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Environmental Restorative Justice

Aiden Stark*

I. INTRODUCTION

Many communities, individuals, and environments are victimized by criminal acts, and it is imperative that new methods of supporting such victims are discovered. Restorative justice, a form of alternative dispute resolution (ADR), heals parties affected by crimes and ensures that they do not reoccur.¹ Restorative justice is not applied to environmental crimes, although it is applied to criminal procedures regarding other crimes.² This note is the first in-depth application of restorative justice to environmental crimes in the United States. It seeks to demonstrate that if the United States adopts environmental restorative justice procedures then victims will be assisted, offenders³ will be rehabilitated, communities will be restored, environments will be saved, and justice will be served.

Section I briefly introduces this article. Section II discusses the gravity of environmental crimes. Section III highlights the history of environmental criminal prosecution. Section IV explains how environmental crimes are currently prosecuted. Section V demonstrates how restorative justice procedures work. Section VI critiques the only previous analysis applying restorative justice to environmental crimes in the United States. Section VII walks through Australian Justice Preston's analysis, which provides a proper foundation for applying restorative justice to environmental crimes. Section VIII applies Justice Preston's framework to criminal procedures in the United States. Section IX discusses criticisms that will be raised by bringing restorative justice to environmental criminal procedures in the United States. Section X concludes.

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1. See Brian J. Preston, *The Use of Restorative Justice for Environmental Crime*, CRIM. L.J. (2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1831822.

2. See *id.*

3. This note uses both terms of "offenders" and "criminals" to designate parties that can make amends for environmental damages. This note sometimes uses the term "offenders" instead of "criminals" because restorative justice can occur before parties charged with crimes are sentenced, and therefore parties who enter restorative justice programs are not necessarily legally proven criminals.

II. THE GRAVITY OF ENVIRONMENTAL CRIMES

Environmental crimes typically involve “hazardous wastes, irresponsible corporate activities, water contamination, or other violations of environmental law.”⁴ Numerous persons can be victimized by environmental crimes⁵ and sometimes these victims are hard to identify.⁶ Environmental crimes may cause individuals to suffer damages to their health, life, or property.⁷ Communities can be victims of environmental crimes as well through damages to natural resources, public property, or the general environment.⁸ Non-humans, such as animals and other “non-human biota,” can be victims of criminal acts as well.⁹ Finally, future generations can be victims of environmental crimes, as today’s crimes can have disastrous effects upon communities tomorrow.¹⁰ This is because extinction of species, as well as both degradation and accumulation of resources, can exacerbate peoples and environments with the progression of time.¹¹ Environmental criminal prosecution arose as a result of the need to safeguard these victims.

4. Mary Clifford & Terry D. Edwards, *Defining “Environmental Crime”*, in ENVIRONMENTAL CRIME: ENFORCEMENT, POLICY, AND SOCIAL RESPONSIBILITY 5 (Mary Clifford ed., 1998).

5. It should be noted that when this note refers to “environmental crimes” it specifically refers to violations of environmental laws that involve harm to human health or the environment, and not crimes that do not entail such results. Many criminal violations of environmental laws do not involve actual harm to human health or the environment. Examples include certain strict liability offenses, failures to report a violation of environmental regulations, or incomplete reporting with no quantifiable harm, such as operating without a permit. Other examples involve good faith misunderstandings as to facts reported to regulating agencies.

6. Preston, *supra* note 1.

7. *Id.* at 9. For example, in 1994, a plant manager placed waste chemicals into a dumpster whose fumes killed two nine-year old boys. ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 1105, 1106 (7th ed. 2013).

8. Preston, *supra* note 1, at 10-11. For example, in 2013, Walmart Stores Inc. pled guilty to violating environmental statutes by illegally disposing hazardous materials such as pesticides, solvents, and aerosols into municipal trash bins and local sewer systems by retail stores across the nation. *Walmart Pleads Guilty to Federal Environmental Crimes*, CALCOASTNEWS (May 29, 2013), <http://calcoastnews.com/2013/05/wal-mart-pleads-guilty-to-federal-environmental-crimes/>.

9. *Id.* For example, the massive oil spill in the Gulf of Mexico by the BP company killed over 8,000 animals within the first six months of the spill. 11 *Facts About the BP Oil Spill*, DOSOMETHING.ORG, <https://www.dosomething.org/facts/11-facts-about-bp-oil-spill> (last visited Feb. 21, 2015). Many of these animals “were already on the endangered species list.” *Id.*

10. Preston, *supra* note 1, at 12.

11. *Id.*

III. A PROSECUTORIAL HISTORY OF ENVIRONMENTAL CRIMES

Environmental criminal prosecution can be traced back to the early 1970's.¹² At that time, the federal government began prosecuting persons who violated the Refuse Act of 1899.¹³ This act was the crutch of nearly all environmental crimes of the early decade, as it was the main source of criminalizing water pollution.¹⁴ Water pollution encompassed almost all of the environmental criminal cases in the early 1970's.¹⁵ With the passage of regulations and amendments, the Refuse Act lost its position as the source of environmental criminal prosecution.¹⁶ Criminal enforcement of environmental regulations continued infrequently.¹⁷

Despite lacking resources to create a criminal environmental prosecution program, the government recognized the necessity of integrating criminal sanctions into its enforcement of environmental regulations.¹⁸ In June of 1976, the Environmental Protection Agency (EPA) produced its first Agency guideline for criminal prosecutions, in which it stressed the necessity of increasing such sanctions.¹⁹ As time progressed, criminal prosecutions launched by the EPA and the Department of Justice (DOJ) increased.²⁰ At the end of President Carter's administration, attorney Peter Beeson was tasked with developing an official program for criminal prosecutions.²¹ From 1981 to 1982, the EPA's criminal enforcement

12. See Andrew S. Hogeland, *Criminal Enforcement of Environmental Laws*, 75 MASS. L. REV. 112, 113 (1990).

13. *Id.* The Refuse Act prohibits discharge of "any refuse matter of any kind . . . into any navigable water of the United States." 33 U.S.C. § 407 (2006). Violations of this prohibition constitute a misdemeanor offense punishable by up to \$2,500 and imprisonment of a time between thirty days to one year. See *id.* at § 411.

14. See *U.S. v. White Fuel Corp.*, 498 F.2d 619 (1st Cir. 1974). See also *U.S. v. Mackin Const. Co.*, 388 F. Supp. 478 (D. Mass. 1975); *U.S. v. Anaconda Wire & Cable Co.*, 342 F. Supp. 1116 (S.D.N.Y. 1972).

15. See *White Fuel Corp.*, 498 F.2d 619. See also *Mackin Const. Co.*, 388 F. Supp. 478; *Anaconda Wire & Cable Co.*, 342 F. Supp. 1116.

16. The Federal Water Pollution Control Act Amendments of 1972 were among the first amendments to cause the Refuse Act to lose its position. Hogeland, *supra* note 13, at 114. It should be noted, however, that the Refuse Act continued to be used for criminal prosecutions long after the 1970's. See *In re Exxon Valdez*, 236 F. Supp. 2d 1043 (D. Alaska 2002), *vacated*, 2003 U.S. App. LEXIS 18219.

17. Robert I. McMurry & Stephen D. Ramsey, *Environmental Crime: The Use of Criminal Sanctions in Enforcing Environmental Laws*, 19 LOY. L.A. L. REV. 1133, 1137 (1986).

18. *Id.*

19. *Id.*

20. *Id.* at 1140.

