

Originally Appeared in the 14th Edition of
NCVLI's Newsletter of Crime Victim Law

LEGAL PUBLICATIONS PROJECT OF THE NATIONAL CRIME VICTIM LAW INSTITUTE AT LEWIS & CLARK LAW SCHOOL

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Protecting the Victims of “Victimless” Crimes

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I. Introduction to the Concept of the “Victimless” Crime

It is sometimes said that “victimless” crimes are those that violate the ordered functioning of society in general, as opposed to those that directly harm individuals. A wide range of crimes have been talked about at one time or another as “victimless,” including such varied offenses as: failing to wear a seatbelt or a helmet, possession or use of illegal substances, gambling, driving while intoxicated or while texting, illegal possession of a firearm, leaving the scene of an accident, bigamy, charging an excessive interest rate, and ticket scalping. Unfortunately, the common use of this terminology fails to account for the injuries to victims that occur in many circumstances and thereby unfairly disadvantages those who have been harmed and seek to enforce their rights.

II. Debunking the Myth of the “Victimless” Crime

For the victim’s advocate, confronting and debunking the myth of the “victimless” crime can seem a daunting task in an era in which such a wide variety of charges are given this designation in public discourse.

The first and perhaps most obvious problem with using the term “victimless” to describe crimes is that it is often inaccurate. Even if it is possible for a felon to merely illegally possess a firearm in the safety and security of a locked cabinet in her bedroom, this scenario is not the norm. Rather, felons are frequently prosecuted for illegal possession of a firearm in cases in which they have used the weapon to harm another person or engage in other crimes. Similarly, although it is possible for someone to get behind the wheel after a long night of drinking and nevertheless manage to drive home without harming people or damaging property, it is often the case that intoxicated drivers cause harm and damage to others. Describing these crimes as “victimless” minimizes the impact they have on the people whose lives are affected by them. Fortunately, the Crime Victims’ Rights Act, 18 U.S.C. § 3771 (CVRA), is broad enough to apply to victims of all federal offenses, regardless of whether they are colloquially described as “victimless” crimes.¹

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A. The definition of “crime victim” under the CVRA does not recognize a particular category or group of offenses as inherently “victimless.”

The CVRA, which was enacted in 2004, was intended “to transform the criminal justice system’s treatment of crime victims.”² This legislation ushered in a new era in which crime victims are “full participants in the criminal justice system.”³

The CVRA defines “crime victim” as “a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia.”⁴ Senator Kyl, the primary drafter of the CVRA, affirmed the broad scope of this definition: “This is an intentionally broad definition because all victims of crime deserve to have their rights protected, whether or not they are the victim of the count charged.”⁵ It is

¹ This article focuses exclusively on federal law and uses as a primary example the federal felon-in-possession statute, 18 U.S.C. § 922(g), which has been referenced by courts in some contexts as being a “victimless” offense. *See, e.g., United States v. Powell*, 6 F.3d 611, 613 (9th Cir. 1993) (noting in the sentencing context that “[i]t is true that we have held that being a felon in possession of a firearm is a ‘victimless crime’ because section 922(g) protects society against those determined unqualified to possess firearms”). The problem of “victimless” crimes, however, is not limited to federal jurisdictions, and state courts are also confronting the issues that arise when victims seek to invoke their constitutional and statutory rights in cases involving one of these offenses. *See, e.g., State ex rel. Smith v. Reeves*, 250 P.3d 196, 200 (Ariz. Ct. App. 2011) (holding that although the crime of failing to stop and render aid in an accident involving death or serious physical injury is a “geographical” offense, this does not render the offense “victimless” for victims’ rights purposes); *Brand v. Commonwealth*, 939 S.W.2d 358, 360 (Ky. Ct. App. 1997) (“This court is unwilling to label any crime committed to be victimless.”); *State v. Vinje*, 548 N.W.2d 118, 120-21 (Wis. Ct. App. 1996) (observing that although “there may be cases in which there is no victim of disorderly conduct, this case is not one of them. The plain language of the disorderly conduct statute does not require a victim. That does not mean, however, that a person may not be a victim of such conduct.”).

² Jon Kyl, Steven J. 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, 593 (2005).

³ *Kenna v. U.S. Dist. Court*, 435 F.3d 1011, 1016 (9th Cir. 2006).

