANN. tit. 11, § 3531(2) (West 2023) (defining “victim” as “any natural person against whom any crime . . . has been attempted, is being perpetrated or has been perpetrated”); GA. CODE ANN. § 17-17-3(11)(a) (West 2023) (defining “victim” as “a person against whom a crime has been perpetrated or has allegedly been perpetrated”); HAW. REV. STAT. ANN. § 801D-2 (West 2023) (defining “victim” as “a person against whom a crime has been committed by either an adult or a juvenile”); LA. STAT. ANN. § 46:1842(15) (2023) (defining “victim” as “a person against whom any of the following offenses have been committed [enumerating homicide or felony offense, sex offense or human trafficking offense, or domestic violence offenses]”); ME. REV. STAT. ANN. tit. 17-A, § 2101(2)(a) (2023) (defining “victim” as “[a] person who is the victim of a crime”); MISS. CODE ANN. § 99-43-3(t) (2023) (defining “victim” as “a person against whom the criminal offense has been committed”); N.M. STAT. ANN. § 31-26-3(f) (2023) (defining “victim” as “an individual against whom a criminal offense is committed”); N.C. GEN. STAT. ANN. § 15A-830(a)(7) (West 2023) (defining “victim” as a “person against whom there is probable cause to believe an offense against the person or a felony property crime has been committed”); S.D. CONST. art. VI, § 29(19) (defining “victim” as “a person against whom a crime or delinquent act is committed”); TENN. CODE ANN. § 40-38-302(4)(a)(i) (2023) (defining “victim” as “[a] natural person against whom a crime was committed”); WASH. REV. CODE ANN. § 7.69B.010(3) (West 2023) (defining “victim” as “a living person against whom a crime has been committed”); WIS. CONST. art. I, § 9m(1) (defining “victim” as “[a] person against whom an act is committed that would constitute a crime if committed by a competent adult”); UTAH CODE ANN. § 77-38-2(9)(a) (West 2023) (defining “victim” as “any natural person against whom the charged crime or conduct is alleged to have been perpetrated or attempted by the defendant . . . .”).

68. NEB. REV. STAT. ANN. § 29-119 (West 2023). The statute also includes persons who suffer serious bodily injury as the result of a DUI offense. *Id.*

69. 18 PA. STAT. AND CONS. STAT. § 11.103 (West 2023).

70. TEX. CODE CRIM. PROC. ANN. art. 56A.001 (West 2023).

71. W. VA. CODE ANN. § 61-11A-2(a) (West 2023).

### C. Crime Victims’ Rights in the Federal Criminal Justice Process

#### 1. Early Federal Crime Victims’ Protections

Like most state definitions of “victim,” federal crime victims’ rights enactments also employ a harmful-effects definition. After experimenting with various formulations, federal statutes coalesced on a definition of “victim” based on direct and proximate harm.<sup>72</sup>

In 1982, Congress passed the first modern federal victims’ rights legislation, the Victim and Witness Protection Act (“VWPA”).<sup>73</sup> The VWPA was designed to expand and protect the role of victims in the federal criminal justice process, including by providing specifically for restitution.<sup>74</sup> Congress’ intent was to “ensure that the wrongdoer is required, to the degree possible to, restore the victim to his or her prior state of well-being” before the crime.<sup>75</sup> The VWPA also required that, before sentencing, a pre-sentence report would be prepared and provided to the judge containing “information concerning any harm, including financial, social, psychological, and physical harm, done to or loss suffered by any victim of the offense” and “any other information that may aid the court in sentencing, including the restitution needs of any victim of the offense.”<sup>76</sup> The VWPA did not specifically define the victims to whom restitution could be awarded.<sup>77</sup> The act did, however, direct the Justice Department to develop guidelines consistent with the act’s purposes, with the intent that the Justice Department would provide services to victims.<sup>78</sup>

In 1983, the Attorney General released a set of guidelines to help prosecutors and courts understand the VWPA’s scope.<sup>79</sup> These guidelines explained that “[a] ‘victim’ is generally defined as someone who suffers direct or threatened physical, emotional or financial harm as the result of the commission of a crime.”<sup>80</sup> More recent versions of the guidelines employ similar definitions.<sup>81</sup>

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72. The federal sentencing guidelines also refer to victims, but the development of the concept was initially largely left to individual court decisions. See Jessie K. Liu, *Victimhood*, 71 MO. L. REV. 115, 119 (2006). More recently, the federal guidelines have been amended to define “victim” in terms of foreseeable pecuniary loss or bodily injury. U.S. SENT’G GUIDELINES MANUAL § 2B1.1 (U.S. SENT’G COMM’N 2018).

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

74. *Id.* at 1254.

75. S. Rep. No. 97-532, at 30 (1982), as reprinted in 1982 U.S.C.C.A.N. 2515, 2536.

76. 96 Stat. at 1249.

77. John F. Wagner Jr., Annotation, *Who is a “Victim,” so as to be Entitled to Restitution under Victim and Witness Protection Act (18 U.S.C.A. §§ 3663, 3664)*, 108 A.L.R. Fed. 828 (1992) (noting “the term ‘victim’ is nowhere defined in the VWPA”).

78. See 96 Stat. at 1256, § 6.

79. U.S. DEP’T OF JUST., ATTORNEY GENERAL GUIDELINES FOR VICTIM AND WITNESS ASSISTANCE (1983), reprinted in NATIONAL ORGANIZATION FOR VICTIMS ASSISTANCE, VICTIM RIGHTS AND SERVICES: A LEGISLATIVE DIRECTORY 1988, at 283 (1989), <https://www.ojp.gov/pdffiles1/Digitization/118276NCJRS.pdf>.

80. *Id.* at 2.

81. See U.S. DEP’T OF JUST., ATTORNEY GENERAL GUIDELINES FOR VICTIM AND WITNESS ASSISTANCE 9 (2005), [https://www.justice.gov/archive/olp/ag\\_guidelines.pdf](https://www.justice.gov/archive/olp/ag_guidelines.pdf) (defining “victim” as “a person that has suffered direct physical, emotional, or pecuniary harm as a result of the commission of a crime”); U.S. DEP’T OF JUST., ATTORNEY GENERAL GUIDELINES FOR VICTIM AND WITNESS ASSISTANCE 7 (2011), [https://www.justice.gov/sites/default/files/olp/docs/ag\\_guidelines2012.pdf](https://www.justice.gov/sites/default/files/olp/docs/ag_guidelines2012.pdf) (same).

In 1984, Congress enacted the Victims Compensation and Assistance Act of 1984 (“VCAA”)<sup>82</sup> and related amendments. Like the VWPA, this act did not define the term “victim.” The VCAA did, however, provide that the pre-sentence report should contain “verified information stated in a nonargumentative style containing an assessment of the financial, social, psychological, and medical impact upon, and cost to, any individual against whom the offense has been committed.”<sup>83</sup> The VCAA also allowed a “victim” to make an impact statement at a parole hearing, defined as “a statement, which may be presented orally or otherwise, by any victim of the offense for which the prisoner is imprisoned about the financial, social, psychological, and emotional harm done to, or loss suffered by such victim.”<sup>84</sup>

In 1990, Congress enacted the first definition of “victim” in a general victims’ rights statute.<sup>85</sup> As part of the Crime Control Act of 1990 (“CCA”),<sup>86</sup> Congress enumerated various “victims’ rights” in a list that would ultimately serve as the basis for the CVRA. The 1990 list included the rights to be treated with “fairness and with respect for the victim’s dignity and privacy,” to attend all court hearings, and to receive restitution.<sup>87</sup>

The CCA defined “victim” as “a person that has suffered direct physical, emotional, or pecuniary harm as a result of the commission of a crime.”<sup>88</sup> The act also extended the definition to include a representative for victims “under 18 years of age, incompetent, incapacitated, or deceased.”<sup>89</sup> As part of the act, Congress adopted a provision expressing the “sense of Congress” that “[v]ictims of crime should be compensated for the damage resulting from the crime to the fullest extent possible by the person convicted of the crime.”<sup>90</sup>

In 1994, Congress adopted the Violent Crime Control and Law Enforcement Act.<sup>91</sup> This act established mandatory restitution for telemarketing fraud and certain other crimes, requiring that courts order restitution for the “full amount of the victim’s losses.”<sup>92</sup> This act then defined the term “full amount of the victim’s losses” to mean “all losses suffered by the victim as a proximate result of the offense.”<sup>93</sup>

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82. Pub. L. No. 98-473, 98 Stat. 1837 (1984).

83. *Id.* at 2015.

84. *Id.* at 2177.

85. Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789.

86. *Id.*

87. *Id.* at 4820.

88. *Id.* at 4822.

89. *Id.*

90. *Id.* Responding to a U.S. Supreme Court decision limiting restitution to the offense for which a defendant was convicted, Congress also added a provision including as a victim “any person directly harmed by the defendant’s criminal conduct in the course of the scheme, conspiracy, or pattern.” See *Hughey v. United States*, 495 U.S. 411, 413 (1990), discussed, *infra*, in note 271 and accompanying text.

91. Pub. L. No. 103-322, 108 Stat. 1796 (1994) (codified as amended in scattered sections of U.S.C.).

92. *Id.* at 2083.

93. *Id.*



In 1996, Congress adopted the Mandatory Victims Restitution Act (“MVRA”), which obligated courts to order restitution for certain serious crimes, particularly crimes of violence.<sup>94</sup> The MVRA also used, for the first time, the “direct and proximate harm” language that would ultimately appear in the CVRA. The MVRA provided that, for purposes of the act, the term “victim” means:

a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered, including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant’s criminal conduct in the course of the scheme, conspiracy, or pattern.<sup>95</sup>

The MVRA also allowed for a victim’s representative for a victim who was “under 18 years of age, incompetent, incapacitated, or deceased”<sup>96</sup> and added the same direct-and-proximate-harm definition to the general restitution statute—the VWPA—that already existed in the federal criminal code.<sup>97</sup>

## 2. The Crime Victims’ Rights Act

The CVRA is the central federal victims’ enactment and the preeminent crime victims’ rights statute in the United States.<sup>98</sup> The CVRA arose from a failed effort to add a federal victims’ rights amendment to the United States Constitution. In 1996, with many state constitutional amendments in place protecting victims’ rights, victims’ advocates secured President Bill Clinton’s support for a similar federal victims’ rights amendment.<sup>99</sup> In the late 1990s and early 2000s, Congress considered this proposed amendment several times, but it never obtained the two-thirds support in both houses of Congress required to secure approval. Critics quarreled not so much over the amendment’s goals but rather with the need to place such rights in the Constitution.<sup>100</sup>

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94. Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of U.S.C., including 18 U.S.C. § 3663A).

95. *Id.* at 1228.

96. *Id.*; see also Beth Bates Holliday, Annotation, *Who Is a “Victim” Entitled to Restitution Under the Mandatory Victims Restitution Act of 1996 (18 U.S.C.A. § 3663A)*, 26 A.L.R. Fed. 2d 283 (originally published in 2008).

97. 18 U.S.C. § 3663.

98. For a detailed review of the CVRA’s enactment, see Paul G. Cassell, *Recognizing Victims in the Federal Rules of Criminal Procedure: Proposed Amendments in Light of the Crime Victims’ Rights Act*, 2005 BYU L. REV. 847, 847–50.

99. For the pros and cons of the amendment as originally introduced, compare Paul G. Cassell, *Barbarians at the Gates? A Reply to the Critics of the Victims’ Rights Amendment*, 1999 UTAH L. REV. 479 (1999), and Steven J. Twist, *The Crime Victims’ Rights Amendment and Two Good and Perfect Things*, 1999 UTAH L. REV. 369 (1999), with Robert P. Mosteller, *The Unnecessary Victims’ Rights Amendment*, 1999 UTAH L. REV. 443 (1999). For a discussion of a newer version of the amendment, see Paul G. Cassell, *The Victims’ Rights Amendment: A Sympathetic, Clause-by-Clause Analysis*, 5 PHX. L. REV. 301 (2012).

100. See *Proposed Constitutional Amendment to Protect Crime Victims: Hearing on S.J. Res. 1 Before the S. Comm. on the Judiciary*, 108th Cong. 126–29 (2003) (statement of Sen. Leahy); see also Steven J. Twist & Daniel Seiden, *The Proposed Victims’ Rights Amendment: A Brief Point/Counterpoint*, 5 PHX. L. REV. 341 (2012).

Of particular interest for this article, critics also wondered why the proposed amendment failed to define the term “victim”—the person who would be entitled to constitutional protection.<sup>101</sup> Proponents responded that a definition was not necessary because each state would bear the responsibility of defining such terms.<sup>102</sup>

In 2004, in exchange for withdrawing their efforts to persuade Congress to pass a constitutional amendment, victims’ rights advocates secured near universal congressional support for a “broad and encompassing” federal victims’ rights statute.<sup>103</sup> During that year, Congress enacted the CVRA, giving victims “the right to participate in the [criminal justice] system.”<sup>104</sup> Congress intended to rework the system by uprooting the long-held “assumption that crime victims should behave like good Victorian children—seen but not heard.”<sup>105</sup> The CVRA created an expansive bill of rights for crime victims, which included “the right to be treated with fairness and with respect for the victim’s dignity and privacy” and “the reasonable right to confer with the attorney for the Government in the case.”<sup>106</sup> District courts were also required to “ensure that the crime victim is afforded” the rights listed in the Act.<sup>107</sup>

In passing the CVRA, Congress appears to have had at least two goals in mind. The first was simply to ensure that crime victims understood what was happening in the criminal justice process. This goal is apparent from the CVRA’s provisions giving crime victims the right to notifications about various court hearings, as well as more general rights such as the rights to confer with prosecutors and to be treated with fairness.<sup>108</sup> The CVRA’s Senate sponsors explained that “[i]n case after case we found victims, and their families, were ignored, cast aside, and treated as non-participants in a critical event in their lives.”<sup>109</sup> In enacting the CVRA, Congress sought to end the system’s obliviousness to crime victims, which often “left crime victims and their families victimized yet again.”<sup>110</sup>

A second overarching purpose of the CVRA was to give crime victims a role in the criminal justice process. Congress intended to make victims “independent participant[s]” in the criminal justice proceedings.<sup>111</sup> The CVRA extended to crime victims a series of “rights” in the criminal justice process—rights that the victims

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101. See, e.g., *Proposed Constitutional Amendment to Protect Crime Victims: Hearing on S.J. Res. 1 Before the S. Comm. on the Judiciary*, 108th Cong. 24–27 (2003) (statement of Patricia Perry) (“[I]f the amendment passes, who will be entitled to these constitutional rights? Defining ‘victim’ is not always easy.”).

102. See, e.g., *Proposed Constitutional Amendment to Protect Crime Victims: Hearing Before the S. Comm. on the Judiciary*, 106th Cong. 93 (1999) (statement of Steven J. Twist) (quoting S. Rep. 105-409 at 35).

103. 150 CONG. REC. S.4261–63 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein).

104. 150 CONG. REC. S.4263 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein). For a detailed description of victim participation, see Douglas E. Beloof, *Constitutional Implications of Crime Victims as Participants*, 88 CORNELL L. REV. 282 (2003).

105. *Kenna v. U.S. Dist. Ct. for C.D. Cal.*, 435 F.3d 1011, 1013 (9th Cir. 2006).

106. 18 U.S.C. § 3771(a)(8), (a)(5) (2006).

107. *Id.* at § 3771(b)(1).

108. *Id.* at § 3771(a)(2), (a)(5), (a)(8).

109. 150 CONG. REC. S4262 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein).

110. *Id.*

111. 150 CONG. REC. S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl).

had independent standing to assert.<sup>112</sup> Congress viewed these provisions as establishing a victim’s right “to participate in the process where the information that victims and their families can provide may be material and relevant.”<sup>113</sup> The CVRA is thus best understood as part of a decades-long “civil-rights movement” that sought to “end the unjust treatment of crime victims by reforming the culture of the criminal justice system.”<sup>114</sup>

## II. ANALYZING THE CVRA’S “VICTIM” DEFINITION

This section explores the CVRA’s “victim” definition in light of nearly twenty years of caselaw explicating that definition.<sup>115</sup> The CVRA is perhaps the single most important crime victims’ rights enactment, serving not only to govern federal cases but also as a model for many other parallel state provisions.<sup>116</sup> The scope of the CVRA’s “victim” definition may thus shed light on this important foundational issue in the federal system and in other similar state provisions.<sup>117</sup>

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112. Compare 18 U.S.C. § 3771(d)(1) (2006), with Susan Bandes, *Victim Standing*, 1999 UTAH L. REV. 331, 345 (1999) (illustrating the debate surrounding victim standing before the CVRA’s adoption).

113. 150 CONG. REC. S4262 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein).

114. The Honorable Jon Kyl, Steven Twist & Stephen Higgins, *On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims’ Rights Act*, 9 LEWIS & CLARK L. REV. 581, 583 (2005).

115. See Fern L. Kletter, Annotation, *Validity, Construction, and Application of Crime Victims’ Rights Act (CVRA)*, (18 U.S.C. § 3771), 26 A.L.R. Fed. 2d 451 (originally published in 2008).

A related question is *when* do CVRA rights attach, i.e., do victims’ rights apply before criminal charges have been formally filed. See, e.g., *Jane Does v. United States*, 817 F. Supp. 2d 1337, 1341–43 (S.D. Fla. 2011) (holding that CVRA rights could attach before charges are filed); *In re Wild*, 955 F.3d 1196 (11th Cir. 2020) (denying mandamus on grounds that CVRA rights do not attach before charges are filed); *In re Wild*, 994 F.3d 1244 (11th Cir. 2021) (en banc) (denying mandamus on grounds that no civil action to enforce rights pre-charging exists), *cert. denied*, 142 S. Ct. 1188 (2022). See generally Paul G. Cassell, Jordan Peck & Bradley Edwards, *Circumventing the Crime Victims’ Rights Act: A Critical Analysis of the Eleventh Circuit’s Decision Upholding Jeffrey Epstein’s Secret Non-Prosecution Agreement*, 2021 MICH. ST. L. REV. 211 (2021); Paul G. Cassell, Nathanael J. Mitchell & Bradley J. Edwards, *Crime Victims’ Rights During Criminal Investigations? Applying the Crime Victims’ Rights Act Before Criminal Charges are Filed*, 104 J. CRIM. L. & CRIMINOLOGY 59 (2014) [hereinafter Cassell, *Rights Before Charges are Filed*]. Cf. Anna Roberts, *Victims, Right?*, 42 CARDOZO L. REV. 1449 (2021) (questioning use of the term “victim” before charges have been filed).

116. See, e.g., Cassell & Garvin, *supra* note 1, at 117–18 (noting parallel provisions in the CVRA and state constitutions on the “right to confer”). The CVRA has also served as a model for other federal victims’ rights enactments. See, e.g., 10 U.S.C. § 806b (defining “victim” for purposes of military justice proceedings in terms similar to the CVRA).