21. *Id.*

program was formed.²² Six years later, in 1988, it gained complete authority to enforce the law by Congress.²³ Since then, the EPA and the DOJ have been the main government agencies charged with prosecuting environmental crimes.²⁴

IV. CURRENT ENVIRONMENTAL ENFORCEMENT

A. Agency Regulation

Certain statutes must be violated for an environmental crime to occur, as environmental laws are statutory.²⁵ Congress creates federal environmental laws²⁶ as broad statutes.²⁷ Because legislators are not experts on environmental issues, administrative agencies, usually the EPA, elaborate upon the broad statutory regulations passed by Congress.²⁸ Nearly all federal environmental laws function in this manner.²⁹

Regulatory statutes are usually enforced when government agencies that administer environmental laws discover violations.³⁰ The EPA is charged to enforce most environmental laws.³¹ Enforcement through litigation exists in civil and criminal forms.³² Civil suits are the most common form.³³ EPA and DOJ attorneys handle federal civil suits together, and state environmental agencies work with Attorney General offices to handle state cases.³⁴ Enforcement through criminal procedures is typically handled by

22. *Id.*; *Criminal Enforcement*, U.S. ENVTL. PROTECTION AGENCY [EPA], <http://www2.epa.gov/enforcement/criminal-enforcement> (last updated Feb. 24, 2016).

23. McMurry & Ramsey, *supra* note 18, at 1141; *Criminal Enforcement*, *supra* note 23.

24. McMurry & Ramsey, *supra* note 18, at 1144.

25. JERRY L. ANDERSON & DENNIS D. HIRSCH, ENVIRONMENTAL LAW PRACTICE 4-5 (2d ed. 2003).

26. This is in contrast with other areas of law in which common law establishes legal precedents.

27. ANDERSON & HIRSCH, *supra* note 26, at 4-5.

28. *Id.*

29. *Id.*

30. *Id.* at 71.

31. *Id.* Some federal environmental laws are enforced by other agencies, such as the Army Corps of Engineers or the Fish and Wildlife Service. *Id.*

32. *Id.* at 71-72.

33. *Id.*

34. *Id.* "While the EPA's own attorneys handle most administrative enforcement actions, any federal enforcement case that reaches the courts will also involve an attorney from the Department of Justice. In essence, the agency at that point becomes 'the client' of the Justice Department attorney." *Id.* at 72.

the DOJ.³⁵ The DOJ is involved in both criminal and civil environmental litigation.³⁶

B. Citizen Suit Actions

Enforcement of environmental laws can also be litigated through citizen suit actions, which do not involve governmental prosecution.³⁷ Provisions in many federal and some state statutes allow injured persons to commence civil actions so that enforcement occurs.³⁸ Typically, environmental interest groups file such suits rather than individuals.³⁹ The commencement of such citizen suits may only occur in limited circumstances,⁴⁰ and no damages may be awarded for them.⁴¹ These limitations give the government priority to litigate over citizens, and citizens may not litigate if the government has already filed suit.⁴²

C. Delegating Government Enforcement

When government enforcement does occur, states usually file suit in both state and federal cases through statutory programs often referred to as the “delegation process.”⁴³ If states do not adopt delegation programs, or if

35. “The local United States Attorney will also be involved, at least nominally, in these civil or criminal cases. However, due to the expertise of DOJ environmental attorneys, in many cases the U.S. Attorney’s role will be limited.” ANDERSON & HIRSCH, *supra* note 26, at 77.

36. *Environmental and Natural Resources Division*, U.S. DEP’T JUST., http://www.justice.gov/enrd/About_ENRD.html (last visited Feb. 21, 2015).

37. ANDERSON & HIRSCH, *supra* note 26, at 71-72. Citizen suits are “a major innovation first incorporated in the Clean Air Act Amendments of 1970, 42 U.S.C. § 7604, and included in virtually all the major environmental laws Congress subsequently adopted.” PERCIVAL ET AL., *supra* note 7, at 1105.

38. See 33 U.S.C. § 1365 (2006); see also ANDERSON & HIRSCH, *supra* note 26, at 71-72.

39. ANDERSON & HIRSCH, *supra* note 26, at 142.

40. Citizens must be injured by the respective environmental regulation in order to launch citizen suits. *Id.* at 71-72. Further, citizen suits may only be typically launched if notice was sent in advance to both federal and state regulatory agencies, as well as to alleged violators. JEAN MACCHIAROLI EGGEN, *TOXIC TORTS IN A NUTSHELL* 97 (1st ed. 1995). Finally, citizen suits cannot usually occur if the government is or was already involved in taking action against the violation. *Id.* This final limitation exists so that agencies can focus on enforcement without distractions from citizen suits. *Id.*

41. Injunctive relief may be ordered as a result of a citizen suit; however, personal injury, property, and other types of damages may not be awarded. EGGEN, *supra* note 41, at 97; ANDERSON & HIRSCH, *supra* note 26, at 71-72.

42. EGGEN, *supra* note 41, at 95.

43. In the “delegation” process, federal actions can be delegated to states if states enact statutes that are “at least as stringent and are substantially equivalent to the federal scheme.”

the EPA decides that states inadequately meet the delegation process, then the EPA may enforce federal statutes itself.⁴⁴ However, this does not usually occur,⁴⁵ as most states utilize delegation processes.⁴⁶

D. Criminal Prosecutions and Penalties

In addition to delegation programs, environmental statutes also often include criminal penalties.⁴⁷ Violators of environmental statutes with criminal provisions can be charged with large fines and face imprisonment.⁴⁸ Some environmental statutes with such criminal provisions mandate terms of incarceration that can last numerous years.⁴⁹

In federal criminal cases, the Environment and Natural Resources Division of the DOJ often works with the U.S. Attorneys' Offices to prosecute violators.⁵⁰ In state cases, attorneys general, district attorneys, and city attorneys often work with state agencies to prosecute violators.⁵¹ These criminal cases can occur simultaneously with civil cases enforced by the government.⁵² "The EPA considers incarceration 'a key component' of the enforcement program, because violators 'cannot pass the sentence on as another 'cost of doing business.'"⁵³

ANDERSON & HIRSCH, *supra* note 26, at 77-78. Further, states must also have "adequate personnel and funding to administer and enforce the [delegation] program requirements." *Id.* at 77-78.

44. See 42 U.S.C. § 7661a(d)(3) (2006); see also *Policy and Technical Guidance Documents for Section 404 of the Clean Water Act*, U.S. ENVTL. PROTECTION AGENCY <http://water.epa.gov/lawsregs/guidance/wetlands/section402.cfm> (last updated Mar. 21, 2016).

45. "Pulling the program is a drastic remedy, however, to which the EPA does not resort unless all attempts at bringing the state's program into compliance have failed." ANDERSON & HIRSCH, *supra* note 26, at 77-78.

46. *Id.* at 77.

47. "Virtually all the federal environmental laws now provide criminal penalties." PERCIVAL ET AL., *supra* note 7, at 1104; see 33 U.S.C. § 1319(c)(2) (2006) (establishing sentencing guidelines that provide a range of incarceration years that offenders can serve); see also 42 U.S.C. § 6928(d) (2006).

48. See 33 U.S.C. § 1319(c)(2); 42 U.S.C. § 6928(d).

49. See 33 U.S.C. § 1319(c)(2); 42 U.S.C. § 6928(d).

50. *Environmental Crimes Section*, U.S. DEP'T OF JUST. ENVTL. CRIMES SEC., http://www.justice.gov/enrd/ENRD_ecs.html (last visited Feb. 21, 2015).

51. ANDERSON & HIRSCH, *supra* note 26, at 99; see *Environmental Enforcement*, OHIO ATT'Y GEN., <http://www.ohioattorneygeneral.gov/About-AG/Service-Divisions/Environmental-Enforcement> (last visited Feb. 21, 2015); see also COLO. ATT'Y GEN. SPECIAL PROSECUTION UNIT, http://www.coloradoattorneygeneral.gov/departments/criminal_justice/special_prosecutions_unit (last visited Feb. 21, 2015); L.A. CITY ATT'Y ENVTL. UNIT, <http://atty.lacity.org/CRIMINAL/EnvironmentalUnit/index.htm> (last visited Feb. 21, 2015).

52. *Parallel Proceedings Policy*, EPA (Sep. 24, 2007), <http://www2.epa.gov/sites/production/files/documents/parallel-proceedings-policy-09-24-07.pdf>.

53. ANDERSON & HIRSCH, *supra* note 26, at 99 (quoting EPA, FISCAL YEAR 1996 ENFORCEMENT AND COMPLIANCE ASSURANCE ACCOMPLISHMENTS REPORT 2-2 (May 1997)).

