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Intergenerational Justice, Environmental Law, and Restorative Justice

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INTERGENERATIONAL JUSTICE, ENVIRONMENTAL LAW, AND RESTORATIVE JUSTICE

Chaitanya Motupalli¹

ABSTRACT

Global climate change is well underway and its impacts are reaching far into the future. As these impacts progress, they present core questions of intergenerational justice. What does justice require of the current generation in tackling climate change to safeguard the wellbeing of future generations? How is the current generation to achieve a just relationship with those to come in light of the atrocious violations represented by global climate change? Taking the *Juliana v. United States* lawsuit as an example, I argue that we are not equipped to address the current climate crisis using existing environmental law, and therefore our obligations for future generations remain unmet. In that light, I demonstrate the unique contributions of the restorative justice framework to the discussion of intergenerational justice, and how restorative justice can address not only environmental crime, but also the harms that future generations will experience because of climate change.

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I. INTRODUCTION

On September 10, 2015, twenty-one youth from all over the United States, supported by the nonprofit organizations Earth Guardians and Our Children’s Trust, filed a lawsuit (*Juliana v. United States*²) on behalf of themselves and future generations in the United States District Court, in the district of Oregon, in the Division of Eugene. The defendants in the case are the President of the United States and many of the agencies of the federal government.³

According to the plaintiffs, the defendants have known the harmful impacts of dangerous climate change caused by carbon

2. First Amended Complaint for Declaratory and Injunctive Relief, *Juliana v. United States*, No. 6:15-cv-1517-TC (D. Or. Sep. 10, 2015), <http://ourchildrenstrust.org/sites/default/files/YouthAmendedComplaintAgainstUS.pdf> [https://perma.cc/7ZU9-G6FN].

3. The list of federal agencies and officers include: the Office of the President of the United States, which includes the Council on Environmental Quality, the Office of Management and Budget, and the Office of Science and Technology Policy; and the directors of those offices; the United States Department of Energy; the Secretary of Energy; the United States Department of the Interior; the Secretary of Interior; the United States Department of Transportation; the Secretary of Transportation; the United States Department of Agriculture; the Secretary of Agriculture; the United States Department of Commerce; the Secretary of Commerce; the United States Department of Defense; the Secretary of Defense; the United States Department of State; the Secretary of State; the United States Environmental Protection Agency (EPA); and the Administrator of the EPA. *Id.* at ii.

dioxide (CO₂) from burning fossil fuels for over fifty years, yet they have willfully ignored the impending harm to human life, liberty, and property that has been caused by continued fossil fuel burning.⁴ Further, through their aggregate actions and omissions, the defendants have “deliberately allowed atmospheric CO₂ concentrations to escalate to levels unprecedented in human history, resulting in a dangerous destabilizing climate system” for the United States and for the plaintiffs.⁵ In that light, the plaintiffs requested the court to order defendants “to cease their permitting, authorizing, and subsidizing of fossil fuels, and, instead, move to swiftly phase out CO₂ emissions, as well as take such other action as necessary to ensure that atmospheric CO₂ is no more concentrated than 350 ppm by 2100, including to develop a national plan to restore Earth’s energy balance, and implement that national plan so as to stabilize the climate system.”⁶

On April 8, 2016, the U.S. Magistrate Judge Thomas Coffin denied the defendants’ motion to dismiss the case and decided in favor of the youth plaintiffs for it to proceed to trial.⁷ In fact, Judge Coffin acknowledged that it is a “relatively unprecedented lawsuit” that “seeks relief from government action and inaction that allegedly results in carbon pollution of the atmosphere, climate destabilization, and ocean acidification.”⁸ As much as the lawsuit is unprecedented in that it involves a planet,⁹ it is also historic in the sense that it is youth-driven. With much caution and thoughtfulness, Judge Coffin in his ruling writes:

4. First Amended Complaint for Declaratory and Injunctive Relief, *supra* note 2, at 2.

5. *Id.* at 2.

6. *Id.* at 4–5.

7. Findings & Recommendation at 24, *Juliana v. United States*, No. 6:15-cv-1517-TC 1, 8 (D. Or. Apr. 8, 2016), <http://ourchildrenstrust.org/sites/default/files/16.04.08.OrderDenyingMTD.pdf> [<https://perma.cc/V823-2TM2>].

8. *Id.* at 1.

9. James Conca, *Federal Court Rules on Climate Change in Favor of Today’s Children*, FORBES (Apr. 10, 2016, 6:00 AM), <https://www.forbes.com/sites/jamesconca/2016/04/10/federal-court-rules-on-climate-change-in-favor-of-todays-children/#34c7e45a6149> [<https://perma.cc/67JY-6XNP>].

The debate about climate change and its impact has been before various political bodies for some time now. Plaintiffs give this debate justiciability by asserting harms that befall or will befall them personally and to a greater extent than older segments of society. It may be that eventually the alleged harms, assuming the correctness of plaintiffs' analysis of the impacts of global climate change, will befall all of us. But the intractability of the debates before Congress and state legislatures and the alleged valuing of short term economic interest despite the cost to human life, necessitates a need for the courts to evaluate the constitutional parameters of the action or inaction taken by the government. This is especially true when such harms have an alleged disparate impact on a discrete class of society.¹⁰

As noted in the court ruling, it is probable that climate change will have a disparate impact on younger generations and generations that are yet to come. In that light, as much as it is necessary to address the constitutional parameters of the actions and inactions taken by the government, it is also necessary to find ways to address the concerns of climate change. The question then is this: how are we equipped to address the climate concerns and needs of younger generations and of future generations?

Despite the initial favorable ruling, within the context of *Juliana v. United States*, I contend that we are not prepared to address the current climate crisis using existing environmental law. By highlighting the unique contributions of restorative justice¹¹ to intergenerational justice, I will argue that a restorative justice approach better addresses the climate concerns raised by the plaintiffs in the lawsuit. Before I discuss the contributions of restorative justice, I will briefly

10. Findings & Recommendation, *supra* note 7, at 8.

11. United Nations Office on Drugs and Crime defines restorative justice as a problem-solving approach to crime that involves the victim, the offender, the community at large, and justice agencies. UNITED NATIONS OFFICE ON DRUGS & CRIME, HANDBOOK ON RESTORATIVE JUSTICE PROGRAMMES 6 (2006), https://www.unodc.org/pdf/criminal_justice/06-56290_Ebook.pdf [<https://perma.cc/ASR3-LERU>]. This definition will be discussed later in the article.

present the problems with environmental law in general. Then I will assess the usefulness of restorative justice framework to address environmental crimes. Only after establishing that a restorative justice approach can address environmental concerns can we proceed to discuss the contributions of restorative justice to intergenerational justice in the light of climate change.

The specter of current environmental problems is global in nature, yet, for the purposes of this article, I will focus on the environmental problems at the national and local levels. There is no uniform approach to addressing environmental problems at the national level because each country has its own environmental laws.¹² Even though I will examine a lawsuit that was filed within the U.S. legal system, I will not discuss the particulars of U.S. environmental law in depth. I will instead discuss certain aspects of environmental law in general, and then draw insights from the legal systems of Australia and New Zealand.

