

Intention in Law and Philosophy

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PART IV:
BEYOND INTENTION?

16 Intention Versus Reactive Fault

JOHN BRAITHWAITE

Building on ideas initially developed by Brent Fisse,¹ this essay argues that the conception of fault in criminal law should in most cases abandon intention in favour of what Fisse calls reactive fault.² Here reactive fault is conceived as restorative fault and articulated to a wider jurisprudence of restorative justice that is relevant to civil as well as criminal law. For that matter, the analysis is that the criminal law should in most cases abandon other mental states such as recklessness or wilful blindness that are believed to have caused the crime to occur. In other words, we are considering a shift from fault which is causally prior to the crime, of which intention is the most important variant, to fault based on how restoratively the offender acts after the crime.

The core intuition of restorative justice is that because crime hurts, justice should heal. Reciprocating hurt with hurt, in contrast, adds to the amount of hurt in the world. Indeed, punishing wrongdoing often creates vicious spirals of hurt begetting hurt.³ Because the poor are disproportionately both victims of crime and convicted offenders,⁴ these vicious spirals of punitive justice add to social injustice. The result is that more of the poor become victims of crime and more of them rot in prison or suffer death in custody.

1 Brent Fisse, 'Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault and Sanctions' (1983) 56 *Southern California Law Review* 1141.

2 *Ibid* 1201.

3 I am indebted to a talk I once heard Howard Zehr deliver for the idea of hurt begetting hurt.

4 Michael Hindelang, Michael Gottfredson and James Garofalo, *Victims of Personal Crime: An Empirical Foundation for a Theory of Personal Victimization* (1978). John Braithwaite and David Biles, 'Victims and Offenders: The Australian Experience' in Richard Block (ed), *Victimization and Fear of Crime: World Perspectives* (1984).

Making intention central to how we allocate responsibility is a mistake from the perspective of the philosophy of restorative justice. In the next section I argue that, while it might be philosophically coherent in some possible world, it is not in any existing world. It is self-defeating to make intention central in the way we sort out responsibility in any sociologically existing world. In part this is an extension of the argument that Philip Pettit and I have made about desert:⁵ in all actually existing worlds just deserts is imposed successfully on the vulnerable, unsuccessfully on the most powerful.

Scapegoats of Intention

In the work Brent Fisse and I did together and separately on corporate crime over a period of many years,⁶ the key problem with the application of *mens rea* to the real world of corporate crime was scapegoats. A criminal law based on intent was shown usually to result in no one being held responsible and when someone was it was usually a scapegoat. Large corporations, we found, have enormous capacities for creating smokescreens of diffused accountability, so everyone is freed of criminal intent by a capacity to blame someone else. The alternative is the designated scapegoat. In *Corporate Crime in the Pharmaceutical Industry*,⁷ I discovered a species of American business executive called the Vice-President Responsible for Going to Jail. Lines of responsibility were drawn so that this Vice-President would be the patsy for the President in a difficult situation. I interviewed three of these Vice-Presidents and was told about others. After a period of faithful service in this role, the Vice President Responsible for Going to Jail would be promoted sideways to a safe Vice-Presidency. If our current conception of *mens rea* fosters this and various other forms of denial of corporate and individual responsibility, does a restorative conception of criminal fault offer an alternative? Before returning to that question I want to make the same point in more banal contexts than the high politics of crimes of the powerful.

5 John Braithwaite and Philip Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice* (1990) 182–201.

6 Much of this work is integrated in Brent Fisse and John Braithwaite, *Corporations, Crime and Accountability* (1993).

7 John Braithwaite, *Corporate Crime in the Pharmaceutical Industry* (1984).

Recall this kind of family scene. Brother pushes sister. She falls, hurts her knee, and cries. You are the parent. You arrive at the scene of the crime. 'He pushed me and hurt my knee and he meant to. It wasn't an accident'.

Question: Do you conduct an enquiry, cross-examining the witnesses to reach a view on whether there was intent in the actions of the son?