“Environmental laws generally make both corporate officers and employees who make corporate decisions personally liable.”⁵⁴ Corporations can also be held criminally liable.⁵⁵ Most entities are subject to criminal prosecutions in part because they did not report themselves to enforcing agencies to meet self-policing requirements.⁵⁶ Further, only “the most significant and egregious violators”⁵⁷ are targeted for criminal enforcement.⁵⁸ These entities are only subject to criminal prosecutions if they acted in a manner that went beyond simply violating the statute, “such as a ‘knowing’ or at least a ‘negligent’ violation, or that the violation harmed or threatened harm to the public.”⁵⁹ Only then can entities face criminal penalties.⁶⁰

In determining what penalties to enforce upon criminal violators, courts look to cases with similar conditions.⁶¹ “The EPA itself strives for uniformity in enforcement actions, so prior penalties can be very persuasive.”⁶² The Sixth Circuit stated in *United States v. Ekco Housewares, Inc.* that although “penalties imposed in other cases are indeed relevant . . . [determining a penalty] is a fact-driven question, one that turns on the circumstances and events peculiar to the case at hand.”⁶³ In making this statement, the Court combined the EPA’s preference for uniform sentencing with the need to have circumstantial facts weigh sentences.⁶⁴

54. PERCIVAL ET AL., *supra* note 7, at 1105.

55. *Id.* at 1105.

56. As explained:

Under EPA’s ‘Audit and Self-Policing Policy’ an entity that comes forward with information about its environmental violations is eligible for a substantial reduction of penalties and for immunity from criminal prosecution . . . EPA states that it generally will not recommend criminal prosecution for those meeting the audit policy conditions, although the agency will refer cases if high-level corporate officials knew of the violations, or if it believes the management concealed or condoned the environmental violations.

ANDERSON & HIRSCH, *supra* note 26, at 86-87.

57. Memorandum from Earl Devaney, Dir., Office of Criminal Enf’t, on The Exercise of Investigative Discretion to all Environmental Protection Agency Employees 2 (Jan. 12, 1994), <http://www2.epa.gov/sites/production/files/documents/exercise.pdf>.

58. Cases must go through a case selection process, and not all cases meeting the criteria of this process can be prosecuted due to “limited criminal resources.” *Id.*

59. ANDERSON & HIRSCH, *supra* note 26, at 99. “Criminal penalties are particularly severe for knowing violations that endanger human life.” PERCIVAL ET AL., *supra* note 7, at 1105.

60. ANDERSON & HIRSCH, *supra* note 26, at 99.

61. See *U.S. v. Ekco Housewares, Inc.*, 62 F.3d 806, 815-17 (6th Cir. 1995).

62. ANDERSON & HIRSCH, *supra* note 26, at 120.

63. 62 F.3d at 816.

64. *Id.*

Violators can reduce penalties through Supplemental Environmental Projects (SEPs), a tool integrated within most environmental policies.⁶⁵ SEPs provide violators the opportunity to have penalty amounts reduced if they voluntarily undertake an expenditure to benefit the environment.⁶⁶ These expenditures must fund projects that they are not legally required to perform, that they are not primarily benefitted by, that they can connect to the nexus of their statutory violation,⁶⁷ and that they cannot utilize to mitigate their financial losses.⁶⁸ SEPs exist to provide an avenue through which the environment can be restored without falling into the “yawning maw of the government.”⁶⁹ Although SEPs are typically a civil procedure,⁷⁰ they are often applied in criminal cases with parallel civil proceedings,⁷¹ in criminal plea bargains,⁷² or in cases in which criminal charges are dropped for an agreed SEP.⁷³

V. RESTORATIVE JUSTICE

Restorative justice is a mode of ADR applied in criminal law.⁷⁴ Traditionally, criminal law follows a retributive philosophy as its goal is to punish offenders and thereby deter society and individuals from

65. ANDERSON & HIRSCH, *supra* note 26, at 104-05.

66. *Id.*

67. This relationship exists if the project “reduces the adverse impact to public health or the environment to which the violation at issue contributes” or if the project “is designed to reduce the likelihood that similar violations will occur in the future.” ANDERSON & HIRSCH, *supra* note 26, at 104-06.

68. SEPs cannot be used by entities so that they spend less money than if they did not undertake the SEP at all. *Id.*

69. *Id.* at 104.

70. *Ohio Environmental Protection Agency Supplemental Environmental Project Guide*, OHIO ENVTL. PROTECTION AGENCY, at 1 (Dec. 2006) http://epa.ohio.gov/portals/35/swerp/sep_guidance_dec06.pdf [hereinafter *Ohio EPA Guide*].

71. In one case, as the Scotts Miracle-Gro Company pled guilty to criminal charges, the company also engaged in an SEP in a parallel civil proceeding. Andrew C. Brought, *EPA Aggressively Pursuing FIFRA Enforcement of Misbranded and Unregistered Pesticides in Region 4, Region 5, and Region 7*, SPENCER FANE (Sept. 17, 2012), <http://www.spencerfane.com/EPA-Aggressively-Pursuing-FIFRA-Enforcement-of-Misbranded-and-Unregistered-Pesticides-in-Region-4-Region-5-and-Region-7-09-17-2012/>.

72. Within the Scotts Miracle-Gro Company’s criminal case, and not its parallel civil proceeding, a plea agreement was made that “involved a \$4 million criminal fine and a \$500,000 environmental project.” *Id.*

73. See *Environmental Criminal Defense*, BRACEWELL, <http://www.bracewellgiuliani.com/practice-detail/environmental-criminal-defense> (last visited Mar. 10, 2016).

74. See *What is Restorative Justice?*, CENT. JUST. & RECONCILIATION, <http://www.restorativejustice.org/university-classroom/01introduction> (last visited Mar. 10, 2016).

misconduct.⁷⁵ As an alternative philosophy, restorative justice seeks to restore parties to the positions they were at before crimes were committed.⁷⁶ It reaches this goal by holding offenders accountable, addressing crimes committed,⁷⁷ creating forums for victims, offenders, and communities,⁷⁸ and healing through “setting things right.”⁷⁹ This restorative approach not only alleviates damages incurred upon both victims and offenders,⁸⁰ but also creates avenues through which future criminal acts can be prevented.⁸¹ Restorative justice programs respond to crimes as fast as possible, and they thereby provide a more expedient method of remedying situations than alternative legal remedies.⁸²

Restorative justice programs can be applied before alleged offenders are indicted, after they are charged but not yet convicted,⁸³ after they have been convicted but not yet sentenced,⁸⁴ and after they have been sentenced.⁸⁵ For a restorative justice program to be applied, victims and offenders must be identified, they must both voluntarily and without coercion agree to participate, and offenders must accept responsibility for their crimes.⁸⁶

75. See generally Paul Clark, *Restorative Justice and Adr: Opportunities and Challenges*, 44 *ADVOC.* 13 (2001).

76. See Matt Semansky, *What is Restorative Justice?*, *DAL NEWS* (Dec. 18, 2014), <http://www.dal.ca/news/2014/12/18/what-is-restorative-justice-.html>.

77. *Id.*

78. Restorative Justice recognizes and encourages the role of community institutions, including the religious and faith communities, in teaching and establishing the moral and ethical standards, which build up the community. Ron Claassen, *Restorative Justice: Fundamental Principles*, *CTR. FOR PEACEMAKING & CONFLICT STUD.* (May 1996), <http://peace.fresno.edu/docs/rjprinc.html>.

79. See Semansky, *supra* note 77.

80. “Restorative justice views the situation as a teachable moment for the offender; an opportunity to encourage the offender to learn new ways of acting and being in community.” Claassen, *supra* note 79. Further, by benefitting criminals, these programs reduce “recidivism by encouraging change in individual offenders and facilitating their integration in the community. Preston, *supra* note 1, at 3. In treating the situations as such, everyone benefits from restorative justice programs.

81. Preventative measures are taken by addressing causes of crimes. Claassen, *supra* note 79.

82. *Id.*

83. Restorative justice programs could be implemented at any time before convictions through referral by law enforcement, prosecutors, or regulatory agencies. Preston, *supra* note 1, at 5.