II. THE CHARACTERISTIC FEATURES OF ENVIRONMENTAL LAW THAT SET IT APART ALSO SET ITS LIMITATIONS

The plaintiffs in *Juliana v. United States* allege that the governmental bodies that are responsible for environmental protection have willfully ignored the impending harm to the plaintiffs' life, liberty, and property.¹³ The increase of CO₂ levels in the atmosphere due to the continued burning of fossil fuels is cited as the source of the harm.¹⁴ Even though the offenses highlighted in the lawsuit qualify as environmental crime, which is a broad category that encompasses everything

12. For example, an analysis of twenty-two different environmental policy measures in twenty-four countries from 1970 to 2005 illustrates that each country has its own environmental laws. See generally Katharina Holzinger, Christoph Knill & Thomas Sommerer, *Is There Convergence of National Environmental Policies? An Analysis of Policy Outputs in 24 OECD Countries*, 20 ENVTL. POL. 20 (2011).

13. First Amended Complaint for Declaratory and Injunctive Relief, *supra* note 2, at 8.

14. See *id.* at 51–55; see also INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2014 IMPACTS, ADAPTATION, AND VULNERABILITY: SUMMARY FOR POLICYMAKERS 4–6 (2014), https://www.ipcc.ch/pdf/assessment-report/ar5/wg2/ar5_wgII_spm_en.pdf [<https://perma.cc/8QAC-69DB>].

from midnight dumping to catastrophic events,¹⁵ environmental law may not be directly applied to the lawsuit because the environmental issues presented only provide the context to consider the alleged violations of constitutional rights. However, Judge Coffin concurs with the plaintiffs' opinion that regulating CO₂ emissions under the Environmental Protection Agency's (EPA) statutory authority, would have a discernible impact on the alleged violations of the plaintiffs' constitutional rights.¹⁶ Therefore, it is appropriate to discuss environmental law's effectiveness in dealing with environmental problems or crimes that directly or indirectly impact the constitutional rights of people, including that of future generations.

A. The Disciplines of Environmental and Criminal Law Are Incompatible

Some legal scholars argue that existing environmental law cannot be effective in addressing environmental problems or crimes. Attorney David Fortney, for example, proposes objections to the use of current environmental law to prosecute environmental crimes.¹⁷ The first objection addresses the principle of "penalizing the violation of environmental regulations by imposing criminal liability."¹⁸ Since "the goals and assumptions of environmental and criminal law are

15. As professor of criminal jurisprudence Kathleen Brickey explains: "Violation of virtually any environmental regulation can be criminally prosecuted, and virtually every place can be a locus for environmental crime." Kathleen F. Brickey, *Environmental Crime at the Crossroads: The Intersection of Environmental and Criminal Law Theory*, 71 TULANE L. REV. 487, 490 (1996). Based on the common characteristics of offenses, Brickey categorizes environmental crimes into two categories: substantive and administrative crimes. Substantive environmental crimes are those that "directly implicate the pivotal concerns of preventing environmental degradation and hazards to public health." *Id.* at 512. A typical example would be the release of a toxic pesticide waste into a sewer by a factory. Administrative environmental crimes are those that "consist of failure to comply with administrative requirements imposed by law." *Id.* In *Juliana v. United States*, it can be argued that the government and governmental agencies' actions and inactions contributed to both substantive and administrative environmental crimes.

16. Findings & Recommendation, *supra* note 7, at 12.

17. David Fortney, *Thinking Outside the 'Black Box': Tailored Enforcement in Environmental Criminal Law*, 81 TEX. L. REV. 1609 (2003).

18. *Id.* at 1620.

fundamentally irreconcilable,”¹⁹ Fortney argues that environmental violations should not attract criminal liability.

In order to understand Fortney’s objections, we need to understand the features of environmental law and compare them with the features of criminal law. Law Professor Richard Lazarus identifies three unique features of environmental law that set it apart from every other branch of law: “(a) the aspirational quality of environmental law; (b) its dynamic and evolutionary tendency; and (c) its complexity.”²⁰

Environmental law is aspirational in the sense that it reflects a nation’s aspirations for environmental quality. It generally aims at changing patterns of behavior through regulation. Despite the successes that could be credited to the aspirational quality of environmental law, Lazarus considers such aspirational quality ill-suited for civil and criminal enforcement.²¹ He therefore concludes: “The susceptibility of those environmental laws to criminal, rather than just civil, enforcement presents a distinct policy issue.”²²

Since environmental law is closely connected to science and politics, it is invariably in a state of constant revision.²³ A review of recent literature on climate change, including the reports produced by the Intergovernmental Panel on Climate Change, makes it clear that the predictions about the future based on climate change are constantly changing due to new scientific discoveries.²⁴ As a result, environmental law, which is based on scientific information that is constantly changing, is subject to redefinition with each new scientific discovery.

In the same line of thought, environmental law’s close connection to politics results in its constant redefinition as well.²⁵ In addition to the desired social goals and public

19. *Id.*

20. See Richard J. Lazarus, *Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law*, 83 GEO. L.J. 2407, 2424 (1995).

21. See *id.* at 2426.

22. *Id.*

23. See *id.* at 2426–27.

24. See INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *supra* note 14, at 11–25.

25. See Michael Greshko, Laura Parker & Brian Clark Howard, *A Running List of How Trump is Changing the Environment*, NAT’L GEOGRAPHIC (Apr. 24, 2018), <https://news.nationalgeographic.com/2017/03/how-trump-is-changing-science-environment/> [https://perma.cc/57WR-DZYN].

opinion, the main controversy surrounding environmental law, according to Lazarus, could be attributed to the fact that it has a “tremendous redistributive thrust.”²⁶ By statutory terms, regulations, and enforcement, environmental law imposes costs and benefits on various stakeholders, and in the process creates winners and losers. Given this power, “environmental law is the product of fiercely contested entrepreneurial politics within both the legislative and executive branches.”²⁷ A law that is constantly changing and “fiercely contested” cannot be used to impose criminal liability in the same way that traditional criminal law is used.

Finally, the complexity of environmental law arises due to various factors. The obvious ones are the scientific and political factors. That the ecosystem is itself complex contributes to the complexity of environmental law. The ecosystem must be studied and understood from multiple perspectives, and all those insights contribute to environmental law.²⁸ The complexity of environmental law makes it difficult to master and apply to environmental crime. Criminal law does not share this aspect of complexity. Given the differences between environmental law and criminal law, even though people’s lives, liberty, and property are being threatened with environmental crimes, it seems hard to hold the responsible parties criminally liable using existing environmental law.

