The Spiritual Principles of Restorative Justice and the Efficiency
Principles of Modern Capitalism: A Path Towards
Reconciliation?

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Restorative justice represents a paradigm shift away from a retributive approach to justice to one of restoration as a way of healing the harms to individuals and communities that have been affected by crime. It works from a recognition and acceptance of the interrelationships and interdependencies of individuals within a community.

Sustainable development operates from the same point of view, recognizing that to heal and sustain the physical environment, interrelationships and interdependencies must be recognized. In the restorative process, in order for a healing to take place the victim’s voice is made prominent and the offender must take responsibility and be accountable for the harm that has occurred. In the context of more and more acceptance by corporations of the importance of sustainability, and by inference the acceptance of the paradigm shift that sustainability relies on, will corporations become ready to participate in restorative processes?

Keywords: restorative justice, sustainable development, corporations, restorative practices, paradigm shift, capitalism, whole systems

Introduction

In discussions about restorative justice, both in terms of its implementation and its theoretical basis, the entire conversation, with few exceptions, has centered on criminal behavior that is committed by one or more persons against another person or persons, represented by the state. Very little space and time has been allocated to a discussion of the crimes committed by corporations against individuals or communities and the healing that a genuinely restorative approach might create. One author, Andrew Spalding, has tackled the issue head-on; however, his approach, as will be discussed below, lacks certain key components of the restorative process thus rendering it more of a hybrid than truly restorative. The overall lack of attention to a restorative justice approach to injuries suffered by individuals and communities at the hands of corporations is unfortunate because corporate crimes are often notorious for the egregiousness of the injuries committed both in terms of the number of people who are harmed and the severity of the harms that occur.

Corporations have many tools at their disposal which enable them to avoid responsibility for the injuries that occur due to their exploitation of natural resources and of the communities that either lay claim to those resources or are sited adjacent to the resource area. Chief among them is their wealth which gives them...
enormous power to manipulate state authority. Corporations are nonetheless abstractions, “created” on paper for purposes of concentrating capital, itself an abstraction for the purpose of generating more capital. However, because corporations have also been designated legal persons\(^1\), under the Fourteenth Amendment, they strategically shield the decision-makers who operate as the corporate entity from much of the responsibility for the decisions they make. The natural persons who carry out those decisions are also shielded, or veiled, from direct responsibility for the actions committed by the corporate legal entity.

Within the context of corporate power and the protections afforded to individuals for actions they take in a corporate framework, there has been some skepticism about the ability to apply restorative justice (RJ) principles to the healing process when an individual or a community has suffered due to corporate malfeasance. The question whether or not the RJ process can be applied in this context is intriguing and it is the purpose of this paper to develop a discussion aimed at searching for an answer to that question.

**Discussion**

In his discussion of the Religion of the Market, David R. Loy (1997) began by acknowledging that “religion is notoriously difficult to define” (p. 275). Through the adoption of a functionalist view and understanding religion as what grounds us by teaching us what the world is, and what our role in the world is, he says it becomes obvious that traditional religions are fulfilling this role less and less because that function is being supplanted by other belief and value systems. Loy then asserts, convincingly in my opinion, that today the most powerful alternative explanation of the world is science, the most attractive value system is consumerism, and their academic offering is economics. On that basis, he argues that our present economic system

> should also be understood as our religion, because it has come to fulfill a religious function for us. The discipline of economics is less a science than the theology of that religion, and its god, the Market, has become a vicious circle of ever increasing production and consumption by pretending to offer a secular salvation … [it is] more apparent that the Market is becoming the first truly world religion, binding [all of us] into a worldview and a set of values whose religious role we overlook only because we insist on seeing them as “secular”. (Loy, 1997, p. 275)

Loy suggests there may be a positive outcome from this, redolent of the concept of sustainability which by extension invites the principles of RJ, when he continues by saying

> The situation of religions today is becoming so critical that the environmental crisis may actually turn out to be a positive thing for religion. That is because ecological catastrophe is awakening us not only to the fact that we need a deeper source of values and meaning than market capitalism can provide but also to the realization that contemporary religion is not meeting this need either.