84. A restorative justice program could be applied before sentencing through a court referral. *Id.*

85. A restorative justice program could be applied after sentencing through a referral by courts, probation services, or correction services either during or after incarceration periods. Preston, *supra* note 1, at 5.

86. *Id.* at 3.

A wide variety of restorative justice programs exist.⁸⁷ One such program is victim-offender mediation (VOM), through which victims confront offenders and explain to them the injury that the offender caused.⁸⁸ Although VOM often occurs after sentencing, applying it earlier provides an avenue for offenders to avoid prosecution or mitigate sentences.⁸⁹ It is usually applied to juvenile disputes, minor misdemeanors, and gang violence preventative programs,⁹⁰ and it has been applied to other areas as well.⁹¹ Other similar programs include conferencing,⁹² circles,⁹³ and restitution.⁹⁴ Although these programs are integrated into criminal justice court systems throughout the nation, none of them are applied to environmental crimes in the United States.⁹⁵ In other nations, restorative justice has been successfully applied to environmental crimes.⁹⁶

87. See *What is Restorative Justice*, *supra* note 75.

88. *Victim Offender Mediation*, RESTORATIVE JUST. ONLINE, <http://restorativejustice.org/restorative-justice/about-restorative-justice/tutorial-intro-to-restorative-justice/lesson-3-programs/victim-offender-mediation/> (last visited Mar. 10, 2016).

89. See *id.*

90. Mark S. Umbreit, *The Development and Impact of Victim-Offender Mediation in the United States*, 12 MEDIATION Q. 263 (1995).

91. See Alyssa H. Shenk, *Victim-offender Mediation: The Road to Repairing Hate Crime Injustice*, 17 OHIO ST. J. ON DISP. RESOL. 185 (2001).

92. *Conferencing*, RESTORATIVE JUST. ONLINE, <http://restorativejustice.org/restorative-justice/about-restorative-justice/tutorial-intro-to-restorative-justice/lesson-3-programs/conferencing/> (last visited Mar. 10, 2016).

93. *Circles*, RESTORATIVE JUST. ONLINE <http://restorativejustice.org/restorative-justice/about-restorative-justice/tutorial-intro-to-restorative-justice/lesson-3-programs/circles/> (last visited Mar. 10, 2016).

94. *Restitution*, RESTORATIVE JUST. ONLINE, <http://restorativejustice.org/restorative-justice/about-restorative-justice/tutorial-intro-to-restorative-justice/lesson-3-programs/restitution/> (last visited Mar. 10, 2016).

95. See *Conferencing*, *supra* note 93; see also *Circles*, *supra* note 94; *Restitution*, *supra* note 95; 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, 503 (2008); Elizabeth Sivell, *Watch out for new environmental enforcement laws*, LEXOLOGY (Sept. 2, 2014), <http://www.lexology.com/library/detail.aspx?g=246c5c8a-01a7-4c73-9dd2-a2d2eef8259a>.

96. Waikato Regional Council, *Mangakino Awarded \$30,000 After Restorative Justice Process*, INFONEWS.CO.NZ (Oct. 26, 2010), <http://www.infonews.co.nz/news.cfm?id=59727> (demonstrating an instance in which restorative justice enabled an offender to substantially heal a damaged community).

VI. WHY THIS ARTICLE IS NECESSARY – THE SHORTCOMINGS OF THE PREVIOUS ANALYSIS

A. Carrie C. Boyd's Discussion of Restorative Justice

Only one legal analysis applying restorative justice to environmental crimes in the United States existed prior to this note.⁹⁷ This article is “Expanding the Arsenal for Sentencing Environmental Crimes: Would Therapeutic Jurisprudence and Restorative Justice Work?” by Carrie C. Boyd.⁹⁸ Boyd’s article argues that therapeutic jurisprudence and restorative justice theories may “bolster sentencing possibilities”⁹⁹ for environmental crimes.¹⁰⁰ While Boyd’s conclusion pertaining to restorative justice¹⁰¹ is correct, her article overlooks many crucial aspects that are fundamental to the application of restorative justice in an environmental context. Her note ends by stating that restorative justice is “worth a closer look”¹⁰² without actually giving it that close look. Although her article is the first to apply restorative justice to environmental crimes in the United States, it insufficiently analyzes the subject.

Boyd’s article discusses current criminal sanctions for environmental offenders and then posturizes therapeutic and restorative justice approaches that could be integrated into the criminal process.¹⁰³ Boyd highlights restorative justice as a means to 1) make the public view environmental damage as wrongful, which Boyd argues criminal statutes may fail to do, 2) bolster sentencing possibilities by creating forums through which communities can express remorse and reach agreements with offenders, and 3) complement the criminal justice system.¹⁰⁴

97. *See* Boyd, *supra* note 96.

98. *Id.* It should also be noted that Elaine L. Hughes and Dr. Larry A. Reynolds wrote an article that briefly posturized the idea of integrating restorative justice into environmental proceedings; however, their article immediately dismissed the restorative justice approach without really discussing it. Elaine L. Hughes & Dr. Larry A. Reynolds, *Creative Sentencing and Environmental Protection*, 19 J. ENVTL. L. & PRAC. 105, 133 (2009).

99. Boyd, *supra* note 96, at 512.

100. *Id.*

101. This article does not analyze therapeutic jurisprudence theories.

102. *Id.* at 512.

103. *Id.* at 483-512.

104. *Id.*

B. *Insufficient Analysis of Reparative Action*

Unfortunately, nearly the entirety of Boyd's discussion on the application of restorative justice to environmental crimes explains only a procedure through which a forum is made in which communities can voice their concerns.¹⁰⁵ While Boyd is correct in demonstrating that having a forum to discuss community concerns is an important aspect of restorative justice, her analysis only briefly mentions reparative action twice.¹⁰⁶ Her note first considers reparative action when it states that "human and environmental health . . . may [be] ameliorate[d],"¹⁰⁷ and it brings up reparative action once more in the sentence, "In addition to expressing these views, the participants will seek consensus as to restorative measures to minimize the harm."¹⁰⁸ Her article makes no further mention of this crucial aspect of restorative justice.¹⁰⁹

This minimal treatment of the potential restoration of damages from environmental crimes through restorative justice overlooks many essential benefits. Applying restorative justice to environmental crime can repair damages, prevent future harms, and restore environments.¹¹⁰ Communal dialogue between offenders and impacted communities nearly encompasses the entirety of Boyd's analysis regarding applying restorative justice to environmental crime, but such communal dialogue does not on its own ameliorate a critical ongoing situation.¹¹¹ Although providing offenders and the victimized community "an opportunity to share their views"¹¹² may restore perceptions of victimized communities and offenders towards one another, that on its own will not fix problems. Dialogue, without action, is not enough to remedy damages upon individuals, communities, and environments. Although one could argue that criminal statutes already levy fines that restore damages,¹¹³ these fines do not necessarily solve the problems they are intended to fix.¹¹⁴ Applying restorative justice to

105. *Id.* at 507-08.

106. *Id.* at 508.

107. *Id.*

108. *Id.*

109. *Id.*

110. Preston, *supra* note 1, at 20-23.

111. Boyd, *supra* note 96, at 507-08.

112. *Id.* at 507.

113. See 33 U.S.C. § 1319(c)(2) (2006); see also 42 U.S.C. § 6928(d) (2006).

114. For example, after almost five years since BP spilled massive amounts of oil in the Gulf of Mexico, prosecutors have provided expert testimony that argues that more monetary penalties are needed, despite that BP already paid "\$42 billion in cleanup costs, criminal and environmental fines." Collin Eaton, *Spill case heads back to court for penalty arguments*, HOUSTON CHRON. (Jan. 26, 2015), <http://www.houstonchronicle.com/business/energy/article/Spill-case-heads-back-to-court-for-penalty-6021530.php#0>.

environmental crimes provides much more than just gaining understanding between parties through dialogue.