B. Establishing Culpability in Environmental Crimes is Challenging

Fortney’s second objection to using environmental law to prosecute environmental crimes pertains to imposing criminal liability upon individual officers without establishing a willful violation of the law. Culpability is one of the core criminal law concepts, in addition to the concepts of harm and deterrence.²⁹

26. Lazarus, *supra* note 20, at 2427.

27. *Id.*

28. *Id.* at 2429. There are other factors that contribute to the complexity of the environmental law that Lazarus highlights: technicality—meaning that it requires sophistication or expert opinion; indeterminacy—meaning the laws are open-ended and the result or outcome is indeterminate; obscurity—meaning it is difficult to find which law applies when; differentiation—meaning the government needs to differentiate itself in its roles as a regulator and the regulated. *Id.*

29. Brickey, *supra* note 15, at 504.

Environmental crimes also require culpability, and criminal liability requires that the violator act “willfully,” “knowingly,” or “negligently.”³⁰ In the case of environmental crimes, however, Fortney notes that in most cases the necessary factors to prove violators’ culpability are realistically unattainable.³¹ Despite that, Fortney goes on to demonstrate that since the Clean Air Act Amendments in 1990, there has been an increase in the number of corporate officers “held personally liable under the criminal law for environmental offenses.”³² He finds criminal liability for environmental violations unfair because it punishes just a few corporate officials.³³ Moreover, if the officials that are being punished are not responsible for the crime, Fortney’s objection has to be taken seriously.³⁴

Perhaps it is because of the difficulty in establishing culpability in environmental crimes that there is a discrepancy in sentencing. According to sentencing commission data, between 1996 and 2001, 36.2 percent of environmental crime defendants received prison sentences, while for all other defendants, 81.6 percent received prison sentences.³⁵ Therefore, Law Professor Michael O’Hear concludes that “. . .sentencing commission data make clear that prison is the exception, not the norm, for environmental defendants.”³⁶

Furthermore, as legal scholar Carrie Boyd shows, there is a discrepancy between how environmental defendants and other federal defendants are sentenced.³⁷ She points out that fewer environmental defendants are sent to prison.³⁸ Even among those who go to prison for environmental crimes, it is the small

30. *Id.* at 508.

31. Fortney, *supra* note 17, at 1624.

32. *Id.*

33. *Id.* at 1629.

34. See Gerhard O.W. Mueller, *An Essay on Environmental Criminality*, in ENVIRONMENTAL CRIME AND CRIMINALITY 15 (Sally M. Edwards et al. eds., 1996).

35. Michael M. O’Hear, *Sentencing the Green-Collar Offender: Punishment, Culpability, and Environmental Crime*, 95 J. CRIM. L. & CRIMINOLOGY 133, 205 (2004).

36. *Id.*

37. Carrie C. Boyd, *Expanding the Arsenal for Sentencing Environmental Crimes: Would Therapeutic Jurisprudence and Restorative Justice Work?*, 32 WM. & MARY ENVTL. L. & POL’Y REV. 483, 496 (2008).

38. *Id.* at 497.

polluters that are generally sentenced with prison sentences, while the large polluters go unscathed.³⁹ These discrepancies underscore the need for a change in how environmental crimes are handled.

With these shortcomings in the current legal system in mind, especially in the context of environmental crime, we may now turn to the unique contributions of restorative justice to address the issues presented in *Juliana v. United States*. Before that, however, we need to ask if we can use restorative justice to address environmental problems. Unfortunately, there is not a lot of literature on how restorative justice can be used to address environmental crimes. Therefore, we need to draw upon the examples from Australia where restorative justice has been in use since the early 2000s to address environmental issues.⁴⁰

III. RESTORATIVE JUSTICE HAS THE POTENTIAL TO ADDRESS ENVIRONMENTAL CRIMES

Throughout this essay, I will use the United Nations Office on Drugs and Crime's (UNODC) definition of restorative justice:

Restorative justice is an approach to problem solving that, in its various forms, involves the victim, the offender, their social networks, justice agencies and the community. Restorative justice [programs] are based on the fundamental principle that criminal [behavior] not only violates the law, but also injures victims and the community. Any efforts to address the consequences of criminal [behavior] should, where possible, involve the offender as well as these injured parties, while also providing help and support that the victim and offender require.

Restorative justice refers to a process for resolving

39. See *id.* at 483; see also Fortney, *supra* note 17, at 1634.

40. See JOHN VERRY ET AL., AUSTL. INST. OF CRIMINOLOGY, RESTORATIVE JUSTICE APPROACHES IN THE CONTEXT OF ENVIRONMENTAL PROSECUTION 2 (2005), <https://restorativejustice.org.uk/sites/default/files/resources/files/RJ%20and%20Environmental%20Prosecution.pdf> [<https://perma.cc/N342-9LVU>].

crime by focusing on redressing the harm done to the victims, holding offenders accountable for their actions and, often also, engaging the community in the resolution of that conflict.⁴¹

With that working definition in mind, it is evident that restorative justice will not face the same limitations as environmental law. For instance, since restorative justice is streamlined to address harm on a case-by-case basis, restorative justice will not have to face the same criticism of being aspirational that environmental law faces. Further, due to the flexibility that the restorative justice approach offers, the factors that contribute to the dynamic and evolutionary tendency of environmental law will not be an obstacle in the decision-making process. In fact, those factors contribute to a better decision-making process. The *complexity* is actually a point of strength because the restorative justice approach can incorporate multiple voices into the process of decision-making.

Brian J. Preston, Chief Judge of the Land and Environmental Court of New South Wales in Australia, is convinced that restorative justice has the potential to address environmental crime.⁴² He explores the different models⁴³ of restorative justice and processes, and how they could be used to address environmental crime. Judge Preston might be convinced, but there are critics who are suspicious of the restorative justice approach, let alone its applicability to address environmental crimes.⁴⁴ In order to make the case that

41. UNITED NATIONS OFFICE ON DRUGS & CRIME, *supra* note 11, at 6.

42. Brian J. Preston, *The Use of Restorative Justice for Environmental Crime*, 35 CRIM. L.J. 136 (2011).

43. Drawing upon the work of criminologist Marc Groenhuijsen, the three models that Judge Preston highlights depend on their relationship to the traditional criminal justice system: integrated, alternative and additional restorative justice. *Id.* at 138–39. In an integrated restorative justice program, restorative justice processes are integrated into the traditional criminal justice system. *Id.* at 139. In an alternative restorative justice program, restorative justice processes are used instead of the criminal justice system. *Id.* In an additional restorative justice program, the restorative justice approach and the criminal justice system exist together complementing each other. *Id.*

44. Consider, for instance, the objections that Declan Roche, lecturer in law at London School of Economics and Political Science, highlights:

Critics fear that restorative justice dispenses with the formal rules and rights which otherwise restrain people's worst impulses, while retaining—or even

restorative justice can be used to address environmental crimes, some of those objections need to be addressed. For that purpose, I consider three objections used to support the claim that restorative justice is not applicable to environmental crimes put forth by legal scholars John Verry, Felicity Heffernan, and Richard Fisher.

A. Restorative Justice is Relevant Even When the Environment is the Primary Victim

The first common objection is that the environment is the primary victim, and thus “[t]he necessity of inviting other stakeholders into the restorative justice process could therefore be seen as compromising the special restorative justice outcomes that [characterize] victim/offender relationships in other criminal contexts.”⁴⁵ This objection is particularly important if we consider the United Nations’ list of four critical ingredients for a successful restorative process: (a) an identifiable victim; (b) voluntary participation by the victim; (c) an offender who accepts responsibility for his/her criminal behavior; and, (d) non-coerced participation of the offender.⁴⁶ The element of “an identifiable victim” is even more crucial in the case of environmental crimes because, traditionally, environmental crimes are considered ‘victimless.’⁴⁷ Similarly, to have corporations, government offices, and governments take responsibility for their actions/inactions and participate in restorative processes is a challenging task. Arguably, adding other stakeholders will compromise restorative justice outcomes.