117. Although foreign and international definitions of “victim” are beyond the scope of this article, the harmful-effects version of a victim definition is also commonly employed in such bodies of law. See, e.g., Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/34 (Nov. 29, 1985) (defining “victim” as “persons who, individual or collectively, have suffered harm . . .”); see also Nema Milaninia, *Conceptualizing Victimization at the International Criminal Court: Understanding the Causal Relationship between Crime and Harm*, 50 COLUM. HUM. RTS. L. REV. 116 (2019) (arguing that the International Criminal Court should define “victim” under CVRA principles). See generally Sara Correia, *Cybercrime Victims: Victim Policy Through a Vulnerability Lens*, SSRN (Aug. 2, 2021), <https://ssrn.com/abstract=3897927>.

### A. *The CVRA's "Victim" Definition*

The CVRA specifically delineates the “victims” to whom the act applies in terms of harm:

... the term “crime victim” means a person directly and proximately harmed as a result of the commission of a Federal offense . . . .<sup>118</sup>

This victim definition was not newly minted. Instead, as described in the previous section, it arose against a backdrop of the conventional understanding of the word and previous federal statutes. In 2004, when Congress passed the CVRA, it chose to simply use the then-existing definition of “victim” contained in the restitution provisions of the MVRA and VWPA. As Senator Kyl and several co-authors noted in a law review article written one year after the CVRA’s enactment, “[t]he CVRA’s definition of a crime victim is based on the federal restitution statutes.”<sup>119</sup> The CVRA, thus, uses a definition of “victim” that is more than thirty years old and that has produced considerable interpretive caselaw.<sup>120</sup> Indeed, courts have often looked to these earlier restitution statutes (and court decisions interpreting them) for guidance in applying the CVRA.<sup>121</sup> These statutes carry “not a history marked by steady congressional erosion, but rather by constant expansion of the restitution remedy.”<sup>122</sup> They also “demonstrate a clarion congressional intent to provide restitution to as many victims and in as many cases as possible.”<sup>123</sup>

As part of its broad and encompassing bill of rights for victims, Congress unsurprisingly crafted an expansive definition of the “crime victims” who would be protected. The CVRA’s legislative history demonstrates Congress’ intent that the “victim” definition should be construed broadly. After reciting the definition-of-victim language, the Act’s co-sponsors explained that it was “an intentionally *broad definition* because all victims of crime deserve to have their rights protected.”<sup>124</sup> The description of the victim definition being “intentionally broad” was given in the course of floor colloquy with the other primary sponsor of the CVRA and therefore deserves significant weight.<sup>125</sup> Indeed, Senator Kyl, at one point in the legislative history, referred to “literally millions of people out there”—i.e.,

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118. Justice for All Act, Pub. L. No. 108-405, 118 Stat. 2260 (2004) (codified as amended at 18 U.S.C. § 3771 (e)(2)).

119. The Honorable Jon Kyl et al., *supra* note 114, at 594.

120. *See generally* Wagner, *supra* note 77.

121. *See* United States v. Atlantic States Cast Iron Pipe Co., 612 F. Supp. 2d 453, 462 (D.N.J. 2009); *see also In re McNulty*, 597 F.3d 344, 350 n.6 (6th Cir. 2010).

122. United States v. Martin, 128 F.3d 1188, 1190 (7th Cir. 1997), *quoted in* United States v. Kamuvaka, 719 F. Supp. 2d 469, 475 (E.D. Pa. 2010).

123. *Id.*, *quoted in* United States v. Kamuvaka, 719 F. Supp. 2d 469, 479 (E.D. Pa. 2010).

124. 150 CONG. REC. S4270 (daily ed. Apr. 22, 2004) (emphasis added) (statement of Sen. Kyl, agreed to by Sen. Feinstein); *see also* 150 CONG. REC. S10912 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).

125. *See* Kenna v. U.S. Dist. Ct. for C.D. Cal., 435 F.3d 1011, 1015–16 (9th Cir. 2006) (discussing significance of CVRA sponsors’ floor statements).

victims—who were being denied victims’ rights.<sup>126</sup> Understanding the definition’s breadth is the goal of this article’s next section.

### B. The Requirement of “Harm”

#### 1. All Forms of Harm Qualify Under the CVRA

The CVRA requires that an individual suffer “harm” from a crime to be protected by the law.<sup>127</sup> Under Congress’ broad definition, any person who is directly and proximately harmed in any way—including suffering dignitary or emotional harm to any degree—is a CVRA “victim.” This conclusion that *any* harm can serve as a trigger for CVRA protections follows inexorably from Congress’ decision to omit qualifiers from the kinds of harm that count. As described in the previous section, some other victims’ enactments containing specific “victim” definitions have delineated particular kinds of qualifying harms. For example, California’s path-breaking constitutional amendment defined “victim” as “a person who suffers direct or threatened *physical, psychological, or financial* harm” from a crime.<sup>128</sup> Similarly, in the 1990 Crime Control Act, Congress defined “victim” as an individual who has “suffered direct *physical, emotional, or pecuniary* harm” from a crime.<sup>129</sup> Likewise, the definition Congress used in 2013 when adding victims’ rights to the Uniform Code of Military Justice defined “victim” as “an individual who has suffered direct physical, emotional, or pecuniary harm” from an offense.<sup>130</sup> In contrast, in the 2004 CVRA, Congress unqualifiedly defined “victim” without reference to specific kinds of harms.<sup>131</sup> Of course, physical, emotional, or pecuniary harm would qualify, but many other kinds of harms would count as well.<sup>132</sup>

Presumably, the reason Congress expansively defined “victim” was to ensure that the CVRA covered not only crimes with obvious victims (such as robbery and theft) but also many other high-profile crimes where “victim” status is more complicated. The expansive definition covers such crimes as attempted murder, assault, stalking, possession of child sex-abuse materials, child endangerment, drunk driving, mailing threatening communications, lewdness in the presence of a child, discharge of a pollutant, blackmail, and extortion.<sup>133</sup> These offenses (among countless others) might not immediately create physical or economic

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126. 150 CONG. REC. S4264 (daily ed. Apr. 22, 2004).

127. 18 U.S.C. § 3771(e)(2)(A).

128. See CAL. CONST. art. I, § 28(e).

129. Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4822 (emphasis added).

130. 10 U.S.C. § 806(b).

131. See *United States v. Maldonado-Passage*, 4 F.4th 1097 (10th Cir. 2021) (holding that the CVRA’s “victim” definition “doesn’t require physical harm”).

132. See, e.g., *id.* at 1102–03 (holding that the CVRA “doesn’t require *physical* harm” and “effectively adding words into a statute” is generally impermissible); *Harris v. McDonald*, 2022 WL 3599394, at \*4–\*5 (M.D. Pa. Aug. 23, 2022) (applying CVRA to protect a confidential informant’s “privacy” interest).

133. See, e.g., *United States v. C.S.*, 968 F.3d 237 (3d Cir. 2020) (recognizing a church as a “victim” of the crime of making terroristic threats, in violation of 18 U.S.C. § 875(c), when threats were made against the church).

consequences. Nonetheless, hornbook criminal law recognizes “harm” when there is an “invasion of *any* social interest which has been placed under the protection of a criminal sanction (whether by common law or statute).”<sup>134</sup> In using the unqualified term “harm” as the CVRA’s trigger, Congress protected all persons who are harmed in any way by any federal crime.

Nor does the CVRA require some particular quantum of harm. To obtain CVRA protection, a person does not need to suffer harm that is substantial, permanent, or otherwise deemed adequate. This is important because at least one commentator has suggested that, for purposes of the federal sentencing guidelines, a “victim” definition should include an adequacy-of-injury requirement.<sup>135</sup> Perhaps such an approach makes sense in the context of the exhaustive sentencing guidelines for judges, which determine federal prison sentences by spelling out gradations of injuries in detail and assigning offense levels based on relatively small differences. But for purposes of a broad victims’ rights statute, such a limitation would generate more questions than it would answer. Congress, thus, avoided creating such debates by applying the CVRA to all cases where any harm exists.

A case involving the federal prosecution of an oil refining company for discharging noxious fumes into the surrounding community illustrates this point.<sup>136</sup> The company argued that unless an individual could provide documentary medical evidence confirming that the fumes caused injury or illness (e.g., cancer), the individual had not suffered sufficient harm to be recognized as a CVRA victim.<sup>137</sup> But after extensive litigation, the district court handling the case concluded, quite properly, that “symptoms such as burning eyes, bad taste in the mouth, nose burning, sore throat, skin rashes, shortness of breath, vomiting, dizziness, nausea, fatigue, and headaches [are] sufficient to constitute ‘harm’ under the CVRA.”<sup>138</sup>

While this environmental case involved tangible (although arguably minor) health manifestations, other types of harm can also trigger CVRA protection, such as emotional distress, affront to dignity, or invasion of privacy.<sup>139</sup> Congress used the broad term “harm,” which is commonly defined (in, for example, *Webster’s Third New International Dictionary*) as “physical or mental damage: injury.”<sup>140</sup> “Mental damage” can broadly include many kinds of impacts on crime victims. For example, multiple federal district courts have had to determine whether an individual depicted in “child pornography” (better described as “child sex-abuse

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134. ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 830 (3d ed. 1982) (emphasis added).

135. See Nash, *supra* note 14, at 1439–44.

136. United States v. CITGO Petroleum Corp., 893 F. Supp. 2d 848 (S.D. Tex. 2012). This case is discussed in greater depth at *infra* notes 384–96 and accompanying text.

137. Dkt. No. 575, United States v. CITGO Petroleum Corp., No. 2:06-cr-563 (S.D. Tex. 2011).

138. *CITGO*, 893 F. Supp. 2d at 853.

139. See, e.g., United States v. Maldonado-Passage, 4 F.4th 1097, 1103 (10th Cir. 2021) (holding “emotional harm” is sufficient to trigger the CVRA).

140. *Harm*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (2002) (emphasis added).



materials” or “CSAM”<sup>141</sup>) is harmed when a defendant views those images. Courts have generally concluded that the invasion of dignity involved in such viewing is sufficient harm to trigger CVRA status.<sup>142</sup>

Affronts to dignity and invasions of privacy are not the only types of mental damage sufficient to grant victim status. Emotional trauma is another (closely related) intangible harm that suffices. In *United States v. McDaniel*, the Eleventh Circuit explained that every time a victim is notified by the National Center for Missing and Exploited Children that a person has been arrested for possessing CSAM depicting that person, this notification only “adds to the ‘slow acid drip’ of trauma and exacerbates [the victim’s] emotional issues.”<sup>143</sup> Even the parents or legal guardians of exploited children in these circumstances can be granted victim status.<sup>144</sup>

Caselaw under the CVRA and similar statutes also recognizes that harm can result in a variety of ways. For example, a person need not be present at a crime scene to be a “victim,” so long as the person’s interests are ultimately harmed.<sup>145</sup> As a simple illustration, if a criminal illegally withdraws funds from a person’s bank account, that person is clearly a victim of the illegal withdrawal even without awareness that the person’s financial interests have been harmed.<sup>146</sup> More complicated examples are variations on this theme. Thus, a homicide victim’s young sons, who were not present at the time of their father’s death, were harmed by the crime “because they ha[d] lost, among other things, a source of financial support.”<sup>147</sup> Similarly, the mother of a missing (and possibly murdered) child was the victim of a defendant’s false statement claiming to know the location of the child’s body because the defendant’s crime caused “renewed emotional torment.”<sup>148</sup>

## 2. Exposing an Individual to a Risk is a CVRA “Harm”

One recurring issue regarding harm is whether being exposed to risk of a harm creates victim status. As an illustration, consider an attempted-murder prosecution, where a defendant shot a bullet at a person’s head with the intent to kill, but the bullet whistles past the person’s ear rather than striking the target. On a constricted reading of the CVRA, it might be argued that no victim suffered a “harm” and thus the CVRA would be inapplicable. Attempted murder would oddly be rendered a

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141. See Paul G. Cassell, James Marsh & Jeremy Christiansen, *Not Just ‘Kiddie Porn’: The Real Harms from Possession of Child Pornography*, in *REFINING CHILD PORNOGRAPHY LAW: CRIME, LANGUAGE, AND SOCIAL CONSEQUENCE* 187, 189 (Carissa Byrne Hessick ed., 2016).

142. See, e.g., *United States v. Monzel*, 746 F. Supp. 2d 76, 83–84 (D.D.C. 2010) (finding that a defendant’s viewing of a child sex-abuse image harmed the child depicted).

143. *United States v. McDaniel*, 631 F.3d 1204, 1206, 1209 (11th Cir. 2011).

144. See, e.g., *United States v. Evers*, 669 F.3d 645, 655–56 (6th Cir. 2012).

145. See, e.g., *Morris v. Nielsen*, 374 F. Supp. 3d 239, 254 (E.D.N.Y. 2019).

146. See, e.g., *Jordan v. Dep’t of Just.*, 173 F. Supp. 3d 44, 50 (S.D.N.Y. 2016).

147. *United States v. Checora*, 175 F.3d 782, 795 (10th Cir. 1999) (interpreting MVRA).

148. *United States v. Haggard*, 41 F.3d 1320, 1324–26 (9th Cir. 1999) (interpreting vulnerable “victim” federal sentencing guidelines provision).

“victimless” crime because the target faced only the *risk* of death instead of suffering injury or death itself. In this attempted murder example, however, common sense tells us that a victim exists because the shooter has placed his target in jeopardy, and creating jeopardy creates “victim” status.

Legal scholars have long recognized the fundamental proposition that creating risk of harm is itself a harm.<sup>149</sup> As one academic has explained, all persons “have a legitimate interest in avoiding unwanted risks. A [defendant] who inflicts a risk of harm on another damages that interest, thus lowering the victim’s baseline welfare.”<sup>150</sup> As another scholar has explained, “[W]e have an interest in being safe—in being securely free of the risk of substantive harm; that interest is set back when I am endangered, even if no substantive harm ensues.”<sup>151</sup>

Under these general principles, a person shot at is the victim of a crime,<sup>152</sup> and it makes no difference whether the person was aware of the attempted harm.<sup>153</sup> In the example above, a person is a “victim” of attempted murder even if he is sleeping when the bullet is fired—and even if he continues to sleep after the attack.<sup>154</sup> As Professor Joshua Dressler has explained, “‘social harm’ may be defined as the negation, endangering, or destruction of an individual, group, or state interest which was deemed socially valuable. Thus, the . . . attempted murderer of the sleeping party [has] endangered the interests of others and [has] caused ‘social harm’ under this definition.”<sup>155</sup>

In defining “victim” in the CVRA, Congress followed these conventional understandings. Certainly, nothing in the CVRA’s text suggests that Congress intended for the uninjured target of an attempted murder to be denied victim status merely because of the fortuity of the criminal’s bad aim or the victim’s lack of immediate awareness of what has happened. Indeed, victim status for a host of federal offenses commonly thought to be covered by the CVRA rests on this reasoning. For example, an assault victim who had a knife waved in his face has not suffered

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149. To be clear, there is a separate issue of whether criminal law properly focuses on conditioning punishment on causing harmful results, rather than an actor’s creation of risk and the actor’s awareness of those risks. *See generally* Guyora Binder, *Victims and the Significance of Causing Harm*, 28 PACE L. REV. 713, 714–15 (2008) (reviewing this issue). But while criminal law philosophers continue to debate this issue, criminal codes routinely impose liability for creating risks. *See id.* at 714 & n.6.

150. Claire Finkelstein, *Is Risk a Harm?*, 151 U. PA. L. REV. 963, 966 (2003) (answering “yes” to the question posed in the title).

151. R.A. Duff, *Criminalizing Endangerment*, 65 LA. L. REV. 941, 950 (2005); *see also* F. Andrew Hessick, *Probabilistic Standing*, 106 NW. U.L. REV. 55, 69 (arguing that “risk of harm may constitute an injury itself”).

152. *See* United States v. Mathews, 874 F.3d 698, 706 (11th Cir. 2017) (applying sentencing guidelines and explaining that “a person can qualify as a victim if the defendant’s offense conduct exposed that person to a risk of actual harm that was reasonably foreseeable, even though actual injury never occurred”).

153. *See* WAYNE R. LAFAYE, CRIMINAL LAW § 16.3(b) at 869 (5th ed. 2009) (collecting examples of cases where assault against a particular person “may be committed though the victim is unaware of his danger . . .”). In some cases, the crime of assault may be defined in terms requiring the defendant to act in a way that causes a victim to apprehend fear. *Id.* In such cases, “victim” status is readily apparent.

154. *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 112–13 (6th ed. 2012) (discussing example of sleeping attempted murder victim).

155. *Id.* (internal quotation marks omitted).

direct physical injury but still qualifies for protection under the Act because of the psychic toll and invasion of the sense of security that such a crime entails.<sup>156</sup> Similarly, a lender who makes a loan on the basis of false representations is a victim: the increased risk of a loss from possible non-repayment of the loan is sufficient harm.<sup>157</sup>

A good illustration of the risk-of-harm-equals-harm principle is an Eighth Circuit decision applying the federal sentencing guidelines, which require certain victim-related enhancements. In *United States v. Drapeau*, the defendant was found guilty of a federal offense for making and possessing a firebomb, which the defendant attempted to use one night to destroy a police officer’s car parked in the officer’s driveway.<sup>158</sup> The defendant lit the wick on the firebomb, but the bomb ultimately failed to ignite.<sup>159</sup> The next morning, the officer found the firebomb’s remains on his driveway.<sup>160</sup> The Government argued that the defendant’s sentence should be enhanced because the police officer was targeted, even though the officer was unaware of the attempt to ignite the firebomb.<sup>161</sup> The defendant responded that his crime of making and possessing a firebomb did not actually harm any victim.<sup>162</sup> In rejecting the defendant’s response, the Eighth Circuit agreed that “an individual need not be harmed, or even be knowledgeable of the crime, to be a victim.”<sup>163</sup>

The Eighth Circuit’s decision was partially based on a target-of-the-crime theory.<sup>164</sup> But an alternative analysis, based exclusively on harm, also leads to the same conclusion. Following the defendant’s arrest, the officer learned of the attempt—knowledge that certainly created concern to some degree (moderated, of course, by the fact of the defendant’s arrest). That apprehension would itself constitute harm. At least for purposes of determining “victim” status, the triggering harm need not necessarily occur before a defendant’s arrest. Indeed, it is now routine in federal courts for possessors of child sex-abuse materials to be ordered to pay restitution even when the child had no knowledge of a defendant’s possession until after the defendant’s arrest.<sup>165</sup> In such cases, a defendant could readily foresee that, if and when his crime was discovered, a victim would be harmed to some degree. Nothing more is required for “victim” status.

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156. See 18 U.S.C. § 351(e) (providing penalties for assault on federal officials, with differing penalties for assaults in which “personal injury results” and those which do not); see also *United States v. Muskett*, 970 F.3d 1233, 1241 (10th Cir. 2020) (defining assault to include “a threat to inflict injury upon the person of another which . . . causes a reasonable apprehension of immediate bodily harm”).