C. Inadequate Consideration of the Benefits of Dialogue

Boyd's analysis of the benefit of communal dialogue is short and ignores other benefits that can be gained by applying restorative justice to environmental crimes.¹¹⁵ Although her article focuses almost exclusively on the benefits of communal dialogue, it does not explain *why* this advantage is important and *how* it can play out.¹¹⁶ Her analysis does not demonstrate that these conversations teach parties how to avoid getting hurt by environmental damages and how to prevent crimes from re-occurring.¹¹⁷ Her analysis does not discuss how restorative justice helps offenders reintegrate into communities and thereby promote local economies.¹¹⁸ Boyd's article never explains why people's understanding of how their environment has been damaged helps them find solace in their own grievances.¹¹⁹ This minimal treatment must be expanded upon for a proper analysis.

D. Minimal Treatment of Restorative Justice Itself

Boyd's article discusses the benefits of applying restorative justice so briefly because it accords minimal treatment to the topic of restorative justice itself.¹²⁰ A substantial portion of her article does not relate to restorative justice with environmental crimes.¹²¹ For example, an entire section of the article discusses sanctions upon non-environmental criminals.¹²² In fact, half of her argument is for the application of therapeutic jurisprudence, an approach that is separate from restorative justice.¹²³ Her article's discussion of restorative justice comprises a small fraction of the note, despite the words "restorative justice" being in the title of the note.¹²⁴ The sidelined state of restorative justice in her article leaves a

115. Boyd, *supra* note 96, at 507-08.

116. *Id.* at 507-08.

117. *See* Preston, *supra* note 1, at 17.

118. *Id.* at 21-22.

119. *Id.*

120. Boyd, *supra* note 96, at 483-512.

121. *Id.*

122. *Id.* at 498-99.

123. *Id.* at 483-512.

124. *Id.*

lot of necessary components for its application to environmental crimes unsaid.

E. Incorrect Conclusion on Sentencing Integration

Within the minimal treatment that Boyd's article accords restorative justice, there is an incorrect point.¹²⁵ This can be found in the sentence, "[t]he restorative justice dialogue occurs in place of judicial sentencing and if no agreement is reached or the offender chooses not to participate, sentencing will take place in the conventional manner."¹²⁶ Applying restorative justice to crimes does not supplant criminal sentencing altogether.¹²⁷ Further, despite stating that restorative justice "occurs in place of judicial sentencing,"¹²⁸ Boyd's discussion concludes by stating that restorative procedures should complement the criminal process, rather than replace it.¹²⁹ Not only is this conclusion inconsistent with the article's previous point, but it also is not supported by an explanation of how restorative justice can complement the criminal process.¹³⁰ Thankfully, such an explanation can be found within the work of the Honorable Justice Brian J. Preston.

VII. JUSTICE PRESTON: PROVIDING THE FOUNDATION FOR A PROPER ANALYSIS

A. Justice Preston's Article

In 2011, the Honorable Brian J. Preston, a Chief Judge in Melbourne, Australia, wrote an article titled "The Use of Restorative Justice for Environmental Crime."¹³¹ Justice Preston's article applied restorative justice principles to demonstrate how it could be used as a response to environmental crimes.¹³² Although Justice Preston wrote his article from an Australian standpoint, his framework could be used as a guide to establishing restorative justice programs for environmental crimes in the United States.¹³³

125. *Id.* at 508.

126. *Id.* at 508.

127. *See* 33 U.S.C. § 411 (2006) (demonstrating a statute that, if violated, requires incarceration); *see also* Preston, *supra* note 1, at 13-15.

128. Boyd, *supra* note 96, at 508.

129. *Id.* at 510.

130. *Id.*

131. Preston, *supra* note 1, at 1.

132. *Id.* at 2.

133. *See id.* at 1.

B. Identifying Victims

Justice Preston writes that the first “critical ingredient”¹³⁴ for successful restorative processes is the identification of victims.¹³⁵ Once victims have been identified, he writes that the next step is for victims to voluntarily agree to partake in restorative processes.¹³⁶ Individuals may participate on their own, or with family, friends, and other advisors.¹³⁷ Entities such as corporations may participate with legal and other advisors through representatives “who are the directing mind and will of the corporation.”¹³⁸ Victims that are members of large classes of people or of the community may participate with legal advisors either individually or through representatives that work on their behalf.¹³⁹ Justice Preston notes that choices of representatives should be determined by the circumstances of crimes that lead to the restorative justice processes.¹⁴⁰ As an example, Justice Preston writes that, in the instance of a river being polluted, “the community that uses and benefits from the river, and the river itself which is also a victim, could be represented by a governmental or non-governmental organi[z]ation responsible for or engaged in protection of riverine ecosystems.”¹⁴¹

Justice Preston provides more examples, but in each one there is the same pattern.¹⁴² In each example, nominated governmental representatives of communities, as well as non-government organizations that take care of environments, are potential representatives for communities and harmed environments themselves.¹⁴³ Future generations, whom Justice Preston notes are also victims, must be represented by “a surrogate victim . . . a person or body [that] can represent future generations.”¹⁴⁴ Justice Preston writes that these surrogates could also be government or non-government organizations depending upon surrounding circumstances.¹⁴⁵

134. *Id.* at 12.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* at 13.

140. *Id.* at 13.

141. *Id.*

142. *Id.* at 13-14.

143. *Id.*

144. *Id.* at 13.

145. *Id.* at 15.

C. Involvement by Criminal Offenders

Once victims have been identified and have agreed to participate in restorative justice programs, Justice Preston writes that the next step is for criminal offenders to accept responsibility for crimes, and then for offenders to volunteer to participate in restorative justice programs.¹⁴⁶ Before volunteering, offenders “should have the right to consult with legal or other professional advisors concerning the restorative process, and the restorative outcomes.”¹⁴⁷ Without the right to such consultation, agreements by offenders to participate cannot be voluntary, as they would be agreeing to something they may not understand.

D. Restorative Outcomes and Apologies

Once offenders accept responsibility for their crimes and volunteer to participate in restorative justice programs, they can be brought together with victims, representatives of victims, and other necessary parties.¹⁴⁸ Justice Preston highlights the many outcomes that can be produced through the restorative justice approach.¹⁴⁹ The first outcome he addresses is apologies, as the restorative justice process is an opportunity for offenders “to offer a sincere apology for committing the crime and causing harm to the victim[s].”¹⁵⁰

E. Agreements

Another restorative outcome Justice Preston discusses is an undertaking or agreement.¹⁵¹ This may be the most important outcome that can be derived from the restorative process, as it incorporates and carries out the most fundamental aspects of restorative justice: healing and preventing criminal reoccurrences.¹⁵² Offenders meeting victims or representatives of victims can make promises to “prevent, control, abate or mitigate harm to the environment”¹⁵³ and to pay the costs of ensuring that these promises are undertaken.¹⁵⁴ Justice Preston demonstrates that these goals can be reached

146. *Id.*

147. *Id.*

148. *See id.* at 16.

149. *Id.*

150. “The healing effect of the apology will be enhanced if the victim is prepared to accept the apology.” *Id.* at 16.

151. *Id.* at 16-17.

152. *Id.* at 17; *see also* Semansky, *supra* note 77.

153. Preston, *supra* note 1, at 16.

154. *Id.* at 17.

by having offenders implement projects to restore damaged environments, fund organizations to carry out such projects, partake in community service works, and provide training courses that can train offenders' employees and contractors to avoid future damages.¹⁵⁵

Justice Preston points out a crucial problem overlooking such ameliorative agreements.¹⁵⁶ He demonstrates how environments may be so critically damaged that they cannot be restored to the condition they were in before offences were committed.¹⁵⁷ Further, if environments can be fully and feasibly restored, "a loss of ecosystem services and functioning as well as . . . [a] loss of individual biota"¹⁵⁸ will occur during the time between the commission of the offense and the point at which the environment has been restored.¹⁵⁹ Justice Preston addresses this issue with the solution that offenders can compensate such harms by "carrying out, or paying for others to carry out, a project for the restoration or enhancement of the environment elsewhere, such as to provide compensatory habitat."¹⁶⁰

F. Transforming Offenders

Justice Preston demonstrates how restorative justice in an environmental crime context can not only create agreements that benefit victims and environments, but that it can also transform offenders.¹⁶¹ By taking responsibility for their conduct, listening to victims voice concerns, engaging in dialogue with victims to understand harms suffered, and formulating remedies, offenders can gain significant insight.¹⁶² Such personal interaction penetrates "[t]he psychological strategies offenders use to distance themselves from knowledge of their crime and its consequences."¹⁶³

Justice Preston demonstrates that this psychological distance particularly applies to corporate offenders, whose members are otherwise separated from any personal interaction with the consequences of their corporate entity's

155. *Id.* at 17, 19.