This first objection has weight, but it does not necessarily

exacerbating—the disadvantages of formal justice, most notably, the individualistic construction of responsibility for crime. Its critics worry that restorative justice utilizes programmes designed around the hope that people will be compassionate, when from a humanitarian perspective, they should be designed around the fear that they will not be. The most obvious problem is that the agreements negotiated in restorative justice meetings are—as even advocates of restorative justice are fond of saying themselves—limited only by the imagination of the parties.

DECLAN ROCHE, ACCOUNTABILITY IN RESTORATIVE JUSTICE 228 (2003).

45. VERRY ET AL., *supra* note 40, at 4.

46. UNITED NATIONS OFFICE ON DRUGS & CRIME, *supra* note 11, at 8.

47. *Environmental Crimes*, UNITED NATIONS INTERREGIONAL CRIME & JUSTICE RESEARCH INST., <http://www.unicri.it/topics/environmental/> [<https://perma.cc/X72N-UVYR>] (last visited Apr. 17, 2018).

prevent parties from using a restorative justice framework to address environmental crimes. It does, however, remind us of the way we perceive the environment and the role environment plays in our deliberations. Even when we are dealing with environmental crimes, if we consider the environment solely as a resource to be managed or as a disposable entity, then we may not only compromise restorative justice outcomes, but also relegate the environment (the primary victim in environmental crimes) into a non-existent position.

Finding the rightful place for the environment in legal deliberations is only the first step. As criminologist Rob White notes: “Identification of victims is only part of the restorative process, however. The voice of the victim needs to be heard as well as be part of the restorative justice proceedings.”⁴⁸ In the case where victims, including the environment itself, of an environmental offense are “voiceless,” Judge Preston proposes that a surrogate victim needs to represent the voiceless victim.⁴⁹ The surrogate victim participates in the restorative processes instead of the actual victim. This is not a unique situation; for instance, there are surrogate victims even in the case of homicide or crimes against legal persons like a company or a school.⁵⁰ We need to remember, however, as White reminds us, that “who speaks for whom is nevertheless still controversial; especially when it comes to natural objects such as trees, rivers and specific bio-spheres.”⁵¹

To sum up, the first objection helps us to be mindful of the place that we give to the environment in our deliberations, but it does not disqualify restorative justice from being used to address environmental concerns. It also reminds us to be conscious of the voices of the victims that are traditionally silenced or sidelined.

48. Rob White, *Indigenous Communities, Environmental Protection and Restorative Justice*, 18 AUSTL. INDIGENOUS L. REV. 43, 44 (2014).

49. Preston, *supra* note 42, at 14.

50. UNITED NATIONS OFFICE ON DRUGS & CRIME, *supra* note 11, at 61.

51. White, *supra* note 48, at 44.

B. Restorative Justice is Relevant Despite the Existing Environmental Law Remedies

The second common objection is that “[e]xisting environmental law remedies are likely to include healthy doses of reparation, compensation and remediation, and otherwise ‘making right’ an environmental wrong. . ..”⁵² This second objection is true; there are healthy doses of reparation, compensation and remediation in the existing environmental law. Consider, for instance, the example of New Zealand’s Resource Management Act of 1991 (RMA) that Verry et al. provide in their essay to substantiate this objection.⁵³ The RMA, which is New Zealand’s main piece of legislation setting out how to manage the environment,⁵⁴ has a broad range of enforcement tools. As New Zealand Judge McElrea points out, RMA has ample provision for “reparation.”⁵⁵

The question, however, is whether the provisions present in the Act were implemented successfully or not. Unfortunately, despite the aspirational quality of the Act,⁵⁶ it does not seem to have been implemented successfully. Taking one aspect of the program as an example, Nigel Bradly concluded that the coastal management functions of the Department of Conservation under the RMA framework were not implemented as intended.⁵⁷

52. VERRY ET AL., *supra* note 40, at 4.

53. *Id.*

54. *Resource Management Act*, MINISTRY FOR THE ENV'T, <http://www.mfe.govt.nz/rma> [<https://perma.cc/JWR2-H6QJ>] (last visited Apr. 17, 2018); *see also* Inga Carlman, *The Resource Management Act 1991 Through External Eyes*, 11 N.Z. J. ENVTL. L. 193 (2007).

55. F.W.M. McElrea, *The Role of Restorative Justice in RMA Prosecutions*, 12 RESOURCE MGMT. J. 1, 6 (2004). Insofar as the United States’ environmental law is concerned, one of the ways in which the aspects of reparation, compensation, and remediation are dealt with is through the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Administrated by the EPA, CERCLA deals with the cleanup of hazardous substance sites, as well as accidents, spills and other emergency releases of hazardous substances into the environment. *See generally* DAVID M. BEARDEN, CONG. RESEARCH SERV., R41039, COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT: A SUMMARY OF SUPERFUND CLEANUP AUTHORITIES AND RELATED PROVISIONS OF THE ACT (2012), <https://fas.org/sgp/crs/misc/R41039.pdf> [<https://perma.cc/8B7L-K5ZA>]. It imposes strict liability on parties connected to the disposal of hazardous substances. *Id.* at 14.

56. *See* Carlman, *supra* note 54, at 181–97.

57. *See generally* Nigel Bradly, *An Evaluation of the Coastal Management by the*

Professor of environmental science Inga Carlman provides another example of how the RMA has not been implemented properly. She argues that the RMA has placed a great responsibility on the judiciary system of New Zealand to not only serve as the guardian of legality, but also to be responsible for environmental sustainability.⁵⁸ This task was supposed to be accomplished based only on the cases brought before the court.⁵⁹ By design, the courts cannot be as proactive as needed in working for environmental control for sustainability, which counteracts the purpose of the RMA.⁶⁰ Furthermore, since sustainability is based on ecological sciences, which are enhanced constantly by new analysis and discoveries, the judicial system needs to be willing to change at the same pace that ecological sciences advance for judgments to be relevant.⁶¹ However, the slow pace at which judicial systems change poses a challenge to the successful implementation of RMA.⁶²

Consider another example from the U.S.: the Clean Water Act of 1972 “sought to achieve fishable and swimmable waters everywhere by 1983, and zero discharge of pollutants into the waters of the United States by 1985.”⁶³ To achieve that goal, the Act would have required 68,000 existing dischargers to reduce their effluent pollution and comply with new technological standards.⁶⁴ Two decades later, only fourteen percent of deadlines and environmental goals that Congress imposed on the EPA have been met.⁶⁵

As these examples suggest, even implementing environmental acts is a difficult task, let alone accounting for

Department of Conservation Under the Resource Management Act 1991 in New Zealand (2000) (unpublished Ph.D. dissertation, University of Delaware) (on file with the University of Delaware Library). According to Nigel Bradley, an environmental scientist, the factors for the unsuccessful implementation are institutional, including intergovernmental relations, intradepartmental issues, lack of resource allocation, and dual legislative conflicts. *Id.* at xv–xvi.

58. See Carlman, *supra* note 54, at 209.

59. *Id.*

60. *Id.*

61. *Id.* at 209–10.