157. See *United States v. Martin*, 803 F.3d 581, 590–94 (11th Cir. 2015) (MVRA restitution case).

158. *United States v. Drapeau*, 188 F.3d 987, 989 (8th Cir. 1999).

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* at 990.

163. *Id.* at 991.

164. See *id.* (discussing *Black’s Law Dictionary* definition of “victim” as the “object of a crime”).

165. See, e.g., *United States v. Rothenberg*, 923 F.3d 1309, 1336–37 & n.10 (11th Cir. 2019) (affirming restitution to “victim” of CSAM possession and rejecting defendant’s argument that the harm needed to be before his arrest).

Finally, CVRA caselaw makes clear that even where an entity is unaware of a threat made against it, the entity can still be recognized as a “victim.” In *United States v. C.S.*,<sup>166</sup> the Third Circuit reviewed a challenge by a delinquent juvenile to a district court order allowing the Government to notify a church that the juvenile had made terroristic threats against the church in an internet chatroom. The juvenile relied on confidentiality provisions in federal law governing delinquency adjudications, claiming that the church should not be made aware of the threat. But the Third Circuit affirmed the district court’s order, explaining that notification would help the church exercise its CVRA right to be “reasonably protected from the accused.”<sup>167</sup> Under this reasoning, any time the Government prosecutes someone for making a threat, the target of the threat should be recognized as a CVRA “victim” in order to be able to take appropriate defensive measures.

### C. *The Requirement that Harm Be “Direct and Proximate”*

Under the CVRA, to qualify as a victim, an individual not only must be harmed, but that harm must also be both “direct and proximate.”<sup>168</sup> This section explores the CVRA’s nexus requirement, examining first the requirement of direct harm and second the requirement of proximate harm.

#### 1. “Direct” Harm

In defining a victim as a person “directly and proximately” harmed, Congress used a phrase with a well-established meaning. The concept of direct and proximate harm developed from tort law and dates back to the nineteenth century. One often-cited case is *Lynn Gas & Electric Company v. Meriden Fire Insurance Company*, an 1893 decision from the Massachusetts Supreme Judicial Court.<sup>169</sup> In that case, a fire caused a short circuit between wires connected with machinery in a part of the building remote from the fire, and this short circuit caused such a strain on the machinery that it broke into pieces.<sup>170</sup> In holding that the fire was the direct cause of the damage to the machinery, *Lynn* concluded that “[t]he active, efficient cause that sets in motion a train of events which brings about a result without the intervention of any force started and working actively from a new and independent source is the *direct and proximate* cause.”<sup>171</sup> *Lynn*’s formulation was influential and was followed in many subsequent decisions.<sup>172</sup>

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166. 968 F.3d 237 (3d Cir. 2020).

167. *Id.* at 249 (citing 18 U.S.C. § 3771(a)(1)).

168. 18 U.S.C. § 3771(e)(2)(A).

169. See *Lynn Gas & Elec. Co. v. Meriden Fire Ins. Co.*, 33 N.E. 690 (Mass. 1893), discussed in, e.g., Vonda Mallicoat Laughlin, *The Efficient Proximate Cause Doctrine—What Is It, and Why Should I Care?*, 73 BAYLOR L. REV. 311, 321 (2021).

170. *Lynn Gas & Elec. Co.*, 33 N.E. at 690.

171. *Id.* (emphasis added).

172. For a helpful discussion, see *Morris v. Nielsen*, 374 F. Supp. 3d 239, 250 (E.D.N.Y. 2019).

Over time, this tort law requirement of direct and proximate cause evolved into a two-part test. The first part considers “but-for” causation to determine direct cause. A separate determination of “proximate” causation is then required to determine whether an event was sufficiently closely connected to justify tort liability.<sup>173</sup> For present purposes, the Supreme Court and other courts have generally recognized convergence between tort law and criminal law on causation issues.<sup>174</sup> On this understanding, when Congress adopted the same language for purposes of defining “victim” in the restitution statutes—and later in the CVRA—it was simply importing these traditional standards.<sup>175</sup>

Turning to the issue of direct harm in the CVRA, this determination requires applying “the traditional ‘but-for’ . . . cause analys[is].”<sup>176</sup> Under this analysis, a court must ask whether an individual would have suffered the harm “but for” the defendant’s crime. The defendant’s crime is thus a cause of a harm if the harm would not have occurred but for the crime; conversely, the defendant’s crime is not a cause of the harm if the harm would have occurred without it.<sup>177</sup> As the Fifth Circuit has explained in interpreting the CVRA:

[A]scertaining the existence of but-for causation requires a court to create “a mental picture of a situation identical to the actual facts of the case in all respects save one: the defendant’s wrongful conduct is now ‘corrected’ to the minimal extent necessary to make it conform to the law’s requirements.” Then, the court asks “whether the injuries that the [victim] suffered would probably still have occurred had the defendant behaved correctly in the sense indicated.” Only if the answer to that question is “No” is the defendant’s conduct a but-for-cause of the [victim’s] injuries.<sup>178</sup>

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173. See generally W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER & KEETON ON THE LAW OF TORTS 263–355 (5th ed. 1984) [hereinafter PROSSER & KEETON].

174. See *Paroline v. United States*, 572 U.S. 434, 446 (2014) (“Proximate cause is a standard aspect of causation in criminal law and the law of torts.”) (collecting authorities); see also *State v. Bass*, 12 P.3d 796, 801 (Ariz. 2000) (interpreting criminal law regarding superseding cause so that standard “will henceforth be the same as our tort standard”); *People v. Moncada*, 210 Cal. App. 4th 1124, 1132, 149 Cal. Rptr. 3d 1 (2012), *as modified* (Nov. 20, 2012) (“Tort principles of proximate or legal causation apply to crimes . . . .”); *State v. McFadden*, 320 N.W.2d 608, 613 (Iowa 1982) (giving tort proximate cause instruction was not error in an involuntary manslaughter case as no policy difference existed); *State v. Irish*, 873 N.W.2d 161, 167 (Neb. 2016) (“The concept of proximate cause is applicable in both criminal and tort law, and the analysis is parallel in many instances.”); *State v. Carpenter*, 2019-Ohio-58, ¶ 51, 128 N.E.3d 857, 878 (“[I]t is well established that Ohio law generally defines ‘cause’ in criminal cases identically to the definition of ‘proximate cause’ in civil cases.”). See generally Paul G. Cassell, James R. Marsh & Jeremy Christiansen, *The Case for Full Restitution for Child Pornography Victims*, 82 GEO. WASH. L. REV. 61, 91–93 (2013).

175. See, e.g., *United States v. Guidant LLC*, 708 F. Supp. 2d 903, 911 (D. Minn. 2010); *United States v. Giraldo-Serna*, 118 F. Supp. 3d 377, 382–83 (D.D.C. 2015), *mandamus granted in part by In re de Henríquez*, 2015 WL 10692637 (D.C. Cir. Oct. 16, 2015); see also *In re McNulty*, 597 F.3d 344, 350 (6th Cir. 2010).

176. *United States v. Giraldo-Serna*, 118 F. Supp. 3d at 383.

177. See PROSSER & KEETON, *supra* note 173, at 266 (setting out “but for” causation test for tort claims).

178. *In re Fisher*, 649 F.3d 401, 403 (5th Cir. 2011) (internal quotation marks omitted) (relying on David W. Robertson, *The Common Sense of Cause in Fact*, 75 TEX. L. REV. 1765, 1770 (1997)).

For example, if a swindler obtains money from an individual under false pretenses but then later commits fraud on a bankruptcy court, the individual is not a victim of that later fraud—the loss would have occurred anyway.<sup>179</sup>

But-for causation can be construed very broadly. As Glanville Williams has noted, “the notion of but-for causation is ridiculously wide, because it takes us back to Adam and Eve.”<sup>180</sup> The influential Prosser and Keaton treatise on torts likewise explains that “[i]t should be quite obvious that, once events are set in motion, there is, in terms of causation alone, no place to stop. The event without millions of causes is simply inconceivable.”<sup>181</sup> As a result of far-reaching chains of events, it is generally understood that but-for causation is simply a rule of exclusion—that is, if the victim’s injury would have occurred anyway without the defendant’s crime, then the defendant’s crime cannot have directly caused the victim’s harm.<sup>182</sup>

When it comes to dividing questions of but-for causation from proximate causation, “the first question is predominantly one of fact, while considerations of policy find room for expression principally in the solution of the second question.”<sup>183</sup> It is generally accepted that “the defendant’s wrongful conduct must be a cause in fact of the plaintiff’s injury before there is liability.”<sup>184</sup> This notion is “an ordinary, matter-of-fact inquiry into the existence or non-existence of a causal relation,” but “[c]learly this is not a quest for a *sole* cause. Probably it cannot be said of any event that it has a single causal antecedent; usually there are many.”<sup>185</sup> This test “permits wide latitude where facts are meager and where it is pure matter of guesswork where the greater probabilities lie.”<sup>186</sup> Therefore, “courts have tended to view with liberality the legitimacy of the inference of causal relation in these cases.”<sup>187</sup>

In light of these understandings, courts commonly recognize that but-for causation is “not a difficult burden to meet.”<sup>188</sup> In identifying who is a “victim” of a crime, “[c]ourts generally agree that there can be multiple causal steps connecting the criminal act to the victim.”<sup>189</sup> For example, in *United States v. Hackett*, the Ninth Circuit considered whether a defendant who pleaded guilty to aiding and

179. See *United States v. Freeman*, 741 F.3d 426, 438 (4th Cir. 2014) (reversing restitution award under VWPA on this reasoning).

180. GLANVILLE WILLIAMS, TEXTBOOK OF CRIMINAL LAW 379–80 (2d ed. 1983).

181. PROSSER & KEETON, *supra* note 173, at 266.

182. *Id.*

183. 4 FOWLER V. HARPER, FLEMING JAMES, JR. & OSCAR S. GRAY, HARPER, JAMES AND GRAY ON TORTS § 20.2, at 97–98 n.2 (3d ed. 2007).

184. *Id.* at 97.

185. *Id.* at 97–100.

186. *Id.* at 106.

187. *Id.* at 110–11 (discussing cases where facts are less “meager” and probabilities can be drawn).

188. *United States v. Mun*, 837 F. App’x. 293, 295 (5th Cir. 2020) (quoting *United States v. Salinas*, 918 F.3d 463, 466 (5th Cir. 2019)) (analyzing sentencing guidelines).

189. *Morris v. Nielsen*, 374 F. Supp. 3d 239, 254 (E.D.N.Y. 2019) (citing *United States v. Hackett*, 311 F.3d 989, 993 (9th Cir. 2002)) (determining “crime victim” status for purposes of protections of the U visa in immigration law).



abetting methamphetamine manufacture could be ordered to pay restitution to an insurance company for property damage caused when a co-defendant started a fire by placing chemicals used to manufacture methamphetamine on a hotplate.<sup>190</sup> In affirming a restitution order to the insurance company as a “victim” of the crime, the Ninth Circuit observed that the defendant had procured the supplies his co-defendant used to manufacture methamphetamine and had knowledge “of the scope and structure of the enterprise and of the activities of [his co-defendants].”<sup>191</sup> The Ninth Circuit held that, even though there were “multiple links in [the] causal chain,” this conduct was “directly related” to the insurance company’s resulting loss.<sup>192</sup>

Because multiple but-for causes of a harm can exist, a victim need not establish that the defendant’s crime was somehow the sole cause of a harm. A standard hypothetical from Professors Prosser and Keeton demonstrates this point.<sup>193</sup> Assume Defendant 1 stabs the victim with a knife, and Defendant 2 fractures the victim’s skull with a rock. If either wound would have been fatal and the victim dies from the effects of both, the law does not exonerate both defendants. Instead, “neither can be absolved from . . . responsibility upon the ground that the identical harm would have occurred without [the defendant’s action], or there would be no liability at all.”<sup>194</sup> Professors Harper and James give a similar example of “several ruffians [who] set upon a man and beat him, each inflicting separate wounds.”<sup>195</sup> Under traditional tort doctrine, the ruffians—intentional tortfeasors—are each “liable for the whole injury.”

More formally, under conventional American tort principles, as explicated by the American Law Institute’s *Restatement (Third) of Torts*, “[w]hen an actor’s tortious conduct is not a factual cause of harm under . . . [independently sufficient or but-for causation] only because one or more other causal sets exist that are also sufficient to cause the harm at the same time, the actor’s tortious conduct is a factual cause of the harm.”<sup>196</sup> This approach recognizes that it is often impossible to identify a single “cause” of an event; a fire burning down a house, for example, is caused not only by a match but also by fuel to burn, lack of a downpour, and a fire department being too far away to immediately respond.<sup>197</sup> Traditionally in American tort law, an “independent-sufficiency requirement is not followed by the courts . . . [Instead], courts have allowed the plaintiff to recover from each defendant who contributed to the . . . injury, even though none of the defendants’

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190. 311 F.3d at 990 (9th Cir. 2002).

191. *Id.* at 993.

192. *Id.*

193. PROSSER & KEETON, *supra* note 173, at 266–67.

194. *Id.*

195. 2 FOWLER V. HARPER & FLEMING JAMES, JR., THE LAW OF TORTS § 20.3, at 1124 (1956).

196. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 27 cmt. f (AM. L. INST. 2010) [hereinafter RESTATEMENT].

197. *Id.* at 391 (collecting authorities in the reporters’ notes discussing this point). See generally Richard W. Wright, *Causation in Tort Law*, 73 CALIF. L. REV. 1735, 1792 (1985) (discussing cases explicating this principle).

individual contributions were either necessary or sufficient by itself for the occurrence of the injury.”<sup>198</sup>

These general principles apply to merely *negligent* tortfeasors. But criminal law most often involves an element of criminal intent, usually defined as acting intentionally or knowingly.<sup>199</sup> The conventional tort principles that apply to such criminal statutes would be those for *intentional* tortfeasors, where “[m]ore liberal rules are applied as to the consequences for which the defendant will be held liable, the certainty of proof required, and the type of damage for which recovery is to be permitted.”<sup>200</sup> Prosser and Keeton agree that “[f]or an intended injury the law is astute to discover even very remote causation.”<sup>201</sup> Reiterating these general principles, the *Restatement* explains that “[a]n actor who intentionally or recklessly causes harm is subject to liability for a broader range of harms than the harms for which that actor would be liable if only acting negligently.”<sup>202</sup>

These principles are well illustrated by the D.C. Circuit’s reversal of a district court decision denying CVRA “crime victim” status to family members of a person who had been murdered by a drug conspiracy.<sup>203</sup> In the prosecution of one of the drug-trafficking conspirators, the district court denied “victim” status to the family of Julio Henríquez, an anti-drug-cartel crusader assassinated in Colombia.<sup>204</sup> The district court reasoned that Henríquez’s murder may have stemmed from multiple causes apart from the trafficking conspiracy being prosecuted before the court.<sup>205</sup> In reversing this decision, the D.C. Circuit first concluded that the district court erred in examining only the conspiracy indictment and statement of facts contained in the resulting plea agreement.<sup>206</sup> The D.C. Circuit noted that “because victim status can be argued for even prior to the filing of an indictment, it is clear that Congress intended courts to look beyond the four corners of an indictment or plea agreement” to determine “victim” status.<sup>207</sup> Thus, in the context of the drug-trafficking conspiracy in that case, “logic allows for the inference . . . that [the defendant’s] paramilitary organization—which relied on ‘war taxes’ to fund its operations and troops to control the region’s coca growth—employed violence and force as part of its method of operation.”<sup>208</sup>

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198. Wright, *supra* note 197, at 1792.

199. See *Staples v. United States*, 511 U.S. 600, 619 (1994) (noting “the usual presumption that a defendant must know the facts that make his conduct illegal”).

200. PROSSER & KEETON, *supra* note 173, at 37.

201. *Id.* at 37 n.27 (quoting *Derosier v. New England Telephone & Telegraph Co.*, 81 N.H. 451, 463, 130 A. 145, 152 (1925)) (internal quotation marks omitted).

202. RESTATEMENT, *supra* note 196, § 33.

203. See *United States v. Giraldo-Serna*, 118 F. Supp. 3d 377, 387 (D.D.C. 2015) (*mandamus granted in part, In re de Henríquez*, 2015 WL 10692637 (D.C. Cir. Oct. 16, 2015)).

204. *Id.* at 381–82.

205. *Id.*

206. *In re de Henríquez*, 2015 WL 10692637 at \*1.

207. *Id.*

208. *Id.*

The D.C. Circuit next rejected the argument that a victim invoking the CVRA must establish that a defendant’s crime was the “sole cause” of a victim’s harm. The D.C. Circuit explained:

While it is true that there might have been more than a single cause contributing to the murder of Julio Henríquez, it is also true that a “but-for” cause of the murder could have been Henríquez’s leadership of an organization dedicated to ending the production of coca within the region under the drug conspiracy’s direct control.<sup>209</sup>

Thus, the D.C. Circuit expressly recognized that even where various causes might be at play, a defendant’s crime could still directly harm a victim:

That there could be a multiplicity of possible ‘but-for’ causes does not mean that the drug conspiracy fails to qualify as a ‘but-for’ cause.”<sup>210</sup> The D.C. Circuit also held that a victim invoking the CVRA need not demonstrate “direct traceability” between a defendant’s crime and subsequent harm, explaining that “direct traceability between, say, the importation of a single coca plant and the eventual murder of Henríquez is a prohibitively onerous burden.”<sup>211</sup>

Finally, in closing this article’s discussion of “direct” harm, it will be useful to offer one example where direct harm was lacking—and thus victim status properly denied. Following a defendant’s conviction for racketeering crimes involving selling cigarettes lacking valid New York State tax stamps, New York City sought restitution.<sup>212</sup> The city argued that it was the victim of the defendant’s conspiracy and lost significant tax revenue as the result of the defendant’s actions.<sup>213</sup> The city claimed that because the defendant could sell cigarettes at a lower price because of his failure to pay taxes, the city lost tax revenues that would have come from properly taxed sales.<sup>214</sup> In rejecting the city’s argument, the district court properly found that it was “entirely speculative to presume that any alleged diverted City purchasers would have purchased their cigarettes in the city had [defendant’s] cigarettes not been available.”<sup>215</sup> Thus, because the city could not demonstrate that but-for the defendant’s crime it would have received tax revenues, it had not suffered direct harm and was not a victim.<sup>216</sup>

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209. *Id.* (citing *Burrage v. United States*, 571 U.S. 204, 211–12 (2014)).

210. *Id.*

211. *Id.* at \*2. On remand, applying the D.C. Circuit’s guidance about the CVRA’s wide reach, the district court reconsidered its earlier ruling and concluded that the Henríquez family members were CVRA victims. *See* Order at 1, *United States v. Giraldo-Serna*, No. 04-114-1-RBW, Dkt. 541 (D.D.C. Mar. 14, 2016).

212. *United States v. Morrison*, 685 F. Supp. 2d 339, 341 (E.D.N.Y. 2010).

213. *Id.*

214. *Id.* at 344–45.

215. *Id.* at 346–47.