156. *Id.* at 17.

157. *Id.*

158. *Id.* at 18.

159. *Id.* at 17.

160. *Id.* at 18.

161. *Id.* at 21.

162. *Id.* at 20-21.

163. *Id.* at 21.

crimes.¹⁶⁴ By having leading employees of corporations personally meet victims who have suffered by their actions, “[t]he humanity of the restorative justice process pierces the corporate veil.”¹⁶⁵ Further, having corporate or individual offenders meet victims, address causes of environmental damages, seek remedies, and change behaviors to prevent criminal acts, offenders can be both rehabilitated and reintegrated into their communities.¹⁶⁶ The incentive of being able to re-integrate into communities is a powerful force that can drive offenders who need to maintain good relations with their communities towards partaking in restorative processes.¹⁶⁷

G. Transforming Victims and Communities

Justice Preston demonstrates how the application of restorative justice to environmental crimes is transformative upon not only offenders, but also victims and communities.¹⁶⁸ By participating in the restorative process and having a voice in criminal enforcement, victims can be both vindicated and healed.¹⁶⁹ The opportunity to be involved in the process of resolving crimes that reverberate throughout communities and to heal the damages that accrue from such crimes “help[s] foster a revitali[z]ed sense of community.”¹⁷⁰ Further, “participation of the community in restorative justice interventions for environmental crimes is consistent with . . . broader principles of the public’s right to public participation in decision-making processes, access to information concerning the environment, and access to justice in environmental matters.”¹⁷¹

H. Transforming Environments

One of the final key restorative outcomes that Justice Preston highlights is that the restorative process is transformative upon not only victims and communities, but also upon environments.¹⁷² This is not only because of the physical benefits accorded to damaged environments, but also because of

164. *Id.*

165. *Id.*

166. *Id.* at 20-21.

167. For example, “rural and other industries which commit environmental offences suffer a loss of trust and reputation with their local community and . . . [making] reparation, including by carrying out projects for the restoration or enhancement of the local environment, can be an important step in healing and rebuilding trust and relationships with the community.” *Id.* at 22.

168. *Id.*

169. *Id.* at 22-23.

170. *Id.*

171. *Id.*

172. *Id.*

how the environment is empowered by the restorative process.¹⁷³ Representing the environment gives it “a voice, validity, and respect. This itself is a transformative act as it recogni[z]es the intrinsic value of the environment . . . [b]y giv[ing] the environment a voice and recogni[z]ing and healing it as a victim, humanity’s relationship with the environment is also transformed.”¹⁷⁴

VIII. APPLYING RESTORATIVE JUSTICE TO UNITED STATES LAW

Justice Preston’s analysis serves as a foundation for applying environmental restorative justice to United States law.¹⁷⁵ Although there are aspects of Justice Preston’s analysis that cannot be directly integrated into United States law,¹⁷⁶ as his article was written from an Australian standpoint, the overall model can be applied.¹⁷⁷ Although environmental regulations, agencies, processes, and statutes differ between both countries, the model of restorative justice with its causes, methods, and goals is the same.

A. SEPs: Demonstrating How Restorative Justice Can Be Integrated

As previously discussed,¹⁷⁸ violators can seek to reduce judicial sentences by benefitting environments through voluntary expenditures through Supplemental Environmental Projects (SEPs).¹⁷⁹ The projects that these expenditures create restore environments damaged by crimes.¹⁸⁰

Restorative justice applied to environmental crimes parallels SEPs. Just like SEPs, restorative justice agreements develop voluntary projects that relate to crimes.¹⁸¹ Just like SEPs, restorative justice agreements are not an

173. *Id.* at 22-23.

174. *Id.* at 23.

175. *See id.*

176. The parts of Justice Preston’s analysis that cannot be directly integrated into United States law are not discussed in this article.

177. In his analysis, Justice Preston often writes that the enforcement of agreements made in restorative justice sessions can be enforced by sentencing courts. *See* Preston, *supra* note 1, at 17. This cannot be directly integrated into United States law because doing so would require altering sentencing mandates in numerous statutes. *See* 33 U.S.C. § 1319(c)(2) (2006); *see also* 42 U.S.C. § 6928(d) (2006).

178. SEPs were discussed in Section VII, subheading A, of this note.

179. *See* ANDERSON & HIRSCH, *supra* note 26, at 104-05.

180. *See id.*

181. *Compare id.* at 104-05 (showing how SEPs must not be legally required and must be related to the nexus of the crime), *with* Preston, *supra* note 1, at 17 (illustrating how offenders in

avenue for offenders to mitigate financial losses.¹⁸² Just like SEPs, restorative agreements do not primarily benefit offenders.¹⁸³ Finally, just like SEPs, offenders have incentives to partake in restorative processes.¹⁸⁴

Although SEPs and restorative justice are substantially similar, they have their differences. The most substantial difference between the two systems is that they involve different parties in the creation of environmental healing projects.¹⁸⁵ Although SEPs are designed to benefit communities,¹⁸⁶ they are not approved by the communities they benefit; rather, they are approved by government commissions or agencies.¹⁸⁷ In contrast, restorative processes empower communities by providing them the opportunity to be involved in resolving crimes they suffered from.¹⁸⁸ While communities are benefitted through SEPs by agencies and offenders, communities are able to benefit themselves through restorative justice.¹⁸⁹ Thus, while SEPs function through projects enacted by public agencies, restorative justice provides remedies for environmental damages through private parties. In so doing, environmental restorative justice broadens the scope of reparative projects that SEPs introduced to United States law.

restorative processes volunteer to ameliorate the harms they create and to prevent criminal reoccurrences).

182. Compare ANDERSON & HIRSCH, *supra* note 26, at 104-05 (demonstrating that SEPs cannot be used to mitigate financial losses), with Preston, *supra* note 1, at 17-19 (illustrating how offenders simultaneously fund projects that restorative processes create as well as bear statutory penalties).

183. Compare ANDERSON & HIRSCH, *supra* note 26, at 104-05 (illustrating how SEPs cannot primarily benefit offenders), with Preston, *supra* note 1, at 17, 19 (showing how restorative agreements are designed to heal damages inflicted upon victimized persons, communities, and environments).

184. Restorative agreements can influence courts to use their discretionary power to impose smaller sentences than they otherwise would have to, just as SEPs have the power to do. See 42 U.S.C. § 6928(d) (2006) (demonstrating an example of a criminal mandate that gives courts discretion in determining incarceration terms from within a range of years); see also ANDERSON & HIRSCH, *supra* note 26, at 104-05 (showing how SEPs can lower penalties for offenders through courts' discretionary power). For further discussion on offender's incentives, see *infra* Part VII.D.

185. Compare *Ohio EPA Guide*, *supra* note 71, at 1 (providing an example of an SEP statute in which the EPA and the Attorney General are the parties that must agree with the offender's project for it to be acceptable), with Preston, *supra* note 1, at 17-19 (illustrating how restorative agreements are made between offenders and various persons, including communities, harmed individuals, and effected organizations).

186. *Supplemental Environmental Projects*, EPA, <http://www2.epa.gov/enforcement/supplemental-environmental-projects-seps#guidelines> (last updated Feb. 9, 2016).

187. See *SEP Statute and Guidance*, TEX. COMMISSION ON ENVTL. QUALITY, <https://www.tceq.texas.gov/legal/sep/sep-policy-guidance> (last modified Mar. 16, 2016) (providing an example of an SEP statute in which agency involvement is required).