One of the core virtues within the religion of economics is efficiency. However, that term can take on different meanings. It can refer to a situation where one individual or entity profits without any other taking a loss, also known as Pareto efficient. It can also refer to an economy that is running at maximum output utilizing

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\(^1\) See *Santa Clara County v. Southern Pacific Railroad Company*, 118 US 394 (1886). The case was a corporate law case before the United States Supreme Court which dealt with taxation of railroad properties. A headnote issued by the Court Reporter claimed to state the sense of the Court regarding the equal protection clause of the Fourteenth Amendment as it applies to corporations, without the Court ever having actually made a decision or issued a written opinion on that issue. This was the first time the Supreme Court was reported to hold that the Fourteenth Amendment’s equal protection clause granted constitutional protections to corporations as well as to natural persons, although numerous other cases since *Dartmouth College v. Woodward* in 1819 had recognized that corporations were entitled to some protections of the constitution.
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all available resources. Another meaning is the strict measure of the amount of the economic output per unit of input. The unit of input could be any number of things, for instance energy inputs or labor inputs per hour. Purdue University Professor of Botany Steve Hallett tackles the revered concept of efficiency saying that rather than being the keystone for productive growth in the system, it is actually a highly misunderstood and a very counter-productive phenomenon, especially in the era of globalization. Globalization, Hallett (2013) said,

takes away the “shutdown” triggers of environmental feedbacks. The overconsumption ought to cause a slowdown, reducing consumption. In the global economy, however, the resource is found elsewhere and the consumption continues....

Globalization is a massive efficiency mechanism that secures resources for the dominant few, but it is also a sign of danger. When productivity and growth from local resources become impossible we begin to source them worldwide, but they are now becoming scarce worldwide. The global economy is stripping resources from all over the world and scattering its wastes into the land, the waters, and the air. A global economy, when it becomes a global machine of efficiency, becomes a global efficiency trap. (p. 182)

In a talk given to the American Antitrust Institute (AAI), Hallett summarized his thesis for the crowd of antitrust lawyers attending AAI’s June, 2014 Invitational Symposium which focused on “A Multidisciplinary Examination of Efficiency”. Hallett is a botanist and so he thinks in terms of systems and in his talk he uses a forest as a metaphor for the economy. As described above, our first misconception is to view efficiency as a good thing. According to Hallett, it is actually pretty difficult to think clearly about efficiency. Our assumptions about it are based on the notion that if, for example, with respect to the energy crisis, we become more efficient by using non-renewable sources of energy (gas and coal); those resources will last longer, thus delaying the crisis and due to efficiency, we will also pollute less. His contention, though, is the more efficiently we use a resource the faster it will disappear. The efficient use of the resource brings progress in production, as a result of which there will be more consumption of the resource and therefore further depletion rather than retention or renewal.

That, according to Hallett, is Efficiency Trap 1. Efficiency Trap 2 is where Hallett employs the economy as a forest metaphor, with the overriding message being that economists (and antitrust lawyers—his audience for this talk, and an area that the author also works in on the plaintiff side) need to be more concerned with dynamic efficiency. Not understanding the complexities of the forest, and viewing it as an economic resource, i.e., timber, “we” see it in terms of its price and its health in terms of its productivity. The more productive it is, the healthier it is. But productive translates as more and more trees, usually of one or two particular kinds dominating the forest. However, a forest is a dynamic system which undergoes cycles that involve multiple species and, Hallett contends, eventually most of them burst into flames. This, Hallett explains, is not necessarily a bad thing. It is just a thing. It is what forests do.

Hallett’s point is that we always look at systems in the way that is easy to look at them. Is the forest growing wood? But, according to Hallett, it is just harder to measure the dynamic questions... Instead we rely on simple questions being posed about complex systems, which leads to simple conclusions that are not necessarily true but efficiency allows us to ignore the more complex reality, to our detriment. Consequently, we assume that if productivity is still going up, then all is probably well. Failure often comes very suddenly when productivity is still rising, and the reason is because we push and push and push and insist that the system produce and produce and produce even after the natural cycle of the system is used up. Then, it does not decline, it fails.