216. *Id.* at 347. To similar effect in not finding “victim” status is *United States v. Rowland*, No. 1:23-CR-207 (M.D.N.C. Dec. 6, 2023). There, defendant boyfriend introduced his girlfriend to a drug dealer. She then paid for and purchased drugs directly from the dealer and died from an overdose. The defendant pleaded guilty to use of a

## 2. “Proximate” Harm

The CVRA also requires an individual to have been “proximately” harmed to be a crime victim. As with the direct-harm requirement, this proximate-harm requirement tracks traditional tort law principles, where “proximate cause” is a well-recognized concept.<sup>217</sup>

Various formulations for describing proximate cause in tort law have been discussed for years.<sup>218</sup> For purposes of applying the CVRA, the formulation that appears to have gained currency is that “[a] person is proximately harmed when the harm is a reasonably foreseeable consequence of the criminal conduct.”<sup>219</sup> This understanding stems from the general tort law principle that the scope of tort liability should “ordinarily extend to but not beyond the scope of the ‘foreseeable risks’—that is, the risks by reason of which the actor’s conduct is held to be negligent.”<sup>220</sup> In the words of the Supreme Court, a proximate-cause requirement thus “preclude[s] liability in situations where the causal link between conduct and result is so attenuated that the consequence is more aptly described as mere fortuity.”<sup>221</sup>

Under long-settled and standard principles of foreseeability, a “defendant need not have foreseen the precise injury, nor [need] (he) have had notice of the particular method in which a harm would occur, if the possibility of harm was clear to the ordinarily prudent eye.”<sup>222</sup> Indeed, there is “universal agreement” in tort law that “what is required to be foreseeable is only the ‘general character’ or ‘general type’ of the event or harm, and not its ‘precise’ nature, details, or above all manner of occurrence.”<sup>223</sup>

These standard tort law principles apply to torts involving mere negligence. But more expansive causation principles apply to intentional torts, which are obviously

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cellphone to distribute illegal drugs, in violation of 21 U.S.C. § 843(b). The district court concluded that the girlfriend was not a “victim” of the defendant’s crime, because he “did not use his cell phone to facilitate the distribution of [drugs] to” his girlfriend. If the defendant had helped facilitate distribution of drugs to his girlfriend, the result could likely have been different. *See, e.g.,* United States v. Stevens, 239 F. Supp. 3d 417 (D. Conn. 2017) (recognizing “victim” status under the CVRA where defendant distributed illegal drugs resulting in the victim’s death).

217. *See generally* PROSSER & KEETON, *supra* note 173, at 272–80.

218. *See id.* at 276–79.

219. *See, e.g., In re Fisher*, 640 F.3d 645, 648 (5th Cir. 2011); *see also* United States v. Giraldo-Serna, 118 F. Supp. 3d 377, 383 (D.D.C. 2015); United States v. Mathew, 916 F.3d 510, 519 (5th Cir. 2019); United States v. Ruzicka, 331 F. Supp. 3d 888, 894 (D. Minn. 2018).

220. PROSSER & KEETON, *supra* note 173, at 273.

221. *Paroline v. United States*, 572 U.S. 434, 445 (2014) (interpreting restitution statute in CVRA case); *see, e.g.,* United States v. Ruzicka, 331 F. Supp. 3d 888, 894 (D. Minn. 2018) (applying this “proximate cause” understanding in interpreting the CVRA).

222. *Kendall v. Gore Properties, Inc.*, 236 F.2d 673, 682 (D.C. Cir. 1956) (citing RESTATEMENT (FIRST) OF TORTS § 449 (AM. L. INST. 1934)) (internal quotation marks omitted).

223. PROSSER & KEETON, *supra* note 173, at 299; 4 HARPER ET AL., *supra* note 183, § 20.5(6), at 203 (“Foreseeability does not mean that the precise hazard or the exact consequences that were encountered should have been foreseen.”).

more analogous to crimes. Indeed, intentional-tort victims generally do not have to establish a standard proximate-cause nexus because “[a]n inquiry into proximate cause has traditionally been deemed unnecessary in suits against intentional tortfeasors.”<sup>224</sup> As the Supreme Court has explained, “it is not unusual to punish individuals for the unintended consequences of their *unlawful* acts.”<sup>225</sup>

This broad understanding dates back hundreds of years. William Blackstone, for example, described the sweeping scope of legal responsibility for harms from unlawful acts:

[I]f any accidental mischief happens to follow from the performance of a *lawful* act, the party stands excused from all guilt: but if a man be doing any thing *unlawful*, and a consequence ensues which he did not foresee or intend, as the death of a man or the like, his want of foresight shall be no excuse; for, being guilty of one offence, in doing antecedently what is in itself unlawful, he is criminally guilty of whatever consequence may follow the first misbehaviour.<sup>226</sup>

In light of these principles, it is an interesting question whether a federal criminal defendant could create entirely unforeseeable “victims” outside the scope of the risk of the defendant’s crime.<sup>227</sup> But in adding a proximate-harm predicate to the CVRA’s “victim” definition, Congress presumably did not intend to break new legal ground but instead simply sought to apply generous interpretations of foreseeability that already existed, particularly when applied to intentional criminal acts. Indeed, shortly after securing the CVRA’s passage, Senate co-sponsor Jon Kyl explained that the CVRA’s “direct and proximate” requirements “necessarily invoke the concept of ‘foreseeability,’ which has been liberally interpreted in other victims’ statutes.”<sup>228</sup>

In support of this liberal interpretation of the CVRA, Senator Kyl cited four cases, all of which found “victim” status under various enactments based on harms broadly deemed to be foreseeable.<sup>229</sup> Interestingly, three of the cases involved bank robbery, creating an instructive trilogy showing how expansive the definition of a bank-robbery “victim” can be.

In identifying bank-robbery victims, as a starting point, it seems incontestable that the financial institution that lost money or the tellers from whom money was

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224. *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 548 (1983) (Marshall, J., dissenting) (internal citations omitted); see also Mark A. Geistfeld, *Proximate Cause Untangled*, 80 MD. L. REV. 420, 457 (2021) (“intentional torts do not require a separate inquiry into proximate cause in the prima facie case”).

225. *Dean v. United States*, 556 U.S. 568, 575 (2009) (citing 2 WAYNE R. LAFAVE, *SUBSTANTIVE CRIMINAL LAW* § 14.4, at 436–37 (2d ed. 2003)).

226. 4 W. BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 26–27 (1769) (quoted with approval in *Dean v. United States*, 556 U.S. 568, 575–76 (2009)).

227. See generally WAYNE R. LAFAVE, *CRIMINAL LAW* § 6.4(c), at 356–57 (5th ed. 2010) (discussing the issue and noting that in tort law, the defendant may be held responsible for harms different from those actually risked by his conduct, while this is generally not the case in the criminal law).

228. The Honorable Jon Kyl et al., *supra* note 114, at 594.

229. *Id.* at 594–95.

forcibly taken would qualify as victims. But the caselaw cited by Senator Kyl extends “victim” status beyond these obvious categories.

Senator Kyl’s first example was *Moore v. United States*,<sup>230</sup> where the Eighth Circuit concluded that a customer inside a bank during a robbery was a victim, even though the defendant was trying to rob the bank rather than any bystanders.<sup>231</sup> The Eighth Circuit found the defendant’s argument that the customer was not a victim to be “unpersuasive,” and quoted the district judge, who concluded that “everybody who was looking down the barrel of a gun seems to me to be a victim.”<sup>232</sup>

Senator Kyl’s next example identified a “victim” bystander outside of a bank that was robbed. In *United States v. Metzger*, the Tenth Circuit considered a robber escaping from a bank with stolen money.<sup>233</sup> Immediately following this robbery, an off-duty police officer, who had been in the bank at the time, received information (inaccurate, as it turned out) about the robber’s car.<sup>234</sup> The officer then went to the parking lot outside and approached a driver in a car.<sup>235</sup> When the driver reached for the floor of the car, the officer believed the driver was reaching for a gun.<sup>236</sup> The officer fired a shot at the car, striking the driver—who turned out to be an innocent bystander.<sup>237</sup>

The Tenth Circuit considered whether an enhancement to the defendant’s sentence was proper under the Sentencing Guidelines because the driver’s injury was a “reasonably foreseeable” consequence of the robbery. The defendant argued that “no one reasonably could have expected an unarmed bank robbery and successful getaway would end in the injury of an innocent bystander at the hands of an off-duty police officer almost two minutes after the robbery.”<sup>238</sup> But the Tenth Circuit held that looking at the events this way was not the “proper inquiry.”<sup>239</sup> Instead of asking whether the defendant could have expected events to unfold in precisely this way, courts “ask more broadly whether it was foreseeable that, given the inherently dangerous nature of bank robbery, a bystander might be seriously injured during the flight or apprehension of a perpetrator.”<sup>240</sup> The Tenth Circuit concluded that “[t]he violent nature of the offense of bank robbery carries with it the inherent prospect that someone could be injured in the robbery or its aftermath.”<sup>241</sup>

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230. 178 F.3d 994 (8th Cir. 1999).

231. *Id.* at 1001.

232. *Id.*

233. 233 F.3d 1226, 1227 (10th Cir. 2000).

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.* at 1227–28.

241. *Id.* at 1228 (quoting *United States v. Passmore*, 165 F.3d 21, 21 (4th Cir. 1998)).



The final case in Senator Kyl’s bank-robbery trilogy was the Seventh Circuit’s decision in *United States v. Donaby*.<sup>242</sup> There, police officers pursued a bank robber in a high-speed chase and damaged their vehicle.<sup>243</sup> In affirming a restitution award to the police department as a “victim” of the robbery, the Seventh Circuit explained that “the need to elude the police after the robbery is a likely and foreseeable outcome of the crime. [The defendant] foresaw this possibility, and he arranged for three getaway cars . . . to reduce the risk of the police catching him.”<sup>244</sup> Thus, the department was a bank-robbery victim because the defendant “directly and proximately caused the damage to the police car” by committing the robbery.<sup>245</sup>

Senator Kyl cited one additional case in support of the “liberal interpretation” of proximate harm that courts have conventionally given in determining who is a victim. In *United States v. Checora*, the Tenth Circuit held that juvenile children of a manslaughter victim were also victims of the manslaughter.<sup>246</sup> The Tenth Circuit explained that the children (eight and ten years old) were “directly and proximately harmed as a result of their father’s death because they have lost, among other things, a source of financial support.”<sup>247</sup>

These cases—and many others like them<sup>248</sup>—amply support Senator Kyl’s truism that “[s]imply put, crime foreseeably has far-reaching consequences.”<sup>249</sup> Often these far-reaching harms are not immediately recognizable, which is one reason victim impact statements are allowed in criminal cases.<sup>250</sup> Research on criminal victimization has developed a broad list of harmful effects, including not only physical injury and financial loss, but also emotional harms and resulting social effects.<sup>251</sup> Academic studies have confirmed the commonsense intuition that criminal victimization can harm quality of life in many ways, such as impairing relationships

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242. 349 F.3d 1046 (7th Cir. 2003).

243. *Id.* at 1048.

244. *Id.* at 1054.

245. *Id.*

246. 175 F.3d 782, 795 (10th Cir. 1999).

247. *Id.* at 795.

248. *See, e.g., United States v. Reichow*, 416 F.3d 802, 804 (8th Cir. 2005) (holding that a police officer injured during a shootout following a bank robbery was properly awarded restitution from robber); *United States v. Alvarez*, 835 F.3d 1180, 1185–87 (9th Cir. 2016) (holding that a car rental company whose car was damaged in a police chase was properly awarded restitution from driver); *People v. Wahmhoff*, 900 N.W.2d 364, 369–70 (Mich. Ct. App. 2017) (holding that police officers and firefighters were entitled to restitution because the “defendant’s measured, illegal act prompted the expenditure of resources far beyond routine costs for investigation, prosecution, or emergency response that would ordinarily be expended”); *United States v. Brock-Davis*, 504 F.3d 991, 993 (9th Cir. 2007) (holding that motel owner was entitled to restitution under the MVRA, where cleanup effort was a foreseeable result of defendant’s attempt to create methamphetamine lab).

249. The Honorable Jon Kyl et al., *supra* note 114, at 594–95.

250. *See Cassell, Barbarians at the Gates?*, *supra* note 99, at 488–91; Paul G. Cassell, *In Defense of Victim Impact Statements*, 6 OHIO ST. J. CRIM. L. 611, 619–21 (2009).

251. *See, e.g., Joanna Shapland & Matthew Hall, What Do We Know About the Effects of Crime on Victims?*, 14 INT’L REV. VICTIMOLOGY 175, 178 (2007).

and impeding proper functioning in society.<sup>252</sup> Economists have been able to quantify these losses from crimes as costing billions of dollars.<sup>253</sup> In determining the harms from crimes, Congress understood that crime can have “a long-lasting, traumatic impact” on the lives of victims<sup>254</sup> and, accordingly, adopted a far-reaching definition of “victim” in the CVRA.

The “far-reaching” consequences of crimes, however, are not unlimited. *United States v. Sharp* illustrates an instance when harm was simply too attenuated to justify victim status.<sup>255</sup> There, a district court considered a defendant who illegally distributed marijuana to a customer.<sup>256</sup> The customer consumed the marijuana and then committed domestic abuse against his girlfriend (Ms. Nowicki—a law professor).<sup>257</sup> She alleged that her boyfriend’s “violence and poor judgment was at least partly attributable to the drugs [the defendant] illegally sold.”<sup>258</sup> In rejecting her argument that she was a victim of the drug-trafficking conspiracy, the court concluded that there was “conflicting evidence, at best, suggesting that the [conspiracy’s] marijuana, when sold to and used by the former boyfriend, was known to cause aggressive behavior or violence in its users. In other words, Nowicki is unable to demonstrate that her alleged injuries were a foreseeable consequence of the Defendant’s drug conspiracy.”<sup>259</sup>

#### *D. The Requirement that the Harm Be as a Result of the Commission of a Federal Offense*

Having defined the qualifying “harm” for victim status as well as the requirement that the harm be “direct and proximate,” one last issue remains: the CVRA’s victim definition extends rights to a person directly and proximately harmed “as a result of the commission of a [f]ederal offense.”<sup>260</sup> What is the “federal offense” that creates harm for victim-definition purposes? And how far does the “commission” of such an offense extend?

One immediately apparent point is that the definition of “federal offense” is broader than that found in some of the restitution statutes, which define “victim” in terms of direct and proximate harm from “an offense for which restitution may be ordered.”<sup>261</sup> The CVRA does not contain this limitation, which means that it

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252. Rochelle F. Hanson, Genelle K. Sawyer, Angela M. Begle & Grace S. Hubel, *The Impact of Victimization on the Quality of Life*, 23 J. TRAUMATIC STRESS 189, 190–92 (2010).

253. Phaedra S. Corso, James A. Mercy, Thomas R. Simon, Eric A. Finkelstein & Ted R. Miller, *Medical Costs and Productivity Losses Due to Interpersonal and Self-Directed Violence in the United States*, 32 AM. J. PREVENTIVE MED. 474, 476 (2007).

254. 150 CONG. REC. S4263 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein).

255. 463 F. Supp. 2d 556, 564–65 (E.D. Va. 2006).

256. *Id.* at 558.

257. *Id.* at 558–59.

258. *Id.*

259. *Id.* at 564–65.

260. 18 U.S.C. § 3771(e)(2)(A) (emphasis added). The definition also applies to “an offense in the District of Columbia,” which raises issues similar to those discussed in text regarding “Federal offense.”

extends to federal offenses falling outside the scope of the restitution statutes, such as environmental crimes outside of Title 18, for which restitution is sometimes unavailable.<sup>262</sup>

The CVRA definition of “offense” is also broader than the one contained in Rule 32 of the Federal Rules of Criminal Procedure when Congress enacted the CVRA. In 2004, Rule 32 (the provision covering sentencing proceedings) defined “victim” as an “individual against whom the defendant committed an offense *for which the court will impose sentence.*”<sup>263</sup> The CVRA, of course, is not limited to sentencing proceedings and extends rights to victims much earlier in the process, such as the right to speak at bail hearings.<sup>264</sup> Moreover, as Senator Kyl explained in his 2005 law review article, at sentencing the CVRA can protect “victims of counts dismissed in a plea agreement” because the CVRA does not contain restrictive language like Rule 32.<sup>265</sup>

In most cases, the identity of a particular federal offense will not be difficult to ascertain because the offense will be identified in a charging document (such as a complaint or indictment), or for pre-charging cases, the nature of the charge will be apparent from other circumstances.<sup>266</sup> One question arising in some cases is whether the victim must be listed in the indictment in order to receive CVRA rights. The obvious answer to that question is no, as the Eleventh Circuit (among other courts) has explained:

[T]he CVRA does not limit the class of crime victims to those whose identity constitutes an element of the offense or who happen to be identified in the charging document. Rather, the CVRA instructs the district court to look at the offense itself only to determine the harmful effects the offense has on parties. Under the plain language of the statute, a party may qualify as a victim, even though it may not have been the target of the crime, as long as it suffers harm as a result of the crime’s commission.<sup>267</sup>

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261. 18 U.S.C. § 3663A(a)(2) (emphasis added).

262. See *United States v. Elias*, 269 F.3d 1003, 1021–22 (9th Cir. 2001) (stating that there is no restitution authorized for Title 42 environmental crime). See generally Testimony of Paul G. Cassell before the U.S. Sentencing Commission, at 24 (Mar. 15, 2006), <https://www.uscc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20060315/cassell-testimony.pdf> (last visited Dec. 29, 2023) (discussing situations where restitution is unavailable).

263. FED. R. CRIM. P. 32(a) (emphasis added) (amended in 2008); see Cassell, *supra* note 98, at 856–57 (discussing proposed “victim” definition in the federal rules).

264. 18 U.S.C. § 3771(a)(4).

265. The Honorable Jon Kyl et al., *supra* note 114, at 594. Congress later amended the Federal Rules of Criminal Procedure to simply define “victim” using the same language found in the CVRA. See FED. R. CRIM. P. 1(b)(12).

266. See Cassell, *Rights Before Charges are Filed*, *supra* note 115, at 73–75.

267. *In re Wellcare Health Plans, Inc.*, 754 F.3d 1234, 1239 (11th Cir. 2014) (internal quotation marks omitted) (quoting *In re Stewart*, 552 F.3d 1285, 1289 (11th Cir. 2008)); accord *In re Fisher*, 640 F.3d 645, 648 (5th Cir. 2011).