188. See Preston, *supra* note 1, at 22.

189. Compare *SEP Statute and Guidance*, *supra* note 188 (demonstrating an example of an SEP statute in which communities are not involved in the process of creating restorative projects), with Preston, *supra* note 1, at 17-19 (showing how communities, harmed individuals, and effected organizations can all be involved in the restorative process).

B. Expanding Opportunities for Victims

Restorative justice benefits individuals by providing forums in which parties can discuss concerns, understand one another, and reach agreements.¹⁹⁰ These forums empower individuals and the agreements they create provide people compensation for personal damages.¹⁹¹ In this sense, restorative justice expands opportunities for victims of environmental crimes in the United States.

Injured persons in the United States often cannot receive compensation while simultaneously and personally enforcing environmental regulations.¹⁹² This is because individuals do not receive damages from citizen suit actions.¹⁹³ This substantial limitation forces individuals to choose between either suing for tortious acts while not enforcing environmental regulations or launching citizen suits to enforce environmental regulations without being compensated. Of course, individuals can pursue both avenues by suing for tortious acts while launching citizen suit actions; however, litigation is costly and time consuming. Utilizing both avenues is hardly a simple matter that a reasonable person suffering injury would want to deal with.

Inviting individuals who suffer from environmental crimes into restorative processes eliminates this problem. Individuals can utilize restorative justice to both force offenders to follow regulations as well as to be compensated. Further, offenders can also benefit from this as it creates settlements to avoid litigation.

C. Addressing Environmental Justice Concerns

Another important benefit of integrating restorative justice into United States law is that it addresses the concerns of the environmental justice movement. A major criticism of current environmental regulation is that it discriminates against people's ethnicities, nationalities, and incomes.¹⁹⁴ "For

190. See Preston, *supra* note 1, at 16-17.

191. *Id.*

192. See ANDERSON & HIRSCH, *supra* note 26, at 71-72.

193. Injunctive relief may be ordered as a result of a citizen suit; however, personal injury, property, and other types of damages may not be awarded. *Id.*; EGGEN, *supra* note 41, at 95.

194. "In the area of standard setting, EPA and other agencies employ scientific risk assessments to support environmental standards that often do not take into account the special characteristics of communities of color and low-income communities." Eileen Gauna et al., *CPR Perspective: Environmental Justice at Stake*, CNTR. FOR PROGRESSIVE REFORM (2005), <http://www.progressivereform.org/persp/EnviroJustice.cfm>; *What is Environmental Justice?*, EPA,

example, in developing water quality criteria, environmental agencies estimate an average fish consumption that ignores the higher rates of fish consumption among Native Americans and other ethnic minorities . . . [and as a result,] agencies fail to propose standards that are sufficiently protective of vulnerable ethnic and racial groups.”¹⁹⁵ Environmental Justice is a social movement designed to end such discrimination.¹⁹⁶ This social movement has taken the forefront of environmental regulation and activism.¹⁹⁷

Environmental justice is concerned with both outcomes and processes taken to reach outcomes.¹⁹⁸ The environmental justice movement stresses “procedural inequalities inconsistent with the ideals of participatory democracy. Environmental Justice advocates ‘demand[] the right to participate as equal partners at every level of decision making, including needs assessment, planning, implementation, enforcement, and evaluation.’”¹⁹⁹

Applying restorative justice to environmental crimes meets this demand. By involving communities in resolving crimes and by turning individuals and communities into equal partners with decision-making powers, the goals of environmental justice are achieved.²⁰⁰ Thus, restorative justice not only meets one of the EPA’s most important goals, but it also eliminates procedural inequalities that underlie the legal system.

D. Incentivizing and Rehabilitating Offenders

Applying restorative justice to environmental crimes in the United States creates incentives for offenders to fix harms they create. One such incentive exists in restorative agreements made before sentencing. Restorative justice provides offenders the hope and opportunity to reduce their criminal sentences. Many criminal penalties in environmental statutes provide ranges of incarceration terms and monetary fines, rather than fixed terms of years or fines.²⁰¹ For example, section 6928 of the Resource Conservation and Recovery Act contains environmental crimes punishable by penalties of up to \$50,000 per day of violation and convictions of up to

<http://www.epa.gov/environmentaljustice/> (last visited Feb. 21, 2015) [hereinafter *EPA Environmental Justice*].

195. Gauna et al., *supra* note 195.

196. See David Schlosberg, *DEFINING ENVIRONMENTAL JUSTICE: THEORIES, MOVEMENTS, AND NATURE* 5 (2007).

197. This is made clear by how the EPA set environmental justice as one of the key goals that it seeks to achieve across the nation. *EPA Environmental Justice*, *supra* note 195.

198. PERCIVAL ET AL., *supra* note 7, at 22.

199. *Id.* (quoting Principles of Environmental Justice, First National People of Color Environmental Leadership Summit (Oct. 24-27, 1991), <http://www.ejnet.org/ej/principles.pdf>.)

200. Preston, *supra* note 1, at 22.

201. See 33 U.S.C. § 1319(c)(2) (2006); see also 42 U.S.C. § 6928(d) (2006).

five years.²⁰² Through restorative justice, offenders who violate such statutes may be motivated to fund restorative projects by the hope that courts will use their discretionary powers to reduce prison sentences. Courts may consider lowering sentences for offenders who have repaired harms they created and have taken steps to prevent future damages.²⁰³ Specific instances in which courts have used their discretionary power to reduce sentences show that some courts value restoration of damages and prevention of future crimes over retribution.²⁰⁴ Although offenders have no guarantee that restorative processes will reduce their sentences, as courts could still impose maximum sentences, many wealthy offenders would likely still take this opportunity.

Another incentive that pushes offenders towards partaking in restorative processes lies in the fact that restorative justice re-integrates both corporate and individual offenders into their respective communities.²⁰⁵ This is important because the goal of restorative justice is to restore all parties to positions they were at before crimes were committed, and not just victimized parties.²⁰⁶ By partaking in restorative programs, participants can be transformed from environmental offenders into environmental advocates.²⁰⁷ This transformation allows corporate offenders to shed the stigmatism that crimes place upon them. Attaining this transformation and re-integrating offenders into communities incentivizes offenders by the potential of saving their reputations and promoting their businesses.

Transforming offenders not only involves conversing, collaborating, and funding agreements, but it also involves shaming. Surprisingly, the shaming involved in restorative processes can be seen as another incentive for offenders to be involved. Shame is a very strong emotion that must be faced in order for victims, communities, and offenders to gain understanding of one another and crimes committed. While this may appear at first glance to

202. See 42 U.S.C. § 6928(d).

203. However, it should be noted that while courts will factor restorative processes into their decisions, they will also factor in the fact that offenders are only restoring the damages they created after they have been charged with criminal violations.

204. See Matt Bowen and Paloma Migone, *Rena Captain and Officer Sent to Jail*, MALBOROUGH EXPRESS (May 25, 2012), <http://www.stuff.co.nz/marlborough-express/news/national-news/6984980/Rena-captain-and-officer-sent-to-jail> (providing an example in which an offender violated environmental laws, caused substantial damage, and used restorative justice to seek forgiveness in the community while taking measures to repair the harm made. As a result, he was not given the maximum sentence for his crime.).

205. Preston, *supra* note 1, at 21-22.

206. See Semansky, *supra* note 77.

207. See Preston, *supra* note 1, at 21.

de-incentivize offenders from wanting to partake in restorative processes, offenders may realize that confronting their actions can avoid them a lifetime of shame. Further, the shame involved in restorative justice is not a stigmatizing shame, as “[p]otential harm to reputation through shaming . . . is contrary to the philosophy of restorative justice . . . Restorative justice works with re-integrative shame where the offense is denounced but not the offender.”²⁰⁸ By shaming offenses, and not offenders, communities can work with offenders, ameliorate damages, and acknowledge crimes so that “actions to make things right, self-respect and acceptance into the community[,] becomes possible.”²⁰⁹ This powerful incentive for offenders not only motivates them to take part in restorative justice programs and thereby help victims, but it also brings rehabilitative options into a criminal justice system that is predominately retributive.²¹⁰

IX. CRITICISMS OF ENVIRONMENTAL RESTORATIVE JUSTICE

Many criticisms can be raised concerning the application of restorative justice to environmental crimes. Though sufficiently discussing all of these concerns is impossible, this section will highlight several major concerns by demonstrating the arguments they raise as well as counter-arguments that apply.