62. *Id.*

63. Lazarus, *supra* note 20, at 2425.

64. *Id.*

65. *Id.*

reparation, compensation, and remediation. It is safe to say then, that although there are provisions for reparations in existing environmental law, the success or failure of those provisions depends on their implementation.⁶⁶

C. Restorative Justice is Relevant Despite Issues with Prosecution of Environmental Crime or Absence of Remorse in Offenders

A third objection to restorative justice in the environmental context is that “[o]ngoing environmental offenses are the ones most likely to attract prosecution, as an enforcement mechanism of last resort. Repeat offenders are unlikely to display any sense of real remorse, and may seek diversion sentencing as a bartering tool to reduce punishment.”⁶⁷

There are two aspects to this limitation. The first aspect relates to prosecution. Ongoing environmental offenses are more likely to be prosecuted. The argument is that the decision to initiate a prosecution under the RMA is likely to be predicated on the fact that violations that cause actual harm to an individual, public health, or the environment tend to attract prosecution, rather than those that are truly accidental.⁶⁸ Therefore, RMA is most likely launched against repeat offenders who might be involved in ongoing environmental offenses.⁶⁹

The second aspect of this limitation is remorse. In order to

66. With the appointment of Scott Pruitt, a longtime opponent of Obama Administration initiatives on climate change and water pollution, as the EPA Administrator, it is not surprising to see how environmental laws are not being enforced under the Trump administration. See Coral Davenport, *Senate Confirms Scott Pruitt as E.P.A. Head*, N.Y. TIMES (Feb. 17, 2017), <https://www.nytimes.com/2017/02/17/us/politics/scott-pruitt-environmental-protection-agency.html> [<https://perma.cc/99V9-T5MA>]. For example, “during the first six months of the Trump presidency, the [EPA] has lagged behind three previous administrations in environmental enforcement, collecting 60 percent less in civil penalties from polluters” Valerie Volcovici, *Trump EPA Lags Behind in Environmental Enforcement*, REUTERS (Aug. 10, 2017, 10:03 AM), <https://www.reuters.com/article/us-usa-epa-enforcement/trump-epa-lags-behind-in-environmental-enforcement-report-idUSKBN1AQ24I> [<https://perma.cc/Z4VX-XL5M>]; see also Lynn L. Bergeson, *The Trump Administration and Likely Impacts on Environmental Law and Policy*, 26 ENVTL. QUALITY MGMT. 97, 99–101 (2017).

67. VERRY ET AL., *supra* note 40, at 4.

68. *Id.* at 6.

69. *Id.* at 4.

understand this aspect, we first need to understand a special category of “strict liability” offenses that are included in environmental offenses. “Strict liability offenses are public welfare offenses in which the conduct of the defendant raises a presumption of guilt, subject to the defendant’s ability to raise a defense of due diligence.”⁷⁰ Codification of strict liability offenses in the RMA framework has the potential to remove the necessity for the court to inquire into the defendant’s state of mind when an offense occurs. In other words, when there is no inquiry into the intention, Verry et al. opine, it inhibits repeat offenders from displaying any sort of remorse.⁷¹

This second objection stems from a common notion that restorative justice offers a “soft option” to crime, which allows offenders to use it as a bartering tool by seeking “diversion” sentencing.⁷² However, as Judge McElrea maintains, the outcomes of restorative conferences⁷³ may well be more demanding than what a court would have required.⁷⁴ As he elaborates, a restorative justice conference makes heavy demands on the offenders. In addition to accepting responsibility for what they have done, the offenders need to be prepared to face their victims—their pain as well as their anger.⁷⁵ Also, they would need to respond to the victims’

70. *Id.* at 5.

71. *Id.*

72. With the aim of providing first-time offenders with a second chance, the New Zealand “Police Adult Diversion Scheme” was introduced in 1988. See SUE TRIGGS, MINISTRY OF JUSTICE N.Z., FROM CRIME TO SENTENCE: TRENDS IN CRIMINAL JUSTICE, 1986 TO 1996, at 99–100 (1998), <https://www.justice.govt.nz/assets/Documents/Publications/1986-to-1996-from-crime-to-sentence-trends-in-criminal-justice.pdf> [<https://perma.cc/YXX9-NSKY>]. In the diversion-sentencing scheme, the offender must admit guilt and accept responsibility for his or her actions. *Id.* Then, depending on the circumstances of the offense, requirements of diversion, such as apology and reparation to the victim, community work, or attendance at an alcohol and drug abuse program, are proposed. *Id.* Upon successful completion of the requirements, the case is withdrawn and no conviction is entered. *Id.*

73. Conferences or conferencing is a term in restorative justice for a planned face-to-face meeting between the victim and offender(s) who have committed crime against the victim. See generally Gabrielle Maxwell et al., *Conferencing and Restorative Justice*, in HANDBOOK OF RESTORATIVE JUSTICE 91–107 (Dennis Sullivan & Larry Tiff eds., 2008).

74. McElrea, *supra* note 55, at 5.

75. *Id.*

questions and may need to make some form of apology.⁷⁶ They have the responsibility to change their ways to avoid harming additional victims.⁷⁷ Although Judge McElrea's observations discredit the notion that restorative justice is a "soft option" to deal with crime, the point that repeat offenders are unlikely to display any kind of remorse is unaddressed. It is a genuine concern. It is important to continue to consider how offenders such as corporations or governments⁷⁸ can show remorse in the context of environmental crimes. On the whole, the third objection raises an important aspect to consider, but it does not present an insurmountable hurdle.

IV. RESTORATIVE JUSTICE CONTRIBUTES TO INTERGENERATIONAL JUSTICE IN THE LIGHT OF CLIMATE CHANGE

In this section, I draw upon the five "core themes" of restorative justice that legal scholar and restorative justice proponent Gerry Johnstone proposes to discuss the unique contributions of restorative justice in addressing the concerns of intergenerational justice.⁷⁹

A. Restorative Justice Helps Create a Renewed Understanding of Environmental Crime

In the traditional understanding, environmental crime is defined as: "An [unauthorized] act or omission that violates the law and is therefore subject to criminal prosecution and

76. *Id.*

77. *Id.*

78. Consider, for instance, in 2004, one hundred years after committing genocide, the German government offered an apology to Hereros in Namibia. See Karie L. Morgan, *Remembering Against the Nation-State: Hereros' Pursuit of Restorative Justice*, 21 TIME & SOC'Y 21, 38 (2012). Similarly, in 2008, the former Prime Minister of Canada, Stephen Harper, made a statement of apology to former students of Indian Residential Schools. See *Statement of Apology to Former Students of Indian Residential Schools*, INDIGENOUS & N. AFFAIRS CAN. (June 11, 2008), <http://www.aadnc-aandc.gc.ca/eng/1100100015644/1100100015649> [<https://perma.cc/BNH4-DXBT>] (last visited Apr. 17, 2018). In both these instances, note that governments have expressed remorse by way of an apology. A similar approach may be taken in the context of environmental crimes as well.