Supporting this conclusion that a victim need not be listed in the indictment to qualify as a CVRA victim is the fact that charging practices vary from jurisdiction to jurisdiction. Some prosecutors list victims in their indictments, while others do not for various reasons.<sup>268</sup> There is no requirement that a victim be identified in the indictment, even to receive restitution.<sup>269</sup> Moreover, in some cases, victims may be so numerous that listing all victims is impractical. But even in mass-victim cases, CVRA rights apply.<sup>270</sup>

Once the particular “federal offense” has been identified, the next step is to identify the harm that stems from the “commission” of that offense. This limitation pertains to the Supreme Court’s decision in *Hughey v. United States*.<sup>271</sup> There, the Supreme Court reversed a restitution order requiring a defendant (Hughey) to repay several credit card companies damaged by his actions.<sup>272</sup> Hughey was indicted on three counts of theft by a postal employee and three counts of unauthorized use of credit cards.<sup>273</sup> In exchange for Hughey pleading guilty to one count of unauthorized use of a credit card, prosecutors dismissed the other charges.<sup>274</sup> The district court sentenced Hughey to pay restitution for the losses he caused through all six original counts rather than the smaller losses from the single count to which he pleaded guilty.<sup>275</sup> On review, the Supreme Court concluded that the trial court exceeded its authority in awarding restitution for losses not caused by the conduct that was the basis for Hughey’s conviction.<sup>276</sup>

In most CVRA cases, the issue discussed in *Hughey* never arises. For example, if a defendant is charged with robbing one particular victim, the conduct charged harms that victim. And even in situations where, for example, a defendant is charged in a six-count indictment with robbing six separate victims, since *Hughey*, it is Justice Department policy to consider the need for all six victims to obtain restitution<sup>277</sup>—and so, frequently, a plea bargain involving just one count will still require that restitution be made on all of the initially charged counts.<sup>278</sup>

Sometimes defendants may mistakenly raise a “*Hughey* issue” in situations where it does not exist. For example, in the *Donaby* case discussed earlier (involving damage to a police car during a bank robber’s escape),<sup>279</sup> no *Hughey* issue

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268. See, e.g., *United States v. Kee*, No. S1 98-CR-778 (DLC), 2000 WL 863119, at \*2 (S.D.N.Y. June 27, 2000) (discussing Government delaying in identifying “Victims 1 and 2” in indictment until shortly before trial).

269. See, e.g., *United States v. Henoud*, 81 F.3d 484, 489 (4th Cir. 1996) (noting that “[t]he VWPA does not state that only those parties named as victims in the indictment may be awarded restitution”).

270. See 18 U.S.C. § 3771(d)(2) (setting out CVRA procedures for mass victim cases).

271. *Hughey v. United States*, 495 U.S. 411, 416, 418 (1990).

272. *Id.* at 413–14, 422.

273. *Id.* at 411.

274. *Id.* at 413–14.

275. *Id.* at 414.

276. *Id.* at 422.

277. U.S. DEP’T OF JUST., ATTORNEY GENERAL GUIDELINES FOR VICTIM AND WITNESS ASSISTANCE 42–46 (2011), [https://www.justice.gov/sites/default/files/olp/docs/ag\\_guidelines2012.pdf](https://www.justice.gov/sites/default/files/olp/docs/ag_guidelines2012.pdf).

278. See, e.g., *In re Doe*, 51 F.4th 1023, 1029–30 (9th Cir. 2022) (CVRA case finding restitution proper for dismissed charges under plea agreement).

existed. Because the defendant had been convicted of the bank robbery that triggered the chase, the case did not present an issue of harm stemming from unconvicted conduct—but rather a causation issue. As the Seventh Circuit explained in affirming victim status, “[t]he district court did not improperly include restitution to victims of other bank robberies (or any other crime) of which Donaby has not been convicted. Instead, the damage arose out of the convicted offense of bank robbery.”<sup>280</sup>

Indeed, the Seventh Circuit thought it was arguable that there was no significant causation issue in the case at all.<sup>281</sup> It is possible to view the robber’s escape from the bank as part of the robbery itself. The Seventh Circuit noted that courts “have often commented on the factual and temporal interconnectedness of bank robbery and flight.”<sup>282</sup> The Third Circuit has similarly held that “[o]ur caselaw has consistently treated escape as part and parcel of a bank robbery, including federal bank robbery as defined in [federal law].”<sup>283</sup> Likewise, the Sixth Circuit has explained that “[a]s the crime of bank robbery cannot be completed without some form of flight or attempted flight, the crime is more naturally understood to include the act of fleeing and the immediate consequences of such flight.”<sup>284</sup> Once a court adopts this realistic conception of bank robbery as necessarily encompassing flight from the bank, the police department’s victim status becomes obvious.

This conclusion is reinforced by the CVRA’s plain language, which identifies the trigger for victim status as direct and proximate harm “as a result of *the commission of* a federal offense.”<sup>285</sup> While it might be argued that fleeing from a bank—and, of course, crashing a car—are not part of the elements of the offense of bank robbery, they can be part of the “commission” of a bank robbery.<sup>286</sup> Thus, the harm that triggers victim status can be “based on facts not strictly required to secure a conviction.”<sup>287</sup>

In response to this position, a defendant may argue that *Hughey* imposes an “elements-only” approach to determining restitution and, by extension, to CVRA determinations. Under this reading of *Hughey*, a victim determination can only be based on conduct that constitutes an element of the offense. But, as the Sixth Circuit has recently explained, “[n]o ‘elements-only’ language appears in *Hughey*. And, importantly, no such language appears in the VWPA, which was amended *after* the *Hughey* decision to authorize restitution for any ‘victim’ ‘directly and

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279. See *supra* notes 242–45 and accompanying text.

280. *United States v. Donaby*, 349 F.3d 1046, 1053 (7th Cir. 2003).

281. See *id.* at 1054.

282. *Id.*

283. *United States v. Williams*, 344 F.3d 365, 372 (3d Cir. 2003) (citing 18 U.S.C. § 2113).

284. *United States v. Muhammad*, 948 F.2d 1449, 1456 (6th Cir. 1991).

285. 18 U.S.C. § 3771(e)(2) (emphasis added).

286. See *United States v. Chalupnik*, 514 F.3d 748, 753 (8th Cir. 2008) (MVRA case concluding that the word “commission” in the “proximately harmed as a result of the commission of” the offense in the MVRA “reflects an intent to include the defendant’s total conduct in committing the offense”).

287. *United States v. Ruiz-Lopez*, 53 F.4th 400, 405 (6th Cir. 2022).

proximately harmed as a result of the commission of an offense.”<sup>288</sup> Similarly, no such “elements-only” language appears in the CVRA, which was also drafted *after* the *Hughey* decision. Because Congress used exactly the same directly-and-proximally-harmed language in the CVRA, the same result naturally follows.<sup>289</sup>

This principle that a crime’s harm extends beyond the elements of the crime also applies to what are known as “continuing offenses.” A continuing offense is one that involves ongoing perpetration, producing an ongoing threat of harm.<sup>290</sup> The prototypical continuing offense is conspiracy, which “continues as long as the conspirators engage in overt acts in furtherance of their plot,” and “each day’s acts bring a renewed threat of the substantive evil Congress sought to prevent.”<sup>291</sup> Another example is kidnapping because the crime, by its nature, involves unlawful seizure and detention and the harm to the victim continues throughout the duration of the detention.<sup>292</sup> Likewise, other offenses that prohibit an individual from *remaining* in an unlawful condition or status have been construed to continue so long as the offender maintains the unlawful condition or status; the perpetration of the offense naturally continues so long as the unlawful condition is maintained.<sup>293</sup> For these continuing offenses, harm that occurs while the offense is continuing is sufficient to confer victim status.<sup>294</sup>

For offenses that are continuing (as with those that are not), applying the CVRA will always require some tracing of consequences. The CVRA’s victim definition (as well as the MVRA’s and VWPA’s) looks to direct and proximate harms “as a result of” a federal offense,<sup>295</sup> which necessarily involves exploring the causation issues discussed previously.<sup>296</sup> To be sure, in some cases, the result will be too far afield to create victim status. But the issue is best described as a causation issue rather than a scope-of-the-offense issue.

An illustration of this point comes from *United States v. Reed*, a Ninth Circuit case where police officers observed a suspected stolen van and gave chase as it sped away.<sup>297</sup> Ultimately the van crashed into several cars.<sup>298</sup> When police approached,

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288. *Id.* at 406.

289. 18 U.S.C. § 3771.

290. *See United States v. Brazell*, 489 F.3d 666, 668 (5th Cir. 2007); *United States v. Yashar*, 166 F.3d 873, 875 (7th Cir. 1999).

291. *Toussie v. United States*, 397 U.S. 112, 122 (1970).

292. *United States v. Garcia*, 854 F.2d 340, 343–44 (9th Cir. 1988).

293. *See, e.g., United States v. Bailey*, 444 U.S. 394, 413 (1980) (holding that escape is a continuing offense, “[g]iven the continuing threat to society posed by an escaped prisoner”); *United States v. Santana-Castellano*, 74 F.3d 593, 598 (5th Cir. 1996) (“Where a deported alien enters the United States and remains here with the knowledge that his entry is illegal, his remaining here until he is ‘found’ is a continuing offense.”).

294. *See United States v. Yashar*, 166 F.3d 873, 875 (7th Cir. 1999) (“The classic example of a continuing offense is a conspiracy, but other offenses such as escape or kidnapping also may fall within those definitions.”).

295. 18 U.S.C. § 3771(e)(2)(A).

296. *See generally supra* notes 168–259 and accompanying text.

297. 80 F.3d 1419, 1420 (9th Cir. 1996).

298. *Id.*



they discovered the defendant (Reed) lying about ten feet away.<sup>299</sup> The officers searched Reed, a convicted felon, and found a loaded revolver in his pocket.<sup>300</sup>

Reed was ultimately convicted of being a felon in possession of a firearm.<sup>301</sup> The district court judge sentenced him to pay restitution for the damage to the stolen van and the other vehicles he struck.<sup>302</sup> The Ninth Circuit overturned the restitution award, concluding that the trial court was prohibited from ordering restitution “for conduct that is related to the offense of conviction, but that is not an element of the offense.”<sup>303</sup> This is the right result for the wrong reason. What the Ninth Circuit should have said is that the damage to the other vehicles was not caused (either directly or proximately) by the offense of being a felon in possession of a firearm. In other words, it cannot be said that “but for” possessing the firearm, the damage to the vehicles would not have occurred. The police gave chase to Reed because he was driving a stolen van. They did not learn that he unlawfully possessed a firearm until later. The police would still have given chase regardless of whether Reed was a felon in possession of a firearm. Thus, the damage to the vehicle was simply not “as a result of” that crime.

This is not to say that the vehicle owners (or their insurers) should have been left suffering the financial consequences of Reed’s conduct. The solution for restitution in similar cases in the future is for prosecutors to simply charge defendants like Reed both with being a felon in possession and with evading arrest. The damage to the vehicles’ owners was obviously directly and proximately caused by the second crime. With proper charging—and proper plea negotiations if the case is resolved via plea—the victim vehicle owners would have been awarded full restitution.

#### *E. The Requirement that a Victim Not Be the Perpetrator of the Crime*

One final and seemingly obvious limitation in the CVRA is worth brief discussion: the requirement that a victim not be the perpetrator of the crime. The CVRA provides that a “person accused of the crime may not obtain any form of relief under [the CVRA].”<sup>304</sup> The result of this provision is the commonsense limitation that a victim does not exist without a perpetrator of the crime, and a perpetrator cannot be his own victim.<sup>305</sup>

Generally, the cases have had little difficulty in interpreting this limitation. A helpful discussion (in a restitution context) comes from the Second Circuit, which explained that victim status “may not be denied simply because the victim had greedy or dishonest motives, where those intentions were not *in pari materia* with those of the defendant.”<sup>306</sup> The Second Circuit offered the illustration of a would-

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299. *Id.*

300. *Id.*

301. *Id.*

302. *Id.*

303. *Id.* at 1422.

304. 18 U.S.C. § 3771(d)(1).

305. *See In re Wellcare Health Plans, Inc.*, 754 F.3d 1234, 1239 (11th Cir. 2014) (construing the MVRA).

be burglar who is robbed by a potential accomplice before either of them commits the planned crime—the would-be burglar might well qualify for victim status.<sup>307</sup> On the other hand, victim status might not be appropriate if one burglar were to rob another of the proceeds of a heist they have just committed.<sup>308</sup>

Applying these principles, the Eleventh Circuit swiftly rejected CVRA claims by Wellcare, a provider of managed health care services to government-sponsored health care programs.<sup>309</sup> In exchange for the Government's agreement to defer prosecution, Wellcare had previously admitted to being a co-conspirator to the underlying criminal conduct, and it paid restitution as a result of its participation in those criminal offenses.<sup>310</sup> Wellcare then tried to argue that it, too, was the victim of a fraud by a small group of top-level Wellcare employees without the involvement of the board of directors or the vast majority of Wellcare's employees.<sup>311</sup> But the Eleventh Circuit noted that a corporation only acts by virtue of its employees, and Wellcare was responsible for the acts of its top-level executives.<sup>312</sup> So, when Wellcare sought restitution from its top-level executives, the Eleventh Circuit held, "Wellcare seeks restitution for its own conduct—something it cannot do."<sup>313</sup>

While the proposition that a person cannot be both a perpetrator and a victim might seem straightforward, complexities can develop in what might be usefully grouped together as "victim-blaming" situations. A quintessential example is sex-trafficking cases, where trafficking victims may have themselves been technically involved in trafficking crimes or may otherwise find themselves blamed for their own trafficking.<sup>314</sup> These complexities should be resolved through careful charging practices by prosecutors, who can draft indictments that properly distinguish between perpetrators and victims.<sup>315</sup>

### III. APPLYING THE CVRA'S "VICTIM" DEFINITION TO IMPORTANT CRIME CATEGORIES

As recounted in the previous section, the CVRA's "harm" requirement requires fully tracing a crime's effects to expansively protect those who have been harmed.

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306. *United States v. Ojeikere*, 545 F.3d 220, 223 (2d Cir. 2008).

307. *Id.*

308. *Id.*

309. *See In re Wellcare*, 754 F.3d at 1239–40.

310. *Id.* at 1235–36.

311. *Id.* at 1239.

312. *Id.*

313. *Id.* at 1240.

314. *See generally* Katherine C. Cunningham & Lisa DeMarni Cromer, *Attitudes About Human Trafficking: Individual Differences Related to Belief and Victim Blame*, 31 J. INTERPERSONAL VIOLENCE 228 (2016); Jayashri Srikantiah, *Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law*, 87 B.U. L. REV. 157, 195–97 (2007).

315. *See* Jeffrey H. Zeeman & Karen Stauss, *Criminal Conduct of Victims: Policy Considerations*, 65 U.S. ATT'YS BULL. 139, 144–46 (2017) (analyzing how to distinguish between victims and abusers in trafficking cases).

This principle can be illustrated by looking at decisions involving important crime categories. This part reviews how the CVRA’s harm requirement broadly applies in violent, property, firearms, environmental, and governmental-process crimes. These crimes often have far-reaching effects—and thus create far-reaching “victim” status.

### A. *Victims of Violent Crimes*

Applying the CVRA’s victim definition to violent crimes is often straightforward. In a robbery case, for example, the person robbed is clearly a victim of the robbery—suffering harm either from the forcible taking of property or the threats inherent in such takings.<sup>316</sup>

Similarly, in homicide cases, victim status would seem to be obvious: the person killed has, undeniably, been harmed. Complications can arise, however, because the person killed is obviously no longer capable of exercising victims’ rights. Often these complexities can be resolved with reference to the CVRA’s representative provision. The CVRA allows rights to be asserted not only by the “victim” but also by the victim’s “lawful representative.”<sup>317</sup> Thus, a wife whose husband is murdered could assert *his* rights as his representative, gaining access in a representative capacity to CVRA protections (such as the right to restitution).<sup>318</sup>

But in addition to being able to gain CVRA protection in a representative capacity, family members may also be able to show a direct and proximate harm from a homicide, gaining recognition as victims of the homicide in their own right. The direct harm is often easy to establish: but for a homicide, for example, a family member would not suffer the emotional trauma resulting from the death. The existence of proximate harm is more complex but also, properly understood, exists in most homicide cases. Harm to surviving family members is readily foreseeable. As Justice Souter has explained, “Murder has foreseeable consequences. When it happens, it is always to distinct individuals, and, after it happens, other *victims* are left behind.”<sup>319</sup>

Applying this understanding of foreseeable consequences from a homicide, federal courts have found victim status in homicide cases for those “left behind.” For

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316. See, e.g., *United States v. Slater*, 547 F. Supp. 3d 58, 62 (D. Me. 2021) (requiring—in a compassionate release case—notice to victim of bank teller whom defendant had threatened to kill in light of the serious psychological trauma from the robbery); see also *United States v. Terry*, 142 F.3d 702, 711 (4th Cir. 1998) (explaining that “[b]ank tellers and patrons are indirect victims in a bank robbery” under the sentencing guidelines (citing U.S.S.G. § 3A1.1, cmt. 2)).

317. 18 U.S.C. § 3771(d)(1).

318. The wife would also likely be entitled to restitution for lost income under restitution statutes. See, e.g., *United States v. Serawop*, 505 F.3d 1112 (10th Cir. 2007). The broader point here is that, under the plain language of the CVRA, a victim need not be alive to be “harmed.” See 18 U.S.C. § 3771(e)(2)(B) (allowing victim “representative” to assert rights for a victim who is “incapacitated” or “deceased”); see also 18 U.S.C. § 2259(c)(4) (similar provision). Instead, harm can continue to be inflicted even after death. Cf. *Engel v. Wild Oats, Inc.*, 644 F. Supp. 1089, 1092 (S.D.N.Y. 1986) (finding that harm from willful copyright infringement continued even after the death of the artist).

319. *Payne v. Tennessee*, 501 U.S. 808, 838 (1991) (Souter, J., concurring) (emphasis added).

example, courts have held that, for purposes of restitution, children of homicide victims are also victims because they have lost, among other things, a source of financial support.<sup>320</sup> Similarly, the Ninth Circuit has held that the mother of a murder victim was a victim under the MVRA because her search for her missing son “was a reasonably foreseeable reaction” to the murder—and thus, the mother was entitled to lost wages for the time spent searching for her son.<sup>321</sup> This is one area where the expanding definition of “victim,” focusing on the harms flowing from a crime rather than just the target, makes an obvious difference.<sup>322</sup>

Burglary is another violent crime that sometimes presents complex questions about victim status. While burglary is listed in the FBI’s Uniform Crime Reports as a property crime, under the federal Armed Career Criminal Act, it is prosecuted as a violent crime.<sup>323</sup> Regardless of the classification, the issue that often arises is which (if any) occupants of a residence are victims of a burglary. Burglary laws recognize the danger an intruder presents to a residence’s occupants.<sup>324</sup> State courts have recognized all occupants of a burglarized home as victims under state crime victims’ rights enactments.<sup>325</sup> Given the easily foreseeable emotional distress that accompanies the invasion of a space like a home,<sup>326</sup> the CVRA should likewise be construed to provide the same expansive coverage.