A. “Community” is not Defined

For restorative justice programs to properly work, communities have to be represented.²¹¹ However, there is no set definition for community.²¹² This problem was considered in a very short section of an article written by Elaine L. Hughes and Dr. Larry A. Reynolds, in which they quickly dismissed the notion of applying restorative justice to environmental law after posturizing it among other theories.²¹³ They rejected the idea of environmental restorative justice without much consideration because, in their opinion, “lack of true public participation mechanisms in environmental law create enormous obstacles to creating the type of

208. Mary Ellen Reimund, *Is Restorative Justice on a Collision Course with the Constitution?*, 3 APPALACHIAN J.L. 1, 22 (2004).

209. *Id.* at 23.

210. Criminal justice traditionally follows a retributive philosophy, by punishing offenders and deterring society from criminal misconduct, over a rehabilitative one. See Clark, *supra* note 76, at 13.

211. Preston, *supra* note 1, at 13.

212. Steven Bonorris et al., *Environmental Enforcement in the Fifty States: The Promise and Pitfalls of Supplemental Environmental Projects*, 11 HASTINGS W.-NW. J. ENVTL. L. & POL’Y 185, 211 (2005).

213. Hughes & Reynolds, *supra* note 99, at 133.

volunteer community that is needed for restorative justice techniques to succeed.”²¹⁴

While this criticism does not warrant entirely dismissing environmental restorative justice without analysis, this criticism raises a fair point.²¹⁵ But there are ways of defining “community.” One such method lies in having elected officials of localities represent injured populations. For example, in Hungary, the Parliamentary Commissioner for Future Generations is charged with investigating “claims relating to Hungarians’ constitutional rights to a healthy environment.”²¹⁶ In investigating such claims, the Commissioner can “make non-binding recommendations to competent authorities with the help of a thirty-five person staff. This form of ADR [entitled the ombudsman program] allows the government to represent citizens who may not have the funds or time to bring their own complaints in court and also to resolve some issues before they get to trial.”²¹⁷ Hungary’s Commissioner demonstrates how government officials or organizations can represent impacted communities to create agreements.²¹⁸

As Justice Preston illustrates, the term “community” can also be read broadly, and affected individuals, corporations, and organizations responsible for protecting environments can all be invited to participate in restorative processes.²¹⁹ The restorative process can involve forums that are open to the public, where anyone can be heard, or they can involve closed forums that legitimately affected organizations or individuals must contact for invitations.

Ultimately, who represents impacted communities is a key decision that must be considered by legislatures or courts when implementing restorative justice into environmental procedures. Failing to invite crucial parties can cause the restorative process to become a guise for corporate offenders to feign remorse and a commitment to righting their wrongs. Inviting unfairly biased parties and excluding affected parties can substantially impede justice. However, if the legitimately affected parties are included in the process, then the goals of restorative justice can be achieved.

214. *Id.*

215. Hughes and Reynolds dismissed the notion of environmental restorative justice after quickly considering it without analyzing it. *Id.*

216. Erica Woodruff, *Environmental Courts and Tribunals: How Can Nations Tackle the Growing Demand for Justice on Environmental Issues?*, 39 DENV. J. INT’L. L. & POL’Y 553, 558 (2011).

217. *Id.* at 558.

218. *See id.* at 558.

219. Preston, *supra* note 1, at 12-13.

B. Lack of Uniformity

Another potential criticism of the restorative process is that there is no defined acceptable standard for restorative justice programs.²²⁰ As Boyd points out in her article, critics of restorative justice argue that it diminishes sentencing uniformity.²²¹ Such critics are correct. Through restorative justice processes, some forums will create expensive agreements while other forums will not, and some offenders will have their sentences lowered while others do not.

Although this lack of uniformity can be seen as problematic, it can also be viewed as beneficial. Lack of uniformity allows agreements to be flexible. Projects enacted by meetings between offenders and communities are tailored to specific environmental damages that make offenders criminal.²²² Thus, a uniform cost for damages should not be set because damages are determined on a case-by-case basis. Further, the discrepancy of outcomes is an issue in all criminal proceedings and not just restorative justice processes.

C. Due Process Concerns

Critics contend that restorative justice programs that occur before offenders are sentenced infringe upon constitutional due process rights.²²³ Such critics argue that offenders' participation in restorative processes can serve as admissions of guilt and thereby infringe upon their right to be presumed innocent until proven guilty.²²⁴ Further, they argue that the rights to receive a fair trial and effective assistance of counsel are at risk by restorative justice programs.²²⁵

These concerns are well founded; however, the problems they espouse are avoidable. Offenders must be able to have legal counsel present throughout restorative processes.²²⁶ Whatever agreements are reached must be reviewable by offenders' attorneys before finalization.²²⁷ Offenders must have the right to dispute alleged facts.²²⁸ Finally, offenders must retain the

220. Bonorris et al., *supra* note 213, at 211.

221. Boyd, *supra* note 96, at 495.

222. Preston, *supra* note 1, at 20-21.

223. See *Due Process, RESTORATIVE JUST. ONLINE*, <http://www.restorativejustice.org/university-classroom/01introduction/tutorial-introduction-to-restorative-justice/legal/due> (last visited Feb. 21, 2015).

224. *See id.*

225. *See id.*

226. Offenders' attorneys should be present and available, but they should not take over the restorative process. *See id.* Instead, offenders should given room to speak freely. *Id.*

227. *See id.*

228. *See id.*

right to either deny guilt or “to terminate the restorative process in order to deny guilt.”²²⁹ Through these measures, due process rights of offenders who have not been proven guilty will be preserved.

D. Some Criminals Should Not Be Benefitted

Another criticism of restorative justice concerns offenders who have been proven guilty. This criticism comes from the perspective that criminals should not be given opportunities to mitigate consequences of their actions. Many may consider the potential of restorative justice to re-integrate offenders into communities and to move shame from criminals to crimes gives criminals a benefit they do not deserve.

This criticism overlooks two points. First, restorative processes do not guarantee restorative outcomes, as criminals still have to talk to victims, understand victims’ plights, and relate with victims sufficiently enough to reach agreements.²³⁰ Second, even if criminals are benefitted by this program, they are not the primary beneficiaries of restorative justice.²³¹ This follows the philosophy of restorative justice that all parties should be restored, including victims.²³² Even if criminals have self-driven incentives to partake in restorative processes, that incentive will allow more victims to be healed. Further, the help that criminals gain for themselves will rehabilitate and transform them from environmental offenders into environmental advocates.²³³ Even if criminals in restorative justice programs maintain an illusory guise of remorse when in reality they are dishonest opportunists, they still will be bound to agreements that heal victims, and they will still have to serve their imposed criminal punishments. Thus, the danger of helping those criminals who do not deserve it is outweighed by the benefits of restorative justice.

X. CONCLUSION

Though a recent development in the law, environmental criminal prosecution has substantially grown. But alternatives to such prosecution

229. *See id.*

230. Preston, *supra* note 1, at 16-17.

231. The primarily benefitted parties by restorative justice programs are victims. *See id.* at 16-17.

232. *See Semansky, supra* note 77.

233. *See Preston, supra* note 1, at 21.

are necessary in order to heal victims.²³⁴ Restorative justice can supplement criminal prosecution by incentivizing offenders to enact projects through which tortious lawsuits will be settled. These projects will heal victims, rehabilitate offenders, and achieve environmental justice in the United States. Bringing environmental restorative justice to the United States will be a major development for environmental prosecution and will positively impact peoples, communities, and environments for generations.

234. The combination of civil and criminal fines currently imposed upon offenders is not always enough. Eaton, *supra* note 115 (demonstrating how, despite having already paid \$42 billion in cleanup costs, prosecutors argue that more monetary penalties are needed to remedy the oil spill by the BP company in the Gulf of Mexico that occurred nearly five years ago).