Most wise parents I suspect will say that the best thing to do is get behind the pushing incident to settle its underlying cause. 'What are you two fighting over?' It turns out to be the TV program. The parent proceeds to resolve the underlying conflict because this is more important than the alleged assault: 'Wasn't there a better way for you to sort out your disagreement?' The parent's objective is (a) to heal the damaged relationship between brother and sister so there will be peace; and (b) if assault has occurred, to create a moral space where the brother might *take* responsibility for it, even apologise or do something nice for his sister to make up for his wrong.

Mutual recriminations about responsibility and intention are not the best path for getting to (b). The theory of restorative justice says that (a) is the best path for getting to (b).

This is not just a point about minor acts of violence between children. It is also true of the most major acts of violence between adults. For example, while there is an important place for prosecution of war crimes, there is less hope for preventing future violence in the former Yugoslavia through prosecuting alleged war criminals like Mr Milosovic than there is through restorative justice processes rather more like those that Nelson Mandela empowered Desmond Tutu to implement through the Truth and Reconciliation Commission in South Africa.⁸ Of course, with murder restorative justice can not bring back the victim any more than a quick execution can balance a slow death at the hands of a torturer under a retributive philosophy. We have learnt over the past decade that living homicide offenders can, however, help considerably with healing for the families of victims, with both war crimes and common murders. In Manitoba we have even seen the John Howard Society organising a play in which murderers and the families of murder victims perform together in a play about the evils of violence and the potential of restorative justice to heal its victims.

8 Desmond Tutu, *No Future Without Forgiveness* (1999).

I won't seek to argue in this essay that restorative justice is the best path for encouraging offenders to take responsibility for the above major and minor kinds of crime.⁹ But let us assume you accept this. You might still say yes, you are right for children or crimes of the powerful, but in between, for run-of-the-mill serious individual adult criminals, enquiry into intent and then punishment proportionate to the offence is the way to go. That view I contend is wrong. It goes against the empirical experience of criminology that accused criminals respond with a variety of techniques of neutralization. The standard empirically established techniques are still those first identified by Sykes and Matza: denial of responsibility (eg I was drunk); denial of injury (eg they can afford it); denial of victim (eg we weren't hurting anyone); condemnation of condemners (eg she was asking for it); appeal to higher loyalties (eg I had to stick by my mates).¹⁰

Most important is blaming the victim and blaming the system (especially the police and the courts). My hypothesis is that attempts at enquiries oriented toward coerced imputation of intent mostly lead to mutual recrimination between accuser and accused, between victim and offender, between police and criminals, and between judges and criminals. And it leads to strategic moves to make scapegoats of others. Further, the hypothesis is that these are general effects. Shadd Maruna's important new study *Making Good: How Ex-Convicts Reform and Rebuild their Lives* found that serious repeat criminals who went straight rewrote their lives according to 'generative' scripts.¹¹ They were ex-offenders who acquired a desire to take active responsibility for making some important contribution to their communities, especially to individuals like themselves who found themselves in trouble with the law. Helping others, be they victims or other offenders, is one of the best ways of helping yourself out of the cycle of crime. The persisters, in contrast to the desisters, adopted 'condemnation' scripts, like blaming the victim and other standard Sykes and Matza neutralizations. Hence the argument for restorative justice is not just the negative of avoiding scapegoating, it is also the positive of creating spaces

where taking responsibility is nurtured, where generative scripts help the offender find a pathway out of crime.¹²

The only reason we routinely play the punishment proportionate to intent game with burglars and street dealers of drugs is that they have no power to resist that counterproductive model. They have no benevolent parents to protect them from outsiders who might punish them if they found out about the violence transacted in the privacy of the family. They have no corporate or political power to protect them. The judge, the philosopher or the legal academic has experience of the world of violence between children and the world of cheating on expense accounts, plagiarism or sexual harassment at work. That experience teaches them that criminal process would be a crude and ineffective way of dealing with such problems. The world of the burglar or drug dealer, in contrast, is a strange and threatening world to them. They do not understand it. It is the world of the other, and a powerless other much vilified by those who do not understand. So they convince themselves that what they recognise as an utterly stupid intentionality-based way of regulating the family crimes of their children, as a counterproductive way of regulating the workplace infractions of their colleagues or others from workplaces like theirs, is a sensible way of regulating the crimes of men in black hats, men astride motor bikes in black leather jackets or women with black skins.