79. GERRY JOHNSTONE, RESTORATIVE JUSTICE: IDEAS, VALUES, DEBATES 11–15 (2011).

sanctions. This offence harms or endangers people's physical safety or health as well as the environment itself. It serves the interests of either organizations—typically corporations—or individuals.”⁸⁰ In *Juliana v. United States*, the defendants are alleged to have willfully ignored the continued exploitation, production, and combustion of fossil fuels, and to have allowed atmospheric CO₂ concentrations to escalate to levels unprecedented in human history.⁸¹ The alleged “crime” is that the “Defendants have infringed on Plaintiffs’ fundamental constitutional rights to life, liberty, and property.”⁸² The plaintiffs “seek relief from government action and inaction that allegedly results in carbon pollution of the atmosphere, climate destabilization, and ocean acidification.”⁸³

Under the traditional legal system route, the plaintiffs propose that the court order the defendants to take the necessary actions to address those various issues.⁸⁴ Notwithstanding the criticism of environmental law by Fortney and Lazarus, given the positive response of Judge Coffin, it might seem like the lawsuit is going in a favorable direction for the plaintiffs. However, the “desirable” outcome might only result in yet another set of aspirational goals without a change in the way the environment or the most vulnerable populations are treated.

In that context, the restorative justice framework offers a renewed understanding of environmental violations. It does not take the allegations lightly, but allows us to look at them in a different light. Howard Zehr, the grandfather of restorative justice, points out that wrongdoing is more than simply a violation of law; it is “a wound in the community, a tear in the web of relationships.”⁸⁵ A similar notion could be applied to environmental wrongs, so that they could be looked

80. YINGYI SITU & DAVID EMMONS, ENVIRONMENTAL CRIME: THE CRIMINAL JUSTICE'S ROLE IN PROTECTING THE ENVIRONMENT 3 (2000).

81. First Amended Complaint for Declaratory and Injunctive Relief, *supra* note 2, at 2.

82. *Id.* at 3.

83. Findings & Recommendation, *supra* note 7, at 1.

84. First Amended Complaint for Declaratory and Injunctive Relief, *supra* note 2, at 4–5.

85. HOWARD ZEHR & ALI GOHAR, THE LITTLE BOOK OF RESTORATIVE JUSTICE 20 (2002).

at as harm done to the web of relationships—including the earth at large and vulnerable populations such as future generations. As Father Jim Consedine, a restorative justice advocate from New Zealand puts it, this kind of perspective helps us recognize “a world view that says we are all interconnected and that what we do, be it good or evil, has an impact on others.”⁸⁶ This shift in thinking does not seem to contribute much to the case in hand, but such a shift will have profound impacts in the long run on the way we deal with environmental issues and crimes that have intragenerational and intergenerational impacts.

B. Restorative Justice Focuses on Restoration with the Victim at the Center

When wrongdoing is understood from the vantage point of restorative justice, it follows that there is a need to make amends on behalf of those who have been harmed. Even in the traditional legal system, the idea of making things right is present, but the focus is on the offender who caused the harm. Instead, Johnstone offers a different approach: “. . .when a crime is committed, our principal question should not be: what should be done with the offender? Rather, it should be: what should be done for the victim?”⁸⁷ With that shift in focus, the task that needs to be done also shifts. The demand for punishment of the offenders takes the back seat, while the process of justice is driven by the victims’ need for restitution or reparation.

In restorative justice, healing and amends must take place with the victims at the center. While the *Juliana v. United States* plaintiffs are directly involved in the lawsuit as victims, we need to recognize and consider the environment and future generations as victims too. Different sets of victims will have different needs. The needs of the plaintiffs in *Juliana v. United States* include reassurance, reparation, vindication, and empowerment.⁸⁸ In the traditional legal system, the needs of

86. JIM CONSEDINE, RESTORING JUSTICE: HEALING THE EFFECTS OF CRIME 183 (1999).

87. JOHNSTONE, *supra* note 79, at 11.

88. HOWARD ZEHR, CHANGING LENSES: A NEW FOCUS FOR CRIME AND JUSTICE 194 (3d ed. 2005).

reparation are considered important, but other needs such as reassurance and empowerment go unaddressed.⁸⁹ Because restorative justice addresses victims' need for reassurance and empowerment, it is a more holistic framework than the traditional legal system.

In addition to taking the needs of the victims seriously, restorative justice also focuses on addressing the needs of the offenders and communities. Like individual victims, communities are also violated by crime. As Zehr notes, crime undermines the sense of wholeness in a community, and the community "wants reassurance that what happened was wrong, that something is being done about it, and that steps are being taken to discourage its recurrence."⁹⁰

In the context of *Juliana v. United States*, stabilization of the climate system may address the broader need of the community. The immediate needs of the community include reducing risks to family farms, reducing temperatures, preventing wild fires, restoring recreational opportunities, and reducing harm to family dwellings.⁹¹ All those needs ought to be taken seriously. In addition, restorative justice highlights unnamed needs such as rebuilding trust in the government⁹²—the need for reassurance from the government and governmental organizations that they will protect the future of youth and generations yet to come.⁹³ This aspect of government reassurance is important not only in the context of the immediate environmental crimes, but also in the context of "political inertia" that the government has demonstrated when dealing with climate change issues in the past.⁹⁴ As philosopher Stephen Gardiner points out, the past two decades of climate change action have been marked by "delays,

89. ZEHR & GOHAR, *supra* note 85, at 13–18, 58–60.

90. ZEHR, *supra* note 88, at 195.

91. Findings & Recommendation, *supra* note 7, at 5–6.

92. As Judge Coffin notes, the government, along with other organizations that represent various entities in the coal, oil, and gas industry, moved to dismiss all claims. *Id.* at 4.

93. *Cf.* ZEHR & GOHAR, *supra* note 85, at 11–16.

94. See Jan Christoph Minx & Christoph von Stechow, *How Political Inertia Threatens the Paris Climate Accord*, HUFFINGTON POST (Apr. 22, 2016, 7:58 AM), https://www.huffingtonpost.com/jan-christoph-minx/paris-climate-accord-politics_b_9749268.html [<https://perma.cc/W36P-4M67>].

obstruction, and broken promises.”⁹⁵

C. Restorative Justice Addresses the Needs of the Wrongdoer

The third contribution of restorative justice focuses on how to “relate to and deal with” the wrongdoer.⁹⁶ The traditional strategy of ‘punitive segregation’ is considered ineffective at bringing about a change in the offender’s behavior, and more importantly, it is considered “morally inappropriate as a response to fellow members of the community.”⁹⁷ The current criminal justice system is concerned with punishing offenders, but it is not concerned with educating offenders about the consequences of their actions or inspiring empathy.

Restorative justice aims to transform offenders by taking their needs and injuries seriously.⁹⁸ Given the fact that the offender is also part of the community, the offender is held accountable and is expected to accept responsibility for their criminal behavior as a way of regaining membership into the community.⁹⁹ In addition, without coercion, offenders are invited to participate in the restorative process.¹⁰⁰ Through the process of meeting the victims and listening to their stories and the losses suffered, offenders may come to better understand the harm they caused.¹⁰¹ Further, they also get the

95. STEPHEN GARDINER, A PERFECT MORAL STORM: THE ETHICAL TRAGEDY OF CLIMATE CHANGE 8 (2011).

96. JOHNSTONE, *supra* note 79, at 11.

97. *Id.* at 13.