### B. *Victims of Property Crimes*

Determining victim status in property crimes is often straightforward. If the property of a person has been taken as a result of the crime, that person has clearly suffered direct and proximate harm from the crime—financial harm—and is a victim under the CVRA (or similar federal statutes).<sup>327</sup>

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320. See *United States v. Checora*, 175 F.3d 782, 795 (10th Cir. 1999); *United States v. Visinaiz*, 428 F.3d 1300, 1314–15 (10th Cir. 2005) (concluding that son of murdered mother was a “victim” under statute authorizing victims’ presence at trial); see also *Richardson v. State*, 957 S.W.2d 854, 859 (Tex. Ct. App. 1997) (awarding restitution for future lost income to child of manslaughter victim under Tex. Code Crim. Proc. Ann. § 42.037(b)(2)(C) allowing for reimbursement for “income lost by the victim as a result of the offense”).

321. *United States v. Juv. Female*, 296 F. App’x 547, 549 (9th Cir. 2008).

322. See *United States v. Terry*, 142 F.3d 702, 710–12 (4th Cir. 1998) (concluding that family members harmed only through their relationship to the victim in an involuntary manslaughter case were not “victims” under the sentencing guidelines but noting that this was under the guidelines’ narrow object-of-the-crime definition of “victim”).

323. RICHARD F. CULP, PHILLIP M. KOPP & CANDACE MCCOY, *IS BURGLARY A CRIME OF VIOLENCE? AN ANALYSIS OF NATIONAL DATA 1998-2007*, at 3 (2015), <https://www.ojp.gov/pdffiles1/nij/grants/248651.pdf>.

324. See Model Penal Code § 221.1 cmt. 2 (Official Draft and Revised Comments 1980) (limiting burglary to “circumstances especially likely to terrorize occupants”); see also *People v. Statler*, 219 Cal. Rptr. 713, 718 (Cal. Ct. App. 1985) (discussing burglary laws based on recognition of danger to personal safety of occupants).

325. See, e.g., *State v. Sarullo*, 199 P.3d 686, 691 (Ariz. Ct. App. 2008) (holding that child who was asleep at home at time of burglary was a “victim” of the burglary under Arizona crime victims’ statute); *State v. Davis*, 954 P.2d 325, 328 (Wash. Ct. App. 1998) (finding both occupant and guest victims of a burglary).

326. See Mike Maguire, *The Impact of Burglary Upon Victims*, 20 BRIT. J. CRIMINOLOGY 261 (1980); Alan Beaton, Mark Cook, Mark Kavanagh & Carla Herrington, *The Psychological Impact of Burglary*, 1 PSYCH., CRIME & L. 33 (2000).

327. See, e.g., *Jordan v. Dep’t of Just.*, 173 F. Supp. 3d 44, 50 (S.D.N.Y. 2016); *United States v. Thetford*, 935 F. Supp. 2d 1280, 1283 (N.D. Ala. 2013).

In addition, some financial crimes can expose individuals to a risk of financial loss. As discussed earlier, criminally subjecting someone to a risk of harm is itself a harm.<sup>328</sup> Courts have applied this risk-of-harm-is-harm principle in cases involving fraudulent representations to lenders. For example, in *United States v. Martin*, the Eleventh Circuit considered a defendant who had made fraudulent representations to lenders to obtain mortgage loans.<sup>329</sup> Those loans were subsequently transferred to successor lenders.<sup>330</sup> Applying the MVRA’s direct-and-proximate-harm language, the circuit court explained that it was “entirely foreseeable” to the defendant “not only that the original lenders would rely on the fraudulent applications, but that the mortgages would be resold to other lenders that would rely on the applications as well.”<sup>331</sup> The successor lenders were harmed because they “purchased the mortgages based upon false perceptions of the buyers’ ability to repay them.”<sup>332</sup> The lenders did not need to show a loss to qualify as victims, but only this harm of false perception.

In connection with financial fraud cases, courts have considered whether an alleged victim actually relied on the perpetrator’s fraudulent misrepresentations.<sup>333</sup> Often, it will be clear that no reasonable person would have given the defendant money if the person had been aware of the fraud.<sup>334</sup> But where there is a debate, an alleged victim must provide some showing of a connection between the fraud and financial harm.<sup>335</sup>

An area where difficulties have arisen is when a crime involves corporate assets. Courts have sometimes struggled with the question of whether a shareholder of a corporation victimized by a crime is also a victim of that crime. For example, in *United States v. Ruzicka*, a district court considered a crime involving the fraudulent taking of money from an S corporation.<sup>336</sup> An individual (Austin) sought to assert rights under the CVRA, arguing that because of his substantial interest in the corporation, he was harmed by the crime.<sup>337</sup> The district court concluded that Austin was not a victim, reasoning from the “basic tenet of American corporate law” that “the corporation and its shareholders are distinct entities.”<sup>338</sup> Austin

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328. See *supra* notes 149–51 and accompanying text.

329. 803 F.3d 581, 586–87 (11th Cir. 2015).

330. *Id.* at 586.

331. *Id.*

332. *Id.* at 593; see also *United States v. Yeung*, 672 F.3d 594, 603 (9th Cir. 2012) (reaching the same conclusion about victimization through risky loans), *abrogated on other grounds* by *Robers v. United States*, 572 U.S. 639 (2014).

333. See, e.g., *United States v. Teadt*, 653 F. App’x 421, 429 (6th Cir. 2016) (restitution case).

334. See, e.g., *United States v. Ojeikere*, 545 F.3d 220, 223 (2d Cir. 2008) (finding victim status under MVRA where defendant tricked lenders into improperly releasing funds).

335. See, e.g., *United States v. Gross*, No. 17-20790, 2018 WL 4610865, at \*4 (E.D. Mich. Sept. 26, 2018) (granting lender’s CVRA victim motion due to reliance on fraudulent representations from fraudster even though financial consequences of loan not completely determined).

336. 331 F. Supp. 3d 888, 891–92 (D. Minn. 2018).

337. *Id.* at 892–93, 900.

338. *Id.* at 899 (quoting *Dole Food Co. v. Patrickson*, 538 U.S. 468, 474 (2003)).

argued that, because of his stake in the corporation, everything taken from the corporation was effectively taken from him.<sup>339</sup> But the district court concluded that the harm to Austin was merely “ancillary” and therefore insufficient to create CVRA status.<sup>340</sup> Quoting the CVRA, the district court raised the concern that if “shareholders are victims merely because they own shares in a victim corporation, then all shareholders would be entitled to ‘be reasonably heard at any public proceeding,’ ‘confer with the attorney for the Government in the case,’ and ‘full and timely restitution.’”<sup>341</sup> The district court concluded with a rhetorical flourish, arguing that it “must avoid turning a criminal trial into a judge-led shareholder meeting.”<sup>342</sup>

A partial answer to the district court’s concerns is that it was undisputed that the corporation itself was a victim of the crime. Accordingly, it would seem as though Austin could have become the appropriate “representative” of the corporation under the CVRA in the proceedings and exercised its rights.<sup>343</sup>

But, in any event, the district court failed to properly apply the CVRA by failing to properly determine the direct-and-proximate-harm issue. If a shareholder in a corporation loses money due to a crime, a shareholder has suffered direct harm—i.e., “but for” the crime, the shareholder would have had more valuable property (more valuable shares in the corporation) than if the crime had not occurred. The proximate harm analysis is similarly straightforward. A crime committed against a corporate entity foreseeably will damage individuals with an interest in that entity. The district court should have found that Austin was a CVRA victim.

The district court’s policy concern about running a “judge-led shareholder meeting” is also easily answered. It may be true that recognizing shareholders as victims of corporate crimes will increase the number of victims who must be notified by prosecutors and involved in the judicial proceedings. But the CVRA only requires that “reasonable” notifications be made—a limitation that would justify dispensing with notice in cases where (unlike Austin’s situation) small losses were caused to large numbers of shareholders.<sup>344</sup> Moreover, notification by prosecutors to multiple victims in mass-victim cases is easily provided by electronic notification systems and websites that the Justice Department already has in place.<sup>345</sup> And with respect to court proceedings, the CVRA itself provides that in “a case where the court finds that the number of crime victims makes it impracticable to accord all of the crime victims the rights [in the CVRA], the court shall

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339. *Id.* at 900.

340. *Id.* at 901.

341. *Id.* (quoting 18 U.S.C. § 3771(a)).

342. *Id.* at 901.

343. *See* 18 U.S.C. § 3771(d)(1) (stating that CVRA rights may be exercised by the victim or the victim’s lawful representative).

344. *Id.* § 3771(a)(2) (extending right to “reasonable” notice of court proceedings).

345. *See Victim Services*, FBI, <https://www.fbi.gov/resources/victim-services> (last visited Nov. 22, 2023) (describing the Justice Department’s Victim Notification System).



fashion a reasonable procedure to give effect in this chapter that does not unduly complicate or prolong the proceedings.”<sup>346</sup> Under this provision, a judge can (for example) receive written victim impact statements rather than entertain oral statements from multiple victims.<sup>347</sup> Thus, the district court’s concern is readily addressed through a more nuanced application of the CVRA’s provisions.

### C. *Victims of Firearms Crimes*

About eleven percent of all federal criminal prosecutions involve firearms.<sup>348</sup> Many of these prosecutions involve the possession of a firearm by a prohibited person, such as a felon or juvenile.<sup>349</sup> Where the prohibited person harms someone with the firearm, the prohibited person can either be charged with that harm directly or the connection between illegally possessing the firearm and the resulting injury will often be clear.<sup>350</sup>

For example, if a felon shoots someone with a firearm, violating the legal prohibition against felons possessing firearms is a but-for cause of the shooting. If the felon had complied with the law, no shooting would have occurred because no gun would have been in his hand.<sup>351</sup> And with respect to proximate cause, because the shooting is intentional, an inquiry into foreseeability is not ordinarily required.<sup>352</sup> Indeed, even if an inquiry were required, foreseeability would usually be obvious—as when the defendant shoots a victim or victim’s property. Courts

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346. 18 U.S.C. § 3771(d)(2); *see also* United States v. Schessel, No. CR 22-0374 (ES), 2022 WL 17094777, at \*5 (D.N.J. Nov. 21, 2022) (allowing Justice Department to notify thousands of victims of a fraud via website).

347. *See* Paul G. Cassell & Edna Erez, *Victim Impact Statements and Ancillary Harm: The American Perspective*, 15 CAN. CRIM. L. REV. 149, 156–59 (2011) (discussing written victim impact statements used by hundreds of victims in the Bernard Madoff sentencing); *cf.* Cassell & Erez, *supra* note 3, at \_\_ (discussing Nassar sentencing hearing where more than 150 victims presented in-court victim impact statements, either in-person or through a representative).

348. GLENN R. SCHMITT & AMANDA RUSSELL, U.S. SENT’G COMM’N, FISCAL YEAR 2019: OVERVIEW OF FEDERAL CRIMINAL CASES 18 (2020), [https://www.uscc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/FY19\\_Overview\\_Federal\\_Criminal\\_Cases.pdf](https://www.uscc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/FY19_Overview_Federal_Criminal_Cases.pdf).

349. *Id.*

350. *Cf.* United States v. Cornett, 515 F. Supp. 3d 367, 368 (E.D.N.C. 2021) (holding that defendant’s estranged wife was not a CVRA “victim” of defendant’s illegal possession of a firearm where defendant violated protective order by being on the wife’s property while leaving the gun in his car; no “harm” to wife from illegal possession).

351. *See, e.g.,* United States v. Ruiz-Lopez, 53 F.4th 400, 404 (6th Cir. 2022) (finding causation in VWPA case involving unlawful firearm possession because “[b]ut-for [defendant’s] unlawful possession the firearm would not have been [at the scene of the shooting]”); *cf.* United States v. Reed, 80 F.3d 1419 (9th Cir. 1996) (finding felon in possession of firearm not cause of police chase when felon status not discovered until after the chase). *See generally supra* note 177 and accompanying text (but-for causation considers what happens if defendant conforms to the law).

The Fifth Circuit has reached the seemingly opposite conclusion. *See* United States v. Penn, 969 F.3d 450, 458–59 (5th Cir. 2020) (overturning restitution award against felon in possession for damage caused during a shootout because the elements of that crime do not include use of a firearm or flight from police). But the Sixth Circuit has persuasively explained why the Fifth Circuit has failed to carefully consider the VWPA’s language, which (like the CVRA) defines victim status in terms of harm from “the commission” of a federal offense. This is a broader formulation than an elements-only approach. *See Ruiz-Lopez*, 53 F.4th at 404–06 (disagreeing with *Penn.*).

352. *See supra* note 224 and accompanying text.

have also found, correctly, that reckless handling of a gun by a prohibited person can foreseeably result in harm.<sup>353</sup>

But what about cases where a defendant has illegally transferred a gun to a prohibited person, resulting in a threat or harm to a person? With respect to defendants who illegally transfer guns, existing CVRA decisions reflect a reluctance to grant victim status to those harmed. Under the principles discussed in this article, that reluctance inappropriately limits the CVRA's reach.

An illustration comes from the Tenth Circuit's decision in *In re Antrobus*.<sup>354</sup> There, Mackenzie Hunter illegally sold a handgun to Sulejman Talovic, a juvenile.<sup>355</sup> As Hunter well knew, because Talovic was underage he could not lawfully possess a handgun.<sup>356</sup> In fact, it appears that Talovic even asked Hunter to obtain the gun for him because Talovic was prohibited from buying one.<sup>357</sup> About six months after the unlawful sale, Talovic entered a shopping center, shooting and killing five people.<sup>358</sup> Before Talovic could shoot anyone else, he was killed by an off-duty police officer.<sup>359</sup> Hunter later pleaded guilty to the federal crime of unlawfully transferring a handgun to Talovic, a juvenile.<sup>360</sup>

One of Talovic's victims was Vanessa Quinn, daughter of Kenny and Sue Antrobus.<sup>361</sup> At Hunter's sentencing for illegally transferring the murder weapon to Talovic, the Antrobuses, as representatives of Vanessa, asked the district court to recognize their daughter as a CVRA victim of Hunter's illegal gun sale, thereby giving them the right to deliver a victim impact statement.<sup>362</sup> But the district court concluded that Vanessa was not a victim of the illegal transfer.<sup>363</sup> The court reasoned that Hunter's crime was "too factually and temporally attenuated" from Vanessa's death to recognize her as a crime victim.<sup>364</sup> The district court acknowledged evidence of a discussion between Hunter and Talovic about a bank robbery, but deemed this conversation "general speculation" that failed to demonstrate the

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353. See, e.g., *Ruiz-Lopez*, 53 F.4th at 404–06 (6th Cir. 2022) (finding reckless discharge of firearm by an undocumented alien created VWPA "victim" entitled to restitution; illegal act of possession of a dangerous firearm foreseeably caused harm).

354. 519 F.3d 1123 (10th Cir. 2008). See generally 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, 601–14 (2010) (reviewing the facts of the case and subsequent litigation). Disclosure: One of the authors (Cassell) served as counsel for the Antrobuses.

355. *United States v. Hunter*, No. 2:07-cr-307-DAK, 2008 WL 53125, at \*1 (D. Utah Jan. 3, 2008), *mandamus denied*, *In re Antrobus*, 519 F.3d 1123 (10th Cir. 2008), and *mandamus denied*, 563 F.3d 1092 (10th Cir. 2009).

356. *Id.*

357. Cassell, *supra* note 354, at 601.

358. *Hunter*, 2008 WL 53125, at \*1.

359. *Police: Off-Duty Cop Saved Lives in Mall*, CBS NEWS (Feb. 13, 2007, 7:32 AM), <https://www.cbsnews.com/news/police-off-duty-cop-saved-lives-in-mall/>.

360. *United States v. Hunter*, No. 2:07-cr-307-DAK, 2008 WL 53125, at \*1 (D. Utah Jan. 3, 2008).

361. *Id.*

362. *Id.* at \*1–2.

363. *Id.* at \*5.

364. *Id.* at \*4.

foreseeability necessary for Hunter’s illegal sale of the firearm to be the proximate cause of Vanessa’s death.<sup>365</sup> Extensive litigation followed as the Antrobuses tried to obtain evidence about foreseeability, but they ultimately failed to overturn the district court’s ruling.<sup>366</sup>

The district court’s decision took a too-narrow view of the kind of foreseeability required to create CVRA victim status. The district court appeared to properly recognize that Vanessa was “directly” harmed by Hunter’s illegal gun sale because “but for” that sale, Vanessa could not have been killed by Talovic with that gun. But the district court found that Vanessa was not “proximately” harmed because her death was not foreseeable to Hunter.

As discussed earlier,<sup>367</sup> traditional foreseeability analysis does not require a wrongdoer to “have foreseen the precise injury, nor ‘should (he) have had notice of the particular method’ in which a harm would occur, if the possibility of harm was clear to the ordinarily prudent eye.”<sup>368</sup> Settled caselaw on foreseeability makes clear that it is “not necessary that the [defendant] be able to foresee the exact nature and extent of the injuries or the precise manner in which the injuries occur, but only that some injury will likely result in some manner as a consequence of his negligent acts.”<sup>369</sup> Thus, the applicable test of foreseeability “is whether the defendant reasonably should have anticipated *any* injury.”<sup>370</sup>

Caselaw involving tort claims concerning illegal firearms transfers confirms this broad understanding of foreseeability.<sup>371</sup> A well-developed line of cases holds that a gun transfer will be deemed the proximate cause of injuries that later result where the transferor knows the transfer is to a member of a class whom Congress has deemed potentially irresponsible or dangerous—i.e., juveniles, felons, and the mentally incompetent—and who are therefore prohibited from possessing firearms.

For example, in *Delana v. CED Sales, Inc.*, the wife of a fatal shooting victim, who was shot by his mentally ill daughter, brought an action against the gun seller for negligence and negligent entrustment.<sup>372</sup> In its decision, the Missouri Supreme Court followed the *Restatement (Second) of Torts*, which recognizes liability for

[o]ne who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should

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365. *Id.* at \*4.

366. See Cassell, *supra* note 354, at 601–14.

367. See *supra* notes 217–59 and accompanying text.

368. Kendall v. Gore Properties, Inc., 236 F.2d 673, 682 (D.C. Cir. 1956) (citing Restatement (First) of Torts § 449 (AM. L. Inst. 1934)).

369. Elliot v. Turner Constr. Co., 381 F.3d 995, 1006 (10th Cir. 2004) (internal citation omitted); see also Scott v. Dyno Nobel, Inc., 967 F.3d 741, 745 (8th Cir. 2020).

370. Elliot, 381 F.3d at 1006.

371. See, e.g., Brady v. Walmart, Inc., 2022 WL 2987078 (D. Md. July 28, 2022) (allowing suit by family members of person shot following allegedly illegal sale of firearm by Walmart to move forward).