Hallett’s thesis is reminiscent of the Marxist influenced economist Joseph Schumpeter’s Theory of
Creative Destruction. Schumpeter believed that creative destruction, which describes the incessant product and process innovation mechanism by which new production units replace outdated ones, would be responsible for the demise of the Capitalist system for reasons similar to the processes described by Hallett’s Efficiency Trap. The term “creative destruction” did not originate with Schumpeter, but he popularized it in his book *Capitalism, Socialism and Democracy*. However, despite the fact that Schumpeter was describing processes that would eventually destroy Capitalism, the term subsequently gained popularity among neo-liberal and free market economics as a description of processes, such as downsizing in order to increase the efficiency and dynamism of a company.

But Hallett’s perspective is one of engendering sustainability, rather than accepting the collapse of the system. In Hallett’s metaphor of the forest when one or two tree species dominate the forest, the forest is then doomed. It cannot sustain itself with one or two species so clearly dominating. Hallett ties this to economic problems, such as monopolies and monopsony, and other domination problems, such as wealth inequality. The bottom line for Hallett is that a focus on efficiency maintains productivity but masks imminent failure.

Here the author would like to quickly tie in the work of the late 2009 Nobel Laureate in economics, and the first woman to receive the Nobel in economics, Elinor Ostrom. Ostrom was not an economist; she was a political scientist, based at Indiana University. But she did exactly what very few economists ever do. She went into the field to see what people do. The background to her contributions dates to 1968 when an ecologist named Garret Hardin wrote an article in the journal *Science* describing the economic theory known as “The Tragedy of the Commons”. The theory describes a situation within a shared-resource system where individual users acting independently according to their own self-interest behave contrary to the common good of all users by depleting that resource through their collective action. Ostrom went into the field and discovered that the exact opposite is happening. Dr. Ostrom’s field work, detailed in her 1990 book *Governing the Commons*, demonstrated that in more cases than not common pool resource users would act cooperatively to sustain the common pool resource by establishing and maintaining governance regimes to manage the resource, particularly in situations where state governance structures did not adequately do so or were otherwise unavailable. In her analysis, Dr. Ostrom cautioned against single governmental units at a global level to solve the collective action problem of coordinating work against environmental destruction. This was partly due to their complexity and partly due to the diversity of actors involved. Among the key guidelines in Dr. Ostrom’s proposal was the reliance on a polycentric approach, where key management decisions should be made as close to the scene of events and the actors involved as possible.

So, what does any of this have to do with restorative justice? The particular research project is focused primarily on the interactions between Indigenous Groups and Multinational Corporations in situations where the latter seek to exploit and develop natural resources laid claim to by the former. The history of this kind of exploitation is full of very serious, long-term, and repeated injuries sustained by the indigenous communities and their sustainably maintained eco-systems.

Within the context of this situation, there are signs that corporations have the capacity to grow in understanding about what their bottom line depends on, as the following indicates. Prof. John Ruggie of Harvard University’s Kennedy, School of Government, was one of the principal architects of The UN Global Compact. In 2005, he was appointed as the UN Secretary-General’s Special Representative for Business and Human Rights. He developed a set of principles, the UN Guiding Principles on Business and Human Rights, which have been adopted by multiple international agencies. In the introduction to his book *Just Business*: 
Multinational Corporations and Human Rights (Ruggie, 2013), Ruggie, citing the experience of Newmont Mining’s activities in Peru, underscores the importance of a firm’s need to identify problems with stakeholder communities early, before they escalate into insurmountable difficulties—often resulting in irremediable mistrust between stakeholders and businesses yielding otherwise avoidable complexities for a major investment. This involves careful listening and the ability to see beyond one’s own perspective, no matter what the cultural setting, inclusive of both domestic and international contexts. Stakeholder interests will continue to assume greater and greater urgency as corporations continue to play a bigger and bigger role in the civic society of nations, in both developed and emerging markets. Therefore, the ability to appreciate stakeholder concerns and to honestly incorporate their values into strategic decision-making becomes key to successful sustainable development and socially responsible behavior, particularly from a management perspective.