98. In their introductory textbook on restorative justice, *Restoring Justice*, leading experts in restorative justice Daniel W. Van Ness and Karen Strong explore the aspect of injuries in the context of the requirements of justice for the victims. According to them:

[I]njuries can be thought of as either contributing to the crime or resulting from the crime. *Contributing* injuries are those that existed prior to the crime and that prompted in some way the criminal conduct of the offender. . . . Although these contributing injuries, or prior conditions, do not excuse the criminal choices of offenders, any attempt to bring healing to the parties touched by crime must address them. *Resulting* injuries are those caused by the crime itself or its aftermath. These may be physical (as when the offender is wounded during the crime or incarcerated as a result of it), emotional (as when the offender experiences shame), or moral and spiritual (because the offender has chosen to injure another).

DANIEL VAN NESS & KAREN STRONG, RESTORING JUSTICE: AN INTRODUCTION TO RESTORATIVE JUSTICE 46 (5th ed. 2015) (emphasis added).

99. UNITED NATIONS OFFICE ON DRUGS & CRIME, *supra* note 11, at 8.

100. *Id.*

101. ROCHE, *supra* note 44, at 10.

opportunity to express their remorse and discharge their shame. In the process, the victims also learn about the offenders and the circumstances that led to the crime. The most important need of the wrongdoer is to be recognized as a person, and not just as a criminal. Restorative justice meets that need by allowing offenders to share their story, listen to the stories of others, and express their feelings.¹⁰²

The wrongdoers in *Juliana v. United States* are the government, government offices, and the heads of those offices.¹⁰³ The difficulty then is to figure out how to hold these wrongdoers accountable, while also making them realize the harm that they have caused. Criminologist Marianne Löschnig-Gspandl recognizes this difficulty, as she maintains that corporations and governments as “[l]egal entities are neither able to act themselves, nor to form a guilty state of mind in terms of intent or negligence which. . . are the basic concepts of crime.”¹⁰⁴ This is one reason restorative justice may not be able to force corporations and governments to feel remorseful for harmful environmental acts. In that light, when talking about restorative justice in the context of corporations and government, the focus needs to be more on the aspects of behavioral changes and restoration, rather than on remorse. In other words, the inability of corporations and governments to show remorse should not prevent us from using the restorative justice approach to address intergenerational concerns. Instead, this inability should be seen as an opportunity for restorative justice to find ways in which corporations and governments can change their behavior and strive for goals of restoration in the community.

Whether it is in the context of *Juliana v. United States* or any other crime, it is easy to think that wrongdoers do not have any needs. But wrongdoers’ needs are an important aspect of the restorative justice approach. In *Juliana v. United States*, for instance, when we consider the complexity of environmental issues, we can find intriguing connections

102. See ZEHR & GOHAR, *supra* note 85, at 14–16.

103. First Amended Complaint for Declaratory and Injunctive Relief, *supra* note 2, at 2.

104. Marianne Löschnig-Gspandl, *Corporations, Crime and Restorative Justice*, in RESTORATIVE JUSTICE IN CONTEXT: INTERNATIONAL PRACTICE AND DIRECTIONS 150 (Elmar G.M. Weitekamp & Hans-Jürgen Kerner eds., 2003).

between the environment, economy, and politics.¹⁰⁵ The decisions of the government and governmental organizations may be influenced by many factors that are considered to be the needs of those organizations. While those contributing factors do not serve as an excuse to shy away from taking responsibility and taking accountability for past crimes, they do help us to understand the complexity of the issues and to find appropriate solutions.

D. Restorative Justice Fosters Community Involvement

For a restorative justice approach to work, the community must be involved.¹⁰⁶ This fourth theme of restorative justice aims at equipping the community to resolve conflicts and social problems. The community not only provides “a collective framework”¹⁰⁷ to shape the notions of crime, victims, and offenders, but it also plays an important role in generating pressure to settle conflicts.¹⁰⁸ Without entirely relegating the tasks of controlling and dealing with crime to the legal system, the community can also be a part of the process of developing a course of action to redress the harm done, and addressing the needs of the victim as well as the offender.¹⁰⁹

In the context of environmental issues in *Juliana v. United States*, equipping the community requires not only the

105. See First Amended Complaint for Declaratory and Injunctive Relief, *supra* note 2, at 60–61.

106. JOHNSTONE, *supra* note 79, at 124–27.

107. Drawing upon criminologist Lode Walgrave’s works, social theorist and criminologist George Pavlich highlights four purposes that the concept of community fulfills in restorative justice contexts:

(1) It extends notions of victim and offender, providing a collective framework from which to consider such subjects. (2) The community provides a ‘social’ context that renders images and practices of ‘restoration’ meaningful . . . (3) Community is also positioned as a ‘secondary victim’ to the extent that crime tears away its relational fabric, which also needs to be restored through healing processes . . . (4) At the other end of the spectrum— and concerning the aim of the process— conceptions of a strong community are posited as the utopia, the valued goal of restorative justice.

GEORGE PAVLICH, GOVERNING PARADOXES OF RESTORATIVE JUSTICE 85 (2005); see also Lode Walgrave, *From Community to Domination: In Search of Social Values for Restorative Justice*, in RESTORATIVE JUSTICE: THEORETICAL FOUNDATIONS 71–89 (Elmar Weitekam & Hans-Jurgen Kerner eds., 2011); RESTORATIVE JUSTICE AND THE LAW (Lode Walgrave ed., 2002).

108. JOHNSTONE, *supra* note 79, at 14.

109. *Id.*

participation of the plaintiffs and the defendants in the justice process, but also the involvement of non-governmental organizations, concerned citizens, and the scientific community. Given that environmental issues “are spread across space, time, and species,”¹¹⁰ it is also important to have representatives spanning geographical boundaries, generational constraints, the environment, and wildlife participate in the justice process.

In *Juliana v. United States*, Earth Guardians and Our Children’s Trust, nonprofit organizations, and Dr. James Hansen, as the guardian of future generations,¹¹¹ play pivotal roles. This aspect is significant in light of a possible challenge to the use of restorative justice for intergenerational purposes. Because restorative justice involves all the parties in the decision-making process, some might argue that it is not a viable option for intergenerational justice, because involving future generations in the decision-making process is not possible. Such arguments can be refuted by the presence of guardians that represent those future generations.

E. Restorative Justice Offers New Ways of Achieving Justice

The final theme emphasizes the role of restorative justice as a less formal means of achieving justice. Johnstone recognizes that the traditional, court-based formal legal justice system is not suitable for achieving restorative goals, and proposes less formal processes to achieve justice.¹¹² He describes the process that needs to take place in restorative justice as such: “[V]ictims and offenders take part in mediation sessions designed to help both of them. In these sessions, offenders and victims communicate directly with each other and participate in decision-making.”¹¹³ Such a process is believed to address the needs of the victims, offenders, and their communities, and deter offenders from committing crimes in the future.

110. GARDINER, *supra* note 95, at 8.

111. First Amended Complaint for Declaratory and Injunctive Relief, *supra* note 2, at 2.

112. JOHNSTONE, *supra* note 79, at 15.

113. Gerry Johnstone, *Introduction: Restorative Justice Approaches to Criminal Justice*, in *A RESTORATIVE JUSTICE READER: TEXTS, SOURCES, CONTEXT 2* (Gerry Johnstone ed., 2003).