372. Delana v. CED Sales, Inc., 486 S.W.3d 316 (Mo. 2016).

expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them.<sup>373</sup>

The court then held that “the defendant’s status as a seller does not preclude liability when the defendant sells a dangerous product to a purchaser with knowledge that that the purchaser will likely be unable to use the product without posing an unreasonable risk of physical harm to herself or others.”<sup>374</sup>

As another example, in *Franco v. Bunyard*, a wrongful-death action was brought against a gun seller who violated a federal gun-control statute by selling a gun without requiring the buyer to provide proper identification.<sup>375</sup> The buyer, a prison escapee, robbed a grocery store, took three hostages, and used the gun to murder two of them and wound the third.<sup>376</sup> The trial court ruled that the criminal’s use of the gun was an intervening cause, which was not foreseeable by the seller.<sup>377</sup> The Arkansas Supreme Court reversed, finding that

[o]n the issue of proximate cause, it is enough to point out that the tragedies could not have occurred as they did if the federal rules had been obeyed. . . . On the issue of foreseeability, we need say only that the very purpose of the law is to keep pistols out of the hands of such persons as [the buyer], who was both a convicted criminal and a fugitive from justice.<sup>378</sup>

Many other cases reach similar results.<sup>379</sup>

In light of decisions such as these, courts construing the CVRA in cases involving knowingly illegal firearms transfers should take an expansive view of whether those sales are sufficiently connected to later crimes to create victim status. The knowingly illegal transfer of a gun to a prohibited person should typically be deemed the proximate cause of harm that flows from that transfer precisely because Congress, in prohibiting certain people from possessing firearms, concluded that a gun transferred to the prohibited person might ultimately result in a violent crime. Such a transfer creates “too high a price in danger [for] us all to allow.”<sup>380</sup> Illegal gun sales to juveniles, for example, contravene the express aim of the Gun Control Act: “to curb crime by keeping firearms out of the hands of those

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373. *Id.* at 325 (citing RESTATEMENT (SECOND) OF TORTS § 390 (AM. L. Inst. 1979)).

374. *Id.* The court collected many cases supporting its ruling. *See id.* at 326 n.6.

375. *Franco v. Bunyard*, 547 S.W.2d 91 (Ark. 1977).

376. *Id.* at 145.

377. *Id.*

378. *Id.* at 147.

379. *See, e.g.*, *K-Mart Enterprises of Florida v. Keller*, 439 So. 2d 283 (Fla. 3d Dist. Ct. App. 1983) (vendor liable for selling gun leading to shooting committed by ex-felon); *Rubin v. Johnson*, 550 N.E.2d 324 (Ind. Ct. App. 1990) (holding that vendor’s sale of gun to mentally incompetent person could be proximate cause of the murder of an innocent victim by gun purchaser six months after purchase); *see also* James L. Isham, Annotation, *Liability of One Who Provides, by Sale or Otherwise, Firearm or Ammunition to Adult Who Shoots Another*, 39 A.L.R. 4th 517 (originally published in 1985).

380. 114 CONG. REC. 13,219 (1968) (remarks of Sen. Tydings on Gun Control Act of 1968).

classified as potentially irresponsible or dangerous.”<sup>381</sup> In short, it cannot generally be the case that a knowingly illegal gun sale produces “use of the gun in such a way as to injure others [that] was not foreseeable.”<sup>382</sup>

#### D. *Victims of Environmental Crimes*

Another recurring CVRA issue is who is a victim of an environmental crime. This issue can arise when a criminal discharges a dangerous pollutant that causes uncertain harm over a wide area to many people. Are all those exposed CVRA “victims”?

The direct answer to this question is yes. Merely because a criminal has created multiple victims provides no basis for denying victims’ rights. To be sure, recognizing many victims can create certain logistical difficulties. But these difficulties are handled by computerized notification processes and the CVRA’s “multiple victim” provision<sup>383</sup> rather than by arbitrarily denying victim status to everyone harmed.

An illustration comes from the federal prosecution of an oil refining company for discharging noxious fumes into the surrounding community: *United States v. CITGO*.<sup>384</sup> After the company was found guilty of criminal discharge of a hazardous pollutant, the Government identified several hundred people whom it believed qualified as “victims” of that crime.<sup>385</sup> When the company objected to this designation, the district court held an evidentiary hearing on the matter.<sup>386</sup> At the hearing, sixteen witnesses from the community testified that for years they had endured the refinery’s odors—what were described as sweet gas smells.<sup>387</sup> Smelling these odors sometimes caused watery eyes, itchy throats, and nosebleeds.<sup>388</sup> Enduring these smells was mentally stressful.<sup>389</sup>

Based on this testimony, the district court ruled that the prosecutors had failed to provide sufficient expert medical testimony to prove the community members had suffered personal injury from the company’s crime.<sup>390</sup> As the district court saw things, “in order for the alleged victims to qualify as ‘crime victims’ under the CVRA, the Government must establish that these individuals were directly and proximately *injured* by emissions” from the refinery.<sup>391</sup> The district court reasoned that although the discharges “may have caused unpleasant odors, there is no proof

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381. *Decker v. Gibson Products Co. of Albany, Inc.*, 679 F.2d 212, 215 (11th Cir. 1982) (allowing mother of murder victim to bring negligence action against gun dealer who sold firearm to felon).

382. *Id.* at 216 (internal citation omitted).

383. *See supra* notes 345–47 and accompanying text.

384. *United States v. CITGO Petroleum Corp.*, 2011 WL 1337101 at \*1 (S.D. Tex. Apr. 5, 2011).

385. *Id.*

386. *Id.*

387. *Petition for a Writ of Mandamus, In re Allen*, 701 F.3d 734 (5th Cir. 2012), No. 12-40954 (filed Sept. 4, 2012).

388. *Id.*

389. *Id.*

390. *United States v. CITGO Petroleum Corp.*, 2011 WL 1337101 at \*2 (S.D. Tex. Apr. 5, 2011).

391. *Id.*

showing that the concentration of chemicals in these emissions rose to the level necessary to cause health effects.”<sup>392</sup>

Thereafter, the victims obtained separate pro bono counsel from the prosecutors, who filed more detailed arguments on why even unpleasant odors could constitute sufficient harm to trigger the CVRA’s protections.<sup>393</sup> Ultimately, the district court reversed its earlier decision, now finding that the community members were CVRA crime victims.<sup>394</sup> The district court explained that it was “persuaded that it applied the incorrect legal standard when it determined that the community members must provide documentary medical evidence confirming injury or illness due to chemical exposure in order to qualify as victims under the CVRA.”<sup>395</sup> Applying a standard that looked solely at harm, the district court found “that testimony by the community members and other witnesses that they suffered symptoms such as burning eyes, bad taste in the mouth, nose burning, sore throat, skin rashes, shortness of breath, vomiting, dizziness, nausea, fatigue, and headaches is sufficient to constitute ‘harm’ under the CVRA.”<sup>396</sup> This conclusion was plainly correct. As discussed above,<sup>397</sup> interpreting the CVRA as protecting any person harmed by a federal crime in any way is the conventional and required approach.<sup>398</sup>

This conclusion seemingly demands that the CVRA be broadly applied to environmental crimes. But one law review note has reached a contrarian conclusion, contending that Congress should specifically amend the CVRA to exclude environmental crime victims.<sup>399</sup> The note asserts that Congress did not intend to include such victims within the CVRA’s ambit, a contention impossible to square with the CVRA’s legislative history supporting broad application.<sup>400</sup> The note also argues that expansive application would create “the dangerous potential for prejudicing defendants in environmental criminal prosecutions.”<sup>401</sup> But support for this argument is non-existent. Even though the note discussed several criminal cases in which the CVRA was applied to environmental crimes (including the *CITGO* case

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392. *Id.* at \*5.

393. See *United States v. CITGO Petroleum Corp.*, 893 F. Supp. 2d 848, 851 (S.D. Tex. 2012). The district court denied leave to file the brief for being untimely, and the victims filed a petition for mandamus with the Fifth Circuit. The Fifth Circuit granted the petition, requiring the district court to rule on the substantive issue. See *In re Allen*, 701 F.3d 734 (5th Cir. 2012). Disclosure: One of the authors (Cassell) served as counsel for the victims.

394. *CITGO*, 893 F. Supp. 2d at 853.

395. *Id.*

396. *Id.*

397. See *supra* notes 127–48 and accompanying text.

398. This conclusion is also supported by a well-recognized principle in environmental law—the precautionary principle: If there is a strong suspicion that an activity may have environmentally harmful consequences, it is better to act immediately than to wait for incontrovertible causation evidence. See, e.g., Ashli Akins, Phil O’B. Lyver, Hugo F. Alrøe & Henrik Møller, *The Universal Precautionary Principle: New Pillars and Pathways for Environmental, Sociocultural, and Economic Resilience*, 11 SUSTAINABILITY 235 (2019).

399. Andrew Atkins, Note, *A Complicated Environment: The Problem with Extending Victims’ Rights to Victims of Environmental Crimes*, 67 WASH. & LEE L. REV. 1623, 1657–58 (2010).

400. See *supra* notes 103–05 and accompanying text.

401. Atkins, *supra* note 399, at 1657.



discussed in the preceding paragraphs), it was unable to provide any concrete example of how the CVRA’s application has ever violated a defendant’s rights. Finally, the note highlighted administrative problems that might occur in mass victimization cases.<sup>402</sup> But cases involving large numbers of victims would appear to warrant *increased* attention to victims’ rights.

Apart from this one law review note, legal commentary has invariably favored generously applying the CVRA to environmental crimes.<sup>403</sup> Powerful arguments have been made in support of this position.<sup>404</sup> One argument is that such crimes often disproportionately harm the health of disempowered communities, including minority communities.<sup>405</sup> As Professors Joshua Ozymy and Melissa Jarrell explain, certain “environmental justice” communities continue to face disproportionate health burdens from living near industrial pollution sources.<sup>406</sup> Applying the CVRA to protect such communities “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.”<sup>407</sup>

Another argument for generously applying the CVRA to environmental crimes focuses on the kinds of crimes federally prosecuted. A comprehensive review of federal environmental prosecutions from 1983 to 2019 reported ninety-three cases involving identifiable victims of environmental crimes.<sup>408</sup> This review found that federal prosecutors generally pursued criminal charges only in cases involving “acute” environmental victimization—e.g., an explosion that injured workers, a chemical release that poisoned bystanders, or a deadly exposure to lead-based paint that a landlord intentionally failed to disclose.<sup>409</sup> In these types of cases, direct victimization is obvious, and it is difficult to see any argument against applying the CVRA.

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402. *Id.* at 1649–51.

403. *See, e.g.*, Jessica B. Goldstein & Jodi A. Mazer, *Prosecuting Environmental Crimes to Advance Environmental Justice*, 36 NAT. RESOURCES & ENV’T 45, 47 (2021) (“Both for their protections and powerful considerations of victims and witnesses of crimes at every stage of the case, these laws [e.g., the CVRA] must remain on the forefront of [environmental crime] investigators [sic], and prosecutors’ minds.”); Ashley Ferguson, *We’re Victims, Too!: The Need for Greater Protection of Environmental Crime Victims Under the Crime Victims Rights Act*, 19 PENN ST. ENV’T L. REV. 287, 288 (2011) (recognizing the “injustice of precluding environmental crime victims from the application of the CVRA”); Alexandra Akre, *Including the Victim in the Decision to Bring Environmental Prosecutions*, 3 WILLAMETTE ENV’T L.J. 1, 33 (2015) (“Because victims of environmental crimes are similar to victims of traditional crimes in many respects, they are entitled to equal consideration.”).

404. Interestingly, it may also be possible for victims of environmental crime to intervene directly in criminal cases brought under the Clean Water Act. *See* Hannah Gardenswartz, *Can Courts Stop Citizens from Prosecuting Criminal Cases Under the Clean Water Act?*, 19 SUSTAINABLE DEV. L. & POL’Y 11 (2018).

405. *See* Joshua Ozymy & Melissa L. Jarrell, *Of Sex Crimes and Fencelines: How Recognition of Environmental Justice Communities as Crime Victims Under State and Federal Law Can Help Secure Environmental Justice*, 38 PACE ENV’T L. REV. 109, 112 (2020).

406. *Id.* at 111.

407. *Id.* at 109.

408. Joshua Ozymy & Melissa L. Jarrell, *Exploring the Role of Victims in Federal Environmental Prosecutions, 1983-2019*, 57 WILLAMETTE L. REV. 25, 33–34 (2020).

409. *Id.* at 54.

Regardless of how any competing policy arguments shake out, the CVRA's plain language creates no carve-out for environmental crimes: the CVRA applies to such crimes no less than other federal offenses.

### *E. Victims of Governmental-Process Crimes*

#### 1. Harms Flowing from Governmental-Process Crimes

One final recurring situation is victim status in governmental-process crimes cases. In these cases, federal prosecutors will allege a crime involving misuse or violation of governmental processes—e.g., lying to federal investigators.<sup>410</sup> The federal government is clearly harmed and is a victim of such a crime, but the crime's ramifications may also harm individuals. Are these individuals CVRA “crime victims”?

At this point, the reader can probably anticipate the proper answer to this question: it depends—specifically on whether the harm to the individuals is, in the CVRA's language, “direct and proximate.” While this determination will involve a fact-specific inquiry, in many cases a direct and proximate connection between the crime committed against the government and harm to a private individual is straightforward to establish.

One illustration comes from *United States v. Contreras*.<sup>411</sup> There, a correctional officer named Contreras maintained a coercive and ongoing sexual relationship with a jail inmate referred to as A.G.<sup>412</sup> When Justice Department investigators asked Contreras about the relationship, he lied.<sup>413</sup> Later Contreras was charged and convicted of making false statements to a federal agency.<sup>414</sup> A.G. then filed a CVRA motion to make a victim impact statement at Contreras' sentencing.<sup>415</sup>

The district court concluded that A.G. was directly and proximately harmed as a result of Contreras' crime of concealing their relationship from federal investigators.<sup>416</sup> The court explained that Contreras “was aware that he could not be in a relationship with A.G. and he used his position as a correctional officer to coerce A.G.”<sup>417</sup> Contreras used “an alias name and an email to circumvent the rules against engaging in a relationship with A.G., as well as hide his relationship with her. [Contreras'] position of trust, his abuse of that position, and his lies about his conduct allowed him to harm A.G.”<sup>418</sup> Other cases likewise find that, for purposes

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410. See 18 U.S.C. § 1001.

411. No. CR 16-00740 HG-01, 2017 WL 2563222 (D. Haw. June 13, 2017).

412. *Id.* at \*1.

413. *Id.*

414. See 18 U.S.C. § 1001.

415. *Contreras*, 2017 WL 2563222, at \*1–\*2.

416. *Id.* at \*2.

417. *Id.*

418. *Id.*

of restitution statutes, victim status exists where process crimes committed against the government directly and proximately harm an identifiable individual.<sup>419</sup>

A more complex issue arises when the argument is that a defendant’s crime disrupted the proper functioning of a government process, a disruption producing harm. Recent litigation involving a Foreign Intelligence Surveillance Act (“FISA”) warrant against former Trump campaign associate Dr. Carter Page exemplifies this issue. In *United States v. Clinesmith*,<sup>420</sup> an FBI attorney (Clinesmith) pleaded guilty to knowingly making false statements in a matter within the jurisdiction of the judiciary—specifically, altering an email to suggest Dr. Page had not previously served as a source for a government agency.<sup>421</sup> Clinesmith’s false statement was then used in an application to the Foreign Intelligence Surveillance Court (“FISC”) to renew a FISA warrant to surveil Dr. Page’s private communications—an application the FISC approved without having all relevant information.<sup>422</sup> Ultimately, Clinesmith pleaded guilty under the general federal statute forbidding false statements to any government agency.<sup>423</sup> As sentencing approached, Dr. Page sought to give a victim impact statement under the CVRA.<sup>424</sup> Dr. Page argued that, because of Clinesmith’s false statement, the FISC had approved the warrant—thereby directly and proximately harming him.<sup>425</sup>

Multiple amicus crime victims’ organizations supported Dr. Page,<sup>426</sup> but they presented a more expansive position. They explained that, apart from whether Clinesmith’s false statements changed the outcome of the process, the statements undoubtedly subverted the process: “In distorting the FISA process, [Clinesmith] clearly targeted and victimized not only Government processes, but also the person most affected by those processes—Dr. Carter Page.”<sup>427</sup>

The victims’ organizations elaborated that the reason the FISC exists is to make a fair determination of “whether to allow government surveillance of identifiable individuals based on all pertinent evidence.”<sup>428</sup> Indeed, this *ex parte* process is

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419. *See, e.g.*, *United States v. Haggard*, 41 F.3d 1320, 1324–26 (9th Cir. 1994) (holding that the mother of child kidnapping victim was herself a victim of defendant’s crimes for restitution purposes, in a prosecution for making false statements to the FBI, arising from the defendant leading the FBI on wild goose chase for the victim’s body); *United States v. Hoover*, 175 F.3d 564, 566–69 (7th Cir. 1999) (finding a university was an MVRA victim of a false statement offense because it provided tuition loan money under student loan program based on defendant’s misrepresentations).

420. *United States v. Clinesmith*, No. CR 20-165 (JEB), 2021 WL 184316 (D.D.C. Jan. 19, 2021).

421. *Id.* at \*1.

422. *Id.*

423. *See* Statement in Support of Guilty Plea, at 1; *United States v. Clinesmith*, No. CR 20-165 (JEB), 2021 WL 184316 (D.D.C. Jan. 19, 2021), ECF No. 9.

424. *See* Motion for Relief Under the CVRA, at 1, *United States v. Clinesmith*, No. CR 20-165 (JEB), 2021 WL 184316 (D.D.C. Jan. 19, 2021), ECF No. 23.

425. *Id.* at 6, 8–9.

426. *See* Br. of the National Crime Victim Law Institute et al. as Amicus Curiae in Support of Motion for Relief Under the CVRA, at 1, *United States v. Clinesmith*, No. CR 20-165 (JEB), 2021 WL 184316 (D.D.C. Jan. 19, 2021), ECF No. 28-1. Disclosure: One of the authors (Cassell) served as counsel for the amici organizations.

427. *Id.* at 18–19.

428. *Id.* at 19.

required to protect Fourth Amendment rights. Protecting those rights requires, as the FISC has explained, “heightened duties of probity and transparency that apply in ex parte proceedings.”<sup>429</sup> “Because FISC review of warrant applications necessarily takes place without the participation of the individuals being surveilled, Government attorneys involved in FISA applications have special obligations to protect the interests of those individuals.”<sup>430</sup> By committing his crime, the victims’ organizations argued, Clinesmith “deprived Dr. Page of the careful FISC review to which he was entitled—i.e., a review of the warrant.”<sup>431</sup>

The district court handling the case ultimately allowed Dr. Page to deliver a victim impact statement at Clinesmith’s sentencing but declined to rule on Dr. Page’s “victim” status.<sup>432</sup> The court explained that it possessed discretion to allow Dr. Page to testify, regardless of whether he qualified as a victim.<sup>433</sup> And because the court was allowing Dr. Page to testify, “a lengthy exegesis” on the victim issue was unnecessary.<sup>434</sup>

While the district court did not ultimately decide the issue, the victims’ organizations’ CVRA analysis is sound. Being deprived of fair consideration in a governmental process is itself a harm. Indeed, a government search conducted without following the proper procedures is itself harmful.<sup>435</sup> And if a defendant’s crime directly and proximately causes that harm, CVRA “crime victim” status exists.<sup>436</sup>

## 2. The Illustration of *United States v. Boeing*

A recent governmental-process crime provides a good closing summary of how courts should broadly construe CVRA “victim” status. In *United States v. The Boeing Company*,<sup>437</sup> a federal district court judge considered the CVRA’s victim definition at length. The case arose from two horrific crashes of Boeing 737 MAX

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429. *Id.* at 13 (citing *In re Accuracy Concerns Regarding FBI Matters Submitted to the FISC*, No. 19-02, Corrected Op. and Order, at 2 (FISC Mar. 5, 2020)).