Given this example of a corporation’s adaptability by recognizing the importance of incorporating stakeholder concerns, the question is “Is it possible to establish restorative justice responses to abuses by corporations, particularly those involving indigenous groups, but not necessarily limited to that context?”

Conrad Brunk, in his essay “Restorative Justice and the Philosophical Theories of Criminal Punishment” describes different schools of thought that have sought an answer to various questions about how punishment should be defined, including such salient questions, like how criminal punishment relates to the aims and functions of law in a society, under what conditions can it be justified, who can legitimately be punished, what is punishment’s appropriate form, and how much punishment is appropriate to the offense or the offender? In brief, Brunk identifies three schools of thought with different answers to these questions, all of which, however, are focused on what should be done with and to the offenders. Briefly, they are the retributist school, with its origins in the Biblically based theology of Europe, which focuses on vengeance and highlights the concern that offenders must get their just deserts; the utilitarian approach which comes out of the secular thinking primarily of the Industrial Revolution, which wants to deter future offenders, thus protecting society from those who have already committed crimes as well as send a message to those who would commit crimes; and the third school of thought, which are the rehabilitation lists who seek to cure offenders so that they will not offend again. The fourth school of thought is restorative justice (RJ) with a focus on healing, not curing and not rehabilitation and with no religious agenda either. Brunk points out that the restorative justice approach has a kinship with the retributivist school in that both want the offender to take responsibility for the wrong doing. However, in contrast to the retributivist school, the RJ approach assumes that the victims of an offense are not simply abstract entities, such as a corporation, the “state” or the “sovereign”, but rather concrete individuals, institutions, and communities whose interests the law protects. And the way the offender rights the wrongs done to the victims is by taking responsibility for the actual, material harm done to them; this is done by “restoring” through his or her own action as much as possible what has been lost, not just in financial terms, but also in what are often the much more profound psychological and spiritual terms (Brunk, 2001).

Most religious or spiritual traditions embody the basic principles of RJ. These core principles and practices are grounded in peace building through dialogue, compensation to victimized individuals and communities, and accountability measures for offenders that lead to greater responsibility and reintegration. As Loy points out, for the vast majority of humankind, crime, punishment, and reform are still inextricably bound up with religious views about sin, judgment, and forgiveness. Justice is one of those ultimate issues that bridges whatever distinction we try to make between sacred and secular, and our criminal justice system will always be subordinate to our larger vision of how people should relate to each other. “Does this”, he asks,
mean then that penal failure is a barometer of our social failure in this larger respect—of our inadequate vision of what personal and social possibilities there are? If so, this would explain our discomforting suspicion that criminals have become scapegoats, readily exploited by ambitious politicians. (Loy, 2001, p. 81)

If this is so with respect to individual offenders who commit crimes against other individuals, how much more so is it true when one thinks of multinational corporations.

One author has made a strong attempt to describe a justification for RJ principles being applied to multinational corporations. Andrew Spalding (2015), in his article “Restorative Justice for Multinational Corporations”, made a case for the adaptation of restorative practices to extra-territorial white collar crimes which would then bring about more constructive results than fine based punishments that are currently in practice. In his article, he spends a fair deal of time arguing that in anti-bribery cases the reliance on deterrence theory actually gives rise to greater corruption and more bribery (Umbreit, Geske, & Lewis, 2015). Due to the narrow focus placed on punishing the offender and in turn ignoring the relational networks that gave rise to the offensive behavior in the first place, the conditions are created to reinforce and encourage more offensive behavior of the same kind. Spalding cites as the consequences of these problems, such as American capital divesting from the country, competitive firms that disregard anti-bribery codes enter into the vacuum (e.g., China), national firms scramble for economic stability, and victimized parties and communities in the host country receive no reparations (Spalding, 2015).