⁴ 18 U.S.C. § 3771(e).

⁵ 150 Cong. Rec. 10,912 (daily ed. Oct. 9, 2004) (statement of

important to note that the “definition of a ‘victim’ under the CVRA is not limited to the person against whom a crime was actually perpetrated. Rather, the term ‘victim’ includes *any* ‘person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia.’”⁶

The CVRA is a relatively new statute, and courts are just beginning to grapple with the task of determining who qualifies as a “victim” with rights under the CVRA.⁷ In one of the few cases directly analyzing the scope of the term “crime victim” under the CVRA, the Eleventh Circuit held that determining who qualifies as a crime victim requires a two-step process: “first, we identify the behavior constituting ‘commission of a federal offense.’ Second, we identify the direct and proximate effects of that behavior on parties other than the United States. If the criminal behavior causes a party direct and proximate harmful effects, the party is a victim under the CVRA.”⁸ The Eleventh Circuit noted that the CVRA “does not limit the class of crime victims to those whose identity constitutes an element

Senator Kyl); *see also United States v. Sharp*, 463 F. Supp. 2d 556, 561 (E.D. Va. 2006) (citing the statement of Senator Kyl as the only known legislative history concerning the scope of the term “crime victim” and explaining that the court is to construe the term “broadly”).

⁶ *In re Mikhel*, 453 F.3d 1137, 1139 n.2 (9th Cir. 2006) (quoting 18 U.S.C. § 3771(e)) (emphasis added).

⁷ Although very few cases directly analyze the definition of “victim” under the CVRA, two earlier statutes—the Mandatory Victim Restitution Act, 18 U.S.C. § 3663A (MVRA), and the Victim and Witness Protection Act, 18 U.S.C. § 3663 (VWPA)—use a similar definition of victim and can assist courts with the task of interpreting the CVRA. *Compare* 18 U.S.C. § 3771(e) (for purposes of the CVRA, defining “crime victim” as “a person directly and proximately harmed as a result of the commission of a Federal offense . . .”) with 18 U.S.C. § 3663A(a)(2) (for purposes of the MVRA, defining “victim” as “a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered”) and 18 U.S.C. § 3663(a)(2) (for purposes of the VWPA, same). The definition of “crime victim” contained in the CVRA is broader than that of “victim” in the MVRA and VWPA, however, as its applicability is not limited to specific crimes. *See* 18 U.S.C. § 3663(a)(1)(A), (a)(2) (VWPA applies to specific crimes); 18 U.S.C. § 3663A(a)(2), (c)(1) (MVRA applies to specific crimes).

⁸ *In re Stewart*, 552 F.3d 1285, 1288 (11th Cir. 2008).

of the offense or who happen to be identified in the charging document.”⁹ Rather, “a party may qualify as a victim, even though [he or she] may not have been the target of the crime, as long as [he or she] suffers harm as a result of the crime’s commission[,]” and as long as “the criminal activity directly and proximately harmed” the individual.¹⁰

In *United States v. Sharp*, a district court observed that an individual is “directly and proximately harmed as a result of the commission of a Federal offense” and is a victim under the CVRA if the “harm results from ‘conduct underlying an element of the offense of conviction.’”¹¹ Once the conduct underlying the offense is identified (possessing a firearm as a convicted felon, for example), the court will analyze whether the victim was “directly harmed” by this behavior. A “person is directly harmed by the commission of a federal offense where that offense is a but-for cause of the harm.”¹² In other words, courts analyze whether the harm to the victim would have occurred “but for” the defendant’s illegal conduct. Additionally, a “[d]efendant’s conduct need not be the sole cause of the [victim’s] loss, but any subsequent action that contributes to the loss . . . must be directly related to the defendant’s conduct.”¹³

⁹ *Id.* at 1289.

¹⁰ *Id.* See also *United States v. Vankin*, 112 F.3d 579, 590 (1st Cir. 1997) (interpreting the VWPA); see also *In re Rendón Galvis*, 564 F.3d at 175 (interpreting the CVRA and the VWPA); *In re Antrobus*, 519 F.3d 1123, 1126 (10th Cir. 2008) (Tymkovich, J., concurring) (interpreting the CVRA); *United States v. Donaby*, 349 F.3d 1046, 1053 (7th Cir. 2003) (interpreting the MVRA); *United States v. Cutter*, 313 F.3d 1, 7 (1st Cir. 2002) (interpreting the MVRA); *Moore v. United States*, 178 F.3d 994, 1001 (8th Cir. 1999) (interpreting the MVRA).