430. *Id.*

431. *Id.*

432. Order, at 1–2, *United States v. Clinesmith*, No. CR 20-165 (JEB), 2021 WL 184316 (D.D.C. Jan. 19, 2021), ECF No. 40.

433. *Id.* at 1.

434. *Id.* at 2.

435. See *Groh v. Ramirez*, 540 U.S. 551, 563 (2004) (holding that a search conducted pursuant to an improperly prepared search warrant was actionable under § 1983).

436. *United States v. Nix*, 256 F. Supp. 3d 272 (W.D.N.Y. 2017) is not inconsistent with this conclusion. There, the defendant (Nix) was convicted of various crimes. Nix then filed a motion alleging that one of his jurors concealed that he was ineligible to serve because he was a felon. *Id.* at 275. Nix claimed this non-disclosure rendered him a CVRA “crime victim” of the juror’s crime of lying during jury selection. *Id.* In rejecting the claim, the district court explained that “since the jury was unanimous, and the other 11 jurors agreed with [the juror’s] conclusion, Nix cannot establish that a non-felon juror would have reached a different result.” *Id.* at 277–78. But a stronger explanation is that the disqualification of felons from juries is not necessarily designed to protect defendants against harm. See *United States v. Boney*, 977 F.2d 624, 633 (D.C. Cir. 1992) (no Sixth Amendment bar to felons on juries and “Congress’ purpose in restricting felons’ jury service may stem from considerations other than a concern for biased jurors”).

437. No. 4:21-CR-00005, 2022 WL 13829875 (N.D. Tex. Oct. 21, 2022).

aircraft in October 2018 and March 2019, which killed 346 passengers and crew.<sup>438</sup> The Justice Department investigated the crashes for many months, from 2019 through the end of 2020.<sup>439</sup> At first, Boeing deliberately refused to cooperate with the investigation.<sup>440</sup> Boeing only began to reveal its criminal conduct to the Justice Department after successfully delaying the criminal investigation for six months.<sup>441</sup> Eventually, the department’s investigation revealed that Boeing lied to the Federal Aviation Administration (“FAA”) about a safety issue related to that particular plane’s design—an issue that caused both crashes.<sup>442</sup>

As early as May 2019, the victims’ families became aware of reports suggesting that the Justice Department was criminally investigating Boeing.<sup>443</sup> In February 2020, having heard nothing from the department, a victims’ families’ representative contacted the department to see what was happening.<sup>444</sup> But rather than acknowledge the investigation, which Boeing was well aware of, the department told the families—falsely—that no such investigation existed.<sup>445</sup>

Ultimately, in the waning days of the Trump Administration, attorneys for the Justice Department and Boeing collaborated to rapidly craft a deferred-prosecution agreement (“DPA”).<sup>446</sup> The DPA provided numerous benefits to the company but no real accountability for the crashes.<sup>447</sup> A fair-minded assessment comes from a former attorney at the Justice Department, who called the arrangement “one of the most unusual and ill-conceived corporate criminal settlements in American history.”<sup>448</sup> A similar assessment comes from Columbia Law Professor John Coffee, an expert on corporate crime, who described the deal as “one of the worst” he had seen.<sup>449</sup>

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438. See generally PETER ROBISON, *FLYING BLIND: THE 737 MAX TRAGEDY AND THE FALL OF BOEING* (2021).

439. See, e.g., Natalie Kitroeff & Michael S. Schmidt, *Federal Prosecutors Investigating Whether Boeing Pilot Lied to F.A.A.*, N.Y. TIMES (Feb. 21, 2020), <https://www.nytimes.com/2020/02/21/business/boeing-737-max-investigation.html>.

440. Deferred Prosecution Agreement at 4, *United States v. The Boeing Co.*, No. 4:21-CR-00005, 2022 WL 13829875 (N.D. Tex. Oct. 21, 2022), ECF No. 4.

441. *Id.*

442. For a full description of the safety problem and its connection to the crashes, see MAJORITY STAFF OF THE H. COMM. ON TRANSP. & INFRASTRUCTURE, 116TH CONG., *FINAL COMMITTEE REPORT: THE DESIGN, DEVELOPMENT & CERTIFICATION OF THE BOEING 737 MAX* (Sept. 2020).

443. See Second Amended Motion of Naoise Ryan et al. under the CVRA for Findings that the Proposed Boeing Deferred Prosecution Agreement was Negotiated in Violation of the Victims’ Rights, at 9, *United States v. The Boeing Co.*, No. 4:21-CR-00005, 2022 WL 13829875 (N.D. Tex. Oct. 21, 2022) [hereinafter *Victims’ Mot.*], ECF No. 52.

444. *Id.*

445. See *id.* at 9–10.

446. *Id.*

447. See Deferred Prosecution Agreement, *supra* note 440.

448. Ankush Khardori, *The Trump Administration Let Boeing Settle a Killer Case for Almost Nothing*, INTELLIGENCER (Jan. 23, 2021), <https://nymag.com/intelligencer/2021/01/boeing-settled-737-max-case-for-almost-nothing.html>.

449. Editor, *Columbia Law Professor John Coffee Says Boeing Deferred Prosecution Agreement One of the Worst*, CORP. CRIME RPTER. (Feb. 23, 2021, 4:35 PM), <https://www.corporatecrimereporter.com/news/200/columbia-law-professor-john-coffee-says-boeing-deferred-prosecution-agreement-one-of-the-worst/>.

The DPA's most important feature was that it immunized Boeing from criminal prosecution for all conduct listed in the annexed statement of facts, which included the two crashes.<sup>450</sup> After the Justice Department and Boeing reached their secret agreement, the department filed it in a Texas district court.<sup>451</sup> Immediately thereafter, the Justice Department issued a congratulatory press release.<sup>452</sup> The first information that the victims' families received that Boeing had been protected from criminal prosecution was from resulting social media.<sup>453</sup>

In December 2021, fifteen family members filed suit under the CVRA, arguing that the prosecutors' failure to confer with them before immunizing Boeing violated the families' CVRA rights.<sup>454</sup> In response, the Justice Department apologized for failing to meet with the victims' families about its deal with Boeing.<sup>455</sup> But the Justice Department argued that because the DPA rested on the crime of conspiring to interfere with the FAA, the only "victim" was the FAA itself.<sup>456</sup>

Following extensive briefing, the district court concluded that the families might represent CVRA "victims" of Boeing's crime if they could demonstrate a direct and proximate connection between the conspiracy to interfere with the FAA and the two crashes.<sup>457</sup> The district court began by identifying the federal crime at issue: the conspiracy alleged in the criminal information.<sup>458</sup> The CVRA "victim" status question then devolved to whether that federal offense had directly and proximately harmed the victims of the two crashes. The court noted that the families had proffered that, if provided an evidentiary hearing, they could prove both but-for causation and proximate causation.<sup>459</sup> The families had proffered that they would produce expert witnesses to establish a three-fold chain of causation between the crime and crashes: (1) if Boeing had not lied, then the FAA would have ordered enhanced training for pilots on U.S. airlines transitioning to fly the new 737 MAX aircraft; (2) those training requirements would have been followed by foreign airlines, including Lion Air and Ethiopian Airlines (whose planes had crashed); and (3) if the pilots on the two doomed flights had received that enhanced

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450. See John C. Coffee, Jr., *Nosedive: Boeing and the Corruption of the Deferred Prosecution Agreement* (2022), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4105514](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4105514).

451. See Deferred Prosecution Agreement, *supra* note 440, at 1.

452. See Press Release, Dep't of Just., Boeing Charged with 737 Max Fraud Conspiracy and Agrees to Pay over \$2.5 Billion (Jan. 7, 2021), <https://www.justice.gov/opa/pr/boeing-charged-737-max-fraud-conspiracy-and-agrees-pay-over-25-billion>.

453. See Victims' Mot., *supra* note 443, at 12.

454. See *id.* Disclosure: One of the authors (Cassell) served as counsel for the family members.

455. Government Response to the Motion Filed by Representatives of Certain Crash Victims for Findings that the Deferred Prosecution Agreement was Negotiated in Violation of the Victims' Rights, Dkt. 58 at 4, *United States v. The Boeing Co.*, No. 4:21-cr-0005, 2022 WL 13829875 (N.D. Tex. Oct. 21, 2022), ECF No. 58.

456. *Id.*

457. Order, *United States v. The Boeing Co.*, No. 4:21-cr-0005, 2022 WL 13829875 (N.D. Tex. Oct. 21, 2022), ECF No. 96.

458. *Id.* at \*8 (describing charges under 18 U.S.C. § 371). In reaching this conclusion, the district court was careful to note that the CVRA can apply to crimes that have yet to be charged by prosecutors. See *id.* at \*6.

459. *Id.* at \*18–\*20.



training, then they would have been able to safely land the two planes.<sup>460</sup> The district court ordered an evidentiary hearing.<sup>461</sup>

Following testimony from expert witnesses, the district court found that those who died in the crashes were CVRA “victims.”<sup>462</sup> Citing the CVRA’s direct-and-proximate harm test, the court explained that “direct” harm required a showing of but-for causation—i.e., that if Boeing had not committed its crime, the crashes would not have occurred.<sup>463</sup> The court explained that this was “not a difficult threshold to meet since there are frequently many causes to a particular event.”<sup>464</sup> The search for but-for causation was “not a quest for sole cause,” but rather “an ordinary, matter-of-fact inquiry into the existence of a causal relation as laypeople would view it.”<sup>465</sup> The district court concluded that Boeing’s fraud was “the *sine qua non* of the harmful result.”<sup>466</sup> Had Boeing’s employees not concealed their knowledge about [inadequate safety features of the 737 MAX,] the [FAA] would have certified a more rigorous level of training, pilots around the world would have been adequately prepared for [the situation that arose], and neither crash would have occurred.”<sup>467</sup>

The district court also relied on expansive principles gleaned from tort-law causation analysis:

- (1) but for causation is generally established where the rule of conduct proscribed was designed to prevent the type of harm that occurred; and (2) when defendant’s conduct increases the risk of danger and the harm is the conduct’s natural consequence; and (3) where ordinary experience predicts a harmful result, and that result actually follows, causation likely exists.<sup>468</sup>

Applying these principles, the district court sensibly determined that any “matter-of-fact inquiry” by reasonable “laypeople” would suggest that poorly trained pilots might result in a catastrophic incident such as an airplane crash.<sup>469</sup>

The district court had little difficulty in dispatching the Justice Department’s arguments against direct causation. While the Government sought to show that intervening causes had broken the causal chain, the district court observed that events often have multiple causes. Thus, even if the Justice Department’s alternative causes contributed to the two crashes, they did not negate Boeing’s crimes as a

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460. *See id.* at \*9–\*10.

461. *Id.* at \*10.

462. Order, *United States v. The Boeing Co.*, No. 4:21-cr-0005, 2022 WL 13829875 (N.D. Tex. Oct. 21, 2022), ECF No. 96.

463. *Id.* at \*5.

464. *Id.* (citing *United States v. Salinas*, 918 F.3d 463, 466 (5th Cir. 2019)).

465. *Id.* (citing *United States v. Paroline*, 572 U.S. at 444 (citing 4 HARPER, JAMES & GRAY, THE LAW OF TORTS § 20.2 (3d ed. 2007)); *Salinas*, 918 F.3d at 466).

466. *United States v. The Boeing Co.*, No. 4:21-cr-0005, 2022 WL 13829875, at \*7 (N.D. Tex. Oct. 21, 2022)

467. *Id.*

468. *Id.* (citing David W. Robertson, *The Common Sense of Cause in Fact*, 75 TEX. L. REV. 1765, 1774–75 (1997)).

469. *Id.*

direct cause.<sup>470</sup> In conclusion, the court summarized its finding that “but for Boeing’s criminal conspiracy to defraud the FAA, 346 people would not have lost their lives in the crashes.”<sup>471</sup>

Turning to proximate cause, the district court explained that the CVRA required it to determine whether the crashes were a reasonably foreseeable consequence of Boeing’s conspiracy to defraud federal aviation regulators.<sup>472</sup> The court had no difficulty in concluding that the answer was yes. Proximate-cause foreseeability analysis requires “only that Boeing could foresee that its deceit created the existence of a *general* danger, not an awareness of the exact sequence of events” that caused the crashes.<sup>473</sup> Accordingly, the district court held that the families represented “crime victims” with rights under the CVRA.<sup>474</sup> And because the Justice Department prosecutors had never conferred at all with the families, the prosecutors violated the families’ CVRA right to confer.<sup>475</sup>

This analysis of the “crime victim” issue provides a good illustration of how to properly apply the CVRA—an application consistent with the principles elucidated in this article. While Boeing’s crime was deceiving only the FAA, the crime’s ramifications directly and foreseeably extended to causing the two crashes. The district court correctly recognized that not only was the Government (e.g., the FAA) a victim of Boeing’s crime, but so were the passengers and crew who ultimately died as a consequence.

The court’s conclusion also aligns with a commonsense understanding of the purposes of the federal criminal justice system.<sup>476</sup> The public cannot have confidence in the resolution of criminal cases if those who have been harmed by a crime are never heard in the criminal justice process. After recognizing the families as “victims” of Boeing’s crime, the district court found that the prosecutors should have conferred with them before the DPA was finalized.<sup>477</sup>

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470. *Id.*

471. *Id.* at \*8.

472. *Id.*

473. *Id.* (internal quotation marks omitted).

474. *Id.* at \*9.

475. *Id.*

476. See Brief of Senator Ted Cruz, as Amici Curiae Supporting Respondent at 1, *United States v. Boeing Co.*, No. 4:21-cr-0005, 2022 WL 13829875 (N.D. Tex. Oct. 21, 2022) (arguing that the Justice Department’s position that the families did not represent crime victims “is simply nonsensical”).

477. As of this writing, proceedings in the case continue as to the appropriate remedy for the Government’s violation of the CVRA rights of the families. The district court ruled that, despite its “immense sympathy for the victims and loved ones of those who died in the tragic plane crashes resulting from Boeing’s conspiracy,” it was powerless to award any remedy for the CVRA violation. *United States v. Boeing Co.*, 655 F. Supp. 3d 519, 540 (N.D. Tex. 2023). The families sought review in the Fifth Circuit, which reversed the district court’s conclusion that it was powerless to act. See *In re Ryan*, 88 F.4th 614, 623 (5th Cir. 2023) (holding that to “the extent that this conclusion determinatively denies application of the CVRA, that is inconsistent with the statute, the criminal rules, and court authority to resolve criminal proceedings commenced in court”). But the circuit also held that any remedy was “premature,” pending further proceedings in the district court. *Id.* at 627. Further proceedings

Not only is this exactly what the CVRA’s drafters intended but also what the public would expect.<sup>478</sup>

### CONCLUSION

In this article, we comprehensively review who is a protected “victim” under the Crime Victims’ Rights Act. We conclude that, with some exceptions, federal courts have properly and expansively applied the CVRA to provide rights to those who have been injured in any way as the consequence of a federal crime. Victim status does not require proof that a person claiming victim status was the crime’s target. Instead, under the CVRA’s plain language, victim status exists whenever a crime has directly and proximately harmed a person. Crimes can cause harm in many different ways and in many different forms. Federal courts are increasingly recognizing this reality, which aligns with Congress’ goals of generously protecting anyone who suffers injury from a federal crime.

Our article has focused on federal court decisions applying the CVRA, but our analysis is more broadly applicable to numerous state provisions protecting crime victims’ rights. Many of the state victims’ rights enactments use language similar to the CVRA.<sup>479</sup> More generally, the understanding that people can be crime victims even when they were not directly targeted by the criminal is becoming uncontroversially accepted in federal cases. Similar acceptance in state cases seems likely to follow.

This general jurisprudential trend towards a broad, harmful-effects approach to defining victim is consistent with the goals animating crime victims’ rights legislation. As cases discussed in this article suggest, looking solely to whether a person has been targeted by a criminal might underprotect crime victims’ rights. For example, in *United States v. The Boeing Company*, Boeing’s conspiracy to defraud the FAA might not have targeted the passengers and crew who flew on Boeing planes. But it would be odd to say that only the FAA was the victim of Boeing’s crime—when hundreds of families lost loved ones as a direct and proximate result. Legislators and policymakers seeking to properly define “victim” should ensure that the term includes not just those targeted by criminals, but also those who have been harmed.

Our analysis is also consistent with work in other fields. While this legal article does not have space for extended review of other disciplines, the field of social

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are anticipated in the summer of 2024, when the Justice Department will announce its position on whether charges against Boeing should be dismissed under provisions in the illegally negotiated DPA.

478. While the Justice Department opposed the victims’ families’ position that they represented “victims” in the Boeing case, it recently amended its internal Guidelines for Victim and Witness Assistance (apparently as a result of this litigation) to provide for victim services for those “significantly harmed by a crime but [who] still may not meet the statutory definition contained” in the CVRA. See U.S. DEP’T OF JUST., ATTORNEY GENERAL GUIDELINES FOR VICTIM AND WITNESS ASSISTANCE (2022), <https://www.justice.gov/opa/pr/justice-department-updates-guidelines-victim-and-witness-assistance>.

479. See *supra* notes 65–67 and accompanying text.

psychology is worth highlighting. Important recent work there concludes that we intuitively think of victims in terms of dyads between an agent who causes harm and a patient who is the subject of the harm.<sup>480</sup> This is how we attribute moral blame for injuries. And it is how we broadly differentiate between villains and victims.<sup>481</sup> A dyadic analysis of the moral status of “victim” is, in essence, nothing more than an inquiry about whether one agent’s actions have harmed another. Perhaps the CVRA’s consistency with the way in which we make moral judgments is the reason its generous definition is, in many cases, uncontroversial.

An expansive application of federal (and state) crime victims’ definition should be applauded, not feared. Extending rights to those who have been harmed as the result of a crime provides not only fairness to individual victims but also enhances public confidence in criminal justice processes. The underlying purpose of crime victims’ rights is to provide a voice to those who have been harmed by crimes. Hearing that voice requires energetically recognizing “victim” status.

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480. See, e.g., Kurt Gray & Daniel M. Wegner, *Morality Takes Two: Dyadic Morality and Mind Perception*, in *THE SOCIAL PSYCHOLOGY OF MORALITY: EXPLORING THE CAUSES OF GOOD AND EVIL* 109 (M. Mikulincer & P.R. Shaver eds., 2012).

481. See Rachel Hartman, Will Blakey & Kurt Gray, *Deconstructing Moral Character Judgments*, 43 *CURRENT OP. PSYCH.* 205 (2022).