Umbreit et al. are supportive of Spalding’s efforts to fashion a response to extra territorial white collar crime based on restorative principles.

Without using the term, Spalding has presented a higher “transformative justice” scenario for addressing corporate-level bribery in that the reparation model itself includes elements that correct the systemic causes of the problem. The equivalent in the regular restorative justice realm would be as follows: a chronic male offender from an inner city who has stacked up felonies for burglary and drug dealing is presented with a new set of obligations. Rather than isolating him for 20 years from his community (which arguably brings little good for him or the community), he is required to invest his time in reversing the very social conditions in his community that made stealing and drug dealing justifiable activities. (Umbreit et al., 2015, p. 43)

And in Spalding’s own words, “What extraterritorial criminal enforcement needs, then, is a foundational theory of punishment that looks beyond the potential violators within its jurisdiction and engages with the broader social and legal environment in which the crime occurred” (Spalding, 2015, p. 383). But this does not go far enough for Umbreit et al. “Again, Spalding is hybridizing a restorative approach (that seeks full restoration for offenders, victims and communities) with a transformative approach (that seeks systemic change at the level of root causes and sustainable relationships between players in conflict)” (Umbreit et al., 2015, p. 43).

For Umbreit et al., the primary deficiency in Spalding’s proposal is the lack of a facilitated dialogue between parties most involved or affected. And they cite to research which has found the restorative justice process of victim offender dialogue in violent cases to have an exceptionally positive impact on participating victims as well as the prisoners (Umbreit et al., 2015, p. 45, as cited in Umbreit, Vos, Coates, & Brown, 2003). They have praise for Spalding’s effort and for everything that it does contribute to the discussion of RJ impacts on corporate crime. But the lack of a dialogue paradigm is critical.

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2 They add “If he further develops his applications for resolving corporate crime, it will be helpful for him to integrate the frameworks of John Paul Lederach which effectively address the foundational and patterned epicenters of problems and not merely the symptomatic episodes”, referencing Lederach (2003).
While Spalding’s hypothetical proposal does well to consider how an offending party invests in meaningful reparations to impacted parties and communities…the model lacks a central component that gives restorative processes their primary power, namely, empowered dialogue between parties. Without dialogue, there generally is no mutual understanding, no new learning, no empathy building, all of which, in a restorative mindset, generates the internal motivation for offenders to make positive amends and not repeat future offenses. Spalding’s model still requires an enforced sentence, able it a restorative sentence, overseen by a judge and other legal professionals. It is one thing to require offending parties to do good things to make things right; it is quite another to empower parties to have the necessary conversations that in turn lead them to choose themselves to make things rights. This gets to the heart of why restorative justice has become effective; the empowerment of parties through voluntarily chosen processes. (Umbreit et al., 2015, p. 45)

Conclusion

The conclusion proceeds along the following lines. Hallett’s examination of the Efficiency Trap highlights the need to recognize that in economics and business the adoption of an approach that is cognizant of the systemic nature and needs of the global economy is critical for systemic survival, and that this is key to understanding sustainability. Because of the systemic qualities and wholistic approach of the RJ paradigm, particularly its emphasis on rebuilding aspects of the system, i.e., an individual person or a community, restorative justice should be regarded as part and parcel of a sustainable approach. There can be no sustainability in a community or a society without it.

Given that corporations now are desirous of adding the sustainability credential to their brand, they should become aware of what RJ is and how it promotes a sustainable approach. While RJ can only be effective if participation is voluntary, on a case by case basis multinational corporations, particularly those that are domiciled or active in countries where there is growing appreciation for the application of RJ principles, need to be approached and encouraged to consider an RJ process when harms are committed. And corporations that are already within the RJ spectrum by virtue of their appreciation of stakeholder concerns, as demonstrated by Newmont Mining, should be encouraged to either subtly or overtly promote the benefits of RJ participation. Finally, the abstraction of the corporation will be diminished as appropriately selected representatives of a corporation take part in the RJ process.

References