In the context of environmental crimes, Judge Preston delineates four main categories of restorative processes that could be used: victim-offender conferencing,¹¹⁴ community and family group conferencing,¹¹⁵ sentencing circles,¹¹⁶ and community reparative boards or community impact panels.¹¹⁷ Regarding *Juliana v. United States*, unless and until the defendants plead guilty, the restorative justice route cannot be taken. This is because restorative justice requires the offenders to take responsibility for their offence and collaborate with victims to find solutions to redress the harm done. In cases where the defendants plead guilty and both parties agree to take the restorative justice route, then such an approach may be pursued even from the early stages of the proceedings. If either or both of the parties choose the traditional legal system route, the restorative justice framework could still be used at a later stage in the proceedings as a tool for sentencing.

For particular issues raised in a lawsuit where a specific offender is identified, a community and family group conferencing process seems appropriate. Pertaining to issues where the offenders are government officers or government

114. In victim-offender conferencing, the victim and the offender have the opportunity to meet one another in a safe environment, along with a trained facilitator or mediator. Preston, *supra* note 42, at 6. The victim will have a chance to share the crime's physical, emotional, or financial impact, and also ask questions about the crime and the offender. *Id.* The offender, in the same fashion, will have a chance to respond to the victim. *Id.* The victim and offender will be directly involved in developing a plan for reparation or restitution for the harm caused to the victim. *Id.*

115. Community and family group conferencing is broader in focus than the victim-offender conferencing. *Id.* at 7. The family and members of the support groups of the victim and the offender are a part of the professionally facilitated conferencing. *Id.* In addition, other members of the community are also allowed to be a part of the conference. *Id.* The goals of the community and family group conferencing are the same as that of victim-offender conferencing. *Id.* They are to identify the desired outcomes, and explore ways to address the effects and after-effects of crime. *Id.*

116. Sentencing circles are used in the context where the offender pleads guilty, and the circle, which comprises of the victim and the offender, their respective families, the judge, defense lawyer, prosecutor, police or regulator officer, and the community residents, will decide on the best way to resolve the conflict. *Id.*

117. In the community reparative boards or community impact panels, the boards or panels, which comprise of a trained coordinator or facilitator, community representatives, one or more offenders and their support groups, question the offender(s) about the offense and makes statements in that regard. *Id.* at 8. The boards or panels also deliberate and arbitrate the appropriate sanctions and reparations for the crime and propose a plan of action. *Id.* Although the victims can participate in the panels, they play a limited role. *Id.*

bodies, community reparative boards or community impact panels can resolve the issues. In either case, the aim of the process is to address the needs of the parties (including the environment) involved in the process, and to help the wrongdoers grasp the harmful effects of their conduct and show willingness to repair the damage done.

An important challenge that we might need to consider is how to persuade the government to participate in a restorative justice process. In fact, it is a challenge that needs to be faced even if the *Juliana v. United States* lawsuit proceeds down the traditional legal route.¹¹⁸ Due to the current administration's drastic attempts to silence the youth, the trial that was supposed to begin on February 5, 2018 has been delayed until October 29, 2018, as of the time of publication.¹¹⁹ Although the challenge of persuading the government to participate in a restorative justice model still stands, the challenge cannot undermine the unique contributions that restorative justice could offer to the lawsuit in hand.

V. CONCLUSION

We are at a historic moment between the blunders of the past and the possibilities of the future. The blunders of the past are far too many to count, but one of the gravest of all is the environmental crisis of climate change. Whether people believe that climate change is anthropogenic or not, the fact of the matter is that climate change is real, and its impacts are being felt all over the world. Sadly, the people that will be affected the worst are children, particularly those in marginalized communities, and future generations.

118. In July of 2017, the current administration filed a petition for writ of mandamus with the Ninth Circuit and requested that the District Court of Oregon dismiss the case. Petition for Writ of Mandamus to the United States District Court for the District of Oregon and Request for Stay of Proceedings in District Court, *United States v. United States Dist. Ct. for the Dist. of Oregon*, No. 6:15-cv-01517-TC-AA (D. Or. filed Jun. 9 2017). The Ninth Circuit ultimately denied the petition. See *In Re United States of America*, No. 17-71692 (9th Cir. Mar. 7, 2018).

119. See *Juliana v. United States Climate Trial Set for October 29, 2018*, OUR CHILDREN'S TRUST (Apr. 12, 2018), <https://static1.squarespace.com/static/571d109b04426270152febe0/t/5acfb356562fa7b5ec6156da/1523561303604/2018.04.12+Trial+Date+Set+in+Juliana+v.+US+-+Press+Release.pdf> [https://perma.cc/VB4S-K834].

Despite the growing awareness of the impacts of climate change and the impending danger, as the *Juliana v. United States* plaintiffs have pointed out, governments and governmental bodies have done little to address the problem. The legal system, through existing environmental laws, has tried to address some of the concerns that were presented. Even in *Juliana v. United States*, Judge Coffin positively responded to the plaintiffs' requests. Although it is a remarkable achievement, we have seen that existing environmental law has considerable limitations, and the hope of using it to fix environmental problems is rather slim.

We have explored the possibility of using the restorative justice framework to address environmental crimes, and we have seen the unique contributions that the restorative justice framework can offer to address intergenerational justice concerns in light of climate change. Looking at *Juliana v. United States* from an environmental crime point of view, we have noticed that the primary victim is the environment, and that aspect should not be forgotten. Certainly, the needs of the Plaintiffs are important, but we have learned that the needs of the environment must be considered as equally important, if not more so. Looking at the environment as one of the victims not only helps address the needs of the environment, but also helps cultivate an alternative worldview in which the environment is not seen solely as a resource to be managed or used, but as an important member of our earth community. Given this ability to provide an alternative worldview and an alternative way of understanding crime, we can say that restorative justice is transformative in nature. It has the ability to transform the justice system, the environment, communities, offenders, and victims.

In the restorative justice framework, we have noticed that there is an emphasis on the participation of various stakeholders in the process of justice. That is a key aspect in the recent climate justice movements around the world; restorative justice, by upholding the principles of participation of all stakeholders, can provide the needed support to such movements by empowering those who are marginalized and whose voices are unheard otherwise.

In conclusion, it could be said that the best way to describe the present climate change scenario is through former British Prime Minister Benjamin Disraeli's famous quote: "[C]hange is

constant.”¹²⁰ The climate system is constantly changing and the solutions that could potentially address the issues pertaining to climate change are also constantly changing. In such a dynamic scenario, the restorative justice framework fits well and is robust enough to deal with such change. Even as we have explored the possibility of using restorative justice to address environmental crime and the demands of intergenerational justice, it seems we have only scratched the surface of the potential for this framework of justice. While restorative justice is attractive in theory, its practical applications still need to be explored.

120. Benjamin Disraeli, *Speech on Reform Bill of 1867, Edinburgh, Scotland, October 29, 1867*, in 2 SPEECHES OF THE LATE RIGHT HONORABLE THE EARL OF BEACONSFIELD 487 (T.E. Kebbel ed., 1882).