¹¹ *Sharp*, 463 F. Supp. 2d at 564 (quoting *United States v. Blake*, 81 F.3d 498, 506 (4th Cir. 1996) and *United States v. Davenport*, 445 F.3d 366, 374 (4th Cir. 2006)). The Supreme Court has contrasted “the offense of conviction” with “conduct unrelated to the offense of conviction.” *Hughey v. United States*, 495 U.S. 411, 418 (1990). The Supreme Court has not decided whether the CVRA is subject to the limitations articulated in *Hughey*.

¹² *In re Fisher*, 640 F.3d 645 (5th Cir. 2011) (citing *In re McNulty*, 597 F.3d 344, 350 (6th Cir. 2010)).

¹³ *United States v. Gamma Tech Indus.*, 265 F.3d 917, 928 (9th

In addition to establishing that the defendant’s illegal conduct was a but-for cause of the victim’s loss, the court must analyze whether the defendant’s illegal conduct is the “proximate cause” of the harm: “Foreseeability is at the heart of proximate harm; the closer the relationship between the actions of the defendant and the harm sustained, the more likely that proximate harm exists.”¹⁴ Conduct that is “too attenuated and unrelated to” the defendant’s offense will not satisfy this proximate cause requirement.¹⁵ This detailed inquiry is necessarily fact-specific.¹⁶

B. Application of causation principles to “victimless” crimes.

It is occasionally the case that a “victimless” crime generates a clear victim who would be entitled to CVRA rights, even under the narrowest definition of the conduct underlying the offense of conviction. For example, in *United States v. Alvarado-Perez*, the court affirmed a sentencing enhancement for a defendant who was convicted of illegally possessing a firearm.¹⁷ In the context of analyzing the propriety of the sentencing enhancement, the court found that by bringing the loaded firearm into his probation officer’s office,

Cir. 2001).

¹⁴ *Sharp*, 463 F. Supp. 2d at 565. The Supreme Court has noted that the purpose of the felon-in-possession statute is to “keep guns out of the hands of those who have demonstrated that they may not be trusted to possess a firearm without becoming a threat to society.” *Scarborough v. United States*, 431 U.S. 563, 572 (1977) (internal citation omitted). The very origin of the statute suggests the foreseeability of weapons possessed by convicted felons being used in furtherance of acts of violence.

¹⁵ *Sharp*, 463 F. Supp. 2d. at 564 n.16; see also *In re Rendón Galvis*, 564 F.3d at 175 (concluding that the mother of a young man murdered by a paramilitary affiliated with a terrorist organization in Colombia, was not a “victim” because there was “insufficient evidence of a nexus” between her harm and defendant’s criminal conduct).

¹⁶ See, e.g., *In re Rendón Galvis*, 564 F.3d at 175 (“The necessary inquiry is a fact-specific one.”); *Vankin*, 112 F.3d at 590 (observing that “what constitutes sufficient causation can only be determined case by case, in a fact-specific probe”).

¹⁷ 609 F.3d 609 (4th Cir. 2010) (addressing the propriety of a defendant’s sentence).

the defendant's criminal conduct (the possession alone) caused the probation officer psychological injury.¹⁸ In light of the court's observations in the context of its analysis of the sentencing guidelines, had the probation officer sought to assert her CVRA rights, she would have qualified as a victim of the defendant's felony possession.

But determining whether a victim's harm is directly and proximately caused by a defendant's possession may be more difficult in cases in which the victim was harmed not by the defendant's illegal *possession* of a firearm, but instead by the defendant's *use* of the illegally possessed weapon.

Using the felon-in-possession example to illustrate this process, imagine a convicted felon who is prohibited by law from possessing a firearm¹⁹ who gets into an argument with a neighbor. The fight escalates beyond the initial verbal altercation, and the felon shoots the neighbor. Although the felon could have been charged with additional crimes, he was only charged with and convicted of illegal possession. The neighbor asserts his CVRA rights. If the court makes a narrow determination that the felon's possession of the gun (and not its use) is the conduct underlying the offense, the court must then analyze whether the harm would have been inflicted on the neighbor "but for" this possession. Because the felon clearly could not have shot his neighbor without possessing the gun, the direct but-for causation requirement is satisfied. With regard to whether the shooting was sufficiently related to the possession of the weapon (the "proximate cause" analysis), the court would likely find that the felon's act of shooting the neighbor using the firearm is both factually (the illegally possessed weapon was used by the defendant to injure the victim) and temporally (the possession and the injury occurred at the same time) related to the possession. Because the conduct underlying the offense of conviction is both a but-for and proximate cause of the neighbor's injuries, the neighbor is a "crime victim" under the CVRA who is entitled to all of

his rights.²⁰

Courts engaging in the direct and proximate cause analysis have consistently affirmed the principle that an individual "may qualify as a victim, even though [he or she] may not have been the target of the crime, as long as [he or she] suffers harm as a result of the crime's commission" and as long as "the criminal activity directly and proximately harmed" the individual.²¹

Conclusion

Despite the colloquial use of the term "victimless" to describe some crimes, the CVRA does not recognize a particular category or group of offenses as inherently "victimless." To the contrary, under the plain language of the CVRA, *any* crime may be associated with victims who have been directly and proximately harmed by a defendant's criminal conduct. Victims face many challenges in enforcing their rights—from learning that they have rights to overcoming procedural hurdles to ensure that their rights are honored by the multitude of actors in the criminal justice system. Courts should not put another obstacle in the path of victims who seek to assert their rights by failing to apply the plain language of the CVRA when determining who qualifies as a victim, regardless of how the particular crime at issue is described in public discourse.

²⁰ Note that the Fourth Circuit, in two unpublished cases, *United States v. Crow*, No. 07-4552, 2007 WL 3390943, at *1 (4th Cir. Nov. 14, 2007) and *United States v. Hawkins*, No. 99-4429, 2000 WL 1507436, at *2 (4th Cir. Oct. 6, 2000), failed to engage in the necessary process of analyzing both but-for and proximate causation when determining that the individuals in those cases were not entitled to restitution as victims of the defendant's felon-in-possession conviction.

²¹ *In re Stewart*, 552 F.3d at 1289. See, e.g., *United States v. De La Fuente*, 353 F.3d 766, 768, 773 (9th Cir. 2003) (finding that, under the MVRA, where the crime was the sending of a threat to injure using the mail, the harm caused when the letter leaked a dangerous-looking powder was a direct and proximate result of the offense); *Donaby*, 349 F.3d at 1051-52 (holding that a defendant's bank robbery was the direct and proximate cause of a high-speed chase that resulted in property damage to the victim under the MVRA); *United States v. Hackett*, 311 F.3d 989, 992-93 (9th Cir. 2002) (analyzing the MVRA and finding that the destruction of the house where the manufacture of methamphetamine took place was a direct and proximate result of the crime, where the offense was aiding and abetting the manufacture of methamphetamine by purchasing or stealing items to be used in the manufacture); *Moore*, 178 F.3d at 1001 (holding that a bank customer at whom the defendant pointed an apparent weapon was a victim of attempted bank robbery under the MVRA). See also *United States v. Reed*, 80 F.3d 1419, 1421 (9th Cir. 1996) (holding that restitution ordering a defendant to pay for damage to several vehicles was inappropriate under the VWPA where the police chase that led to the damage was a consequence of the defendant's theft of the vehicle he was driving and not the illegal possession of a firearm charge for which he was convicted).

¹⁸ *Id.* at 616.

¹⁹ 18 U.S.C. § 922(g).

Publication of this article was originally supported by Grant No. 2008-DD-BX-K001, awarded by the Office for Victims of Crime (OVC), Office of Justice Programs, U.S. Department of Justice. The opinions, findings, and conclusions expressed in this newsletter are those of the author(s) and do not necessarily represent the official position or policies of the U.S. Department of Justice. OVC is a component of the Office of Justice Programs, which also includes the Bureau of Justice Assistance, the Bureau of Justice Statistics, the National Institute of Justice, and the Office of Juvenile Justice and Delinquency Prevention.