Reactive Fault

We turn to Brent Fisse's theory of reactive fault¹³ (further developed in *Corporations, Crime and Accountability*¹⁴) for the alternative. All criminal justice systems incorporate notions of causal and intentionality-based fault and reactive or restorative fault. Causal fault is about being causally responsible, while reactive fault is about how responsibly one reacts after the harm is done. The balance between the two varies enormously from system to system. Western criminal justice systems (like the US) are at the causal end of the continuum, though Fisse showed that there were elements of reactive fault in US corporate criminal law.¹⁵ Asian systems (such as

9 I do so in my forthcoming book, John Braithwaite, *Restorative Justice and Responsive Regulation* ch 6.

10 Gresham Sykes and David Matza, 'Techniques of Neutralization: A Theory of Delinquency' (1957) 22 *American Sociological Review* 664.

11 Shadd Maruna, *Making Good: How Ex-Convicts Reform and Rebuild their Lives* (2001).

12 For the increasingly encouraging evidence that restorative justice can reduce crime compared to courtroom processing of offenders, see Braithwaite, above n 9, ch 3.

13 Fisse, above n 1.

14 Fisse and Braithwaite, above n 6.

15 Fisse, above n 1, 1195.

Japan) tend to the reactive end. Yet, even in the West, reactive fault sometimes dominates causal fault, as in our intuition that with hit-run driving, the running is the greater evil than the hitting.

In *Crime, Shame and Reintegration*, I told two stories to illustrate the extremes in the cultural balancing of causal and reactive fault.¹⁶

The first is of two American servicemen accused of raping a Japanese woman. On Japanese legal advice, private reconciliation with the victim was secured; a letter from the victim was tabled in the court stating that she had been fully compensated and that she absolved the Americans completely. After hearing the evidence, the judge leaned forward and asked the soldiers if they had anything to say. 'We are not guilty, your honor', they replied. Their Japanese lawyer cringed; it had not even occurred to him that they might not adopt the repentant role. They were sentenced to the maximum term of imprisonment, not suspended.

The second story is of a Japanese woman arriving in the US with a large amount of American currency which she had not accurately declared on the entry form. It was not the sort of case that would normally be prosecuted. The law is intended to catch the importation of cash which is the proceeds of illicit activities, and there was no suggestion of this. Second, there was doubt that the woman had understood the form which required the currency declaration. After the woman left the airport, she wrote to the Customs Service acknowledging her violation of the law, raising none of the excuses or explanations available to her, apologizing profusely, and seeking forgiveness. In a case that would not normally merit prosecution, the prosecution went forward *because* she had confessed and apologized; the US Justice Department felt it was obliged to proceed in the face of a bald admission of guilt.¹⁷

These are stories about how the US justice system creates disincentives for reactive fault, while the Japanese justice system requires it. In its most radical version, reactive fault would mean that, in a case of assault, the alleged assailant would go into a restorative justice conference not on the basis of an admission of criminal guilt, but on the basis of admitting responsibility for the *actus reus* of an assault ('I was the one who

16 The first story is from John Haley, 'Sheathing the Sword of Justice in Japan: An Essay on Law Without Sanctions' (1982) 8 *Journal of Japanese Studies* 262. The second story is from H Wagatsuma and A Rossett, 'The Implications of Apology: Law and Culture in Japan and the United States' (1986) 20 *Law and Society Review* 486.
17 John Braithwaite, *Crime, Shame and Reintegration* (1989) 165.

punched her').¹⁸ Whether the mental element required for crime was present would be decided reactively, on the basis of the constructiveness and restorativeness of his reaction to the problem caused by his act. If the reaction were restorative, the risk of criminal liability would be removed; only civil liability might remain. However, if reactive criminal fault were found by a court to be present, that would be insufficient for a conviction; the mental element for the crime would also have to be demonstrated before or during its commission.¹⁹ But it would be the reactive fault that would be the more important determinant of any penalty than the causal or *mens rea* fault. If the offender responded in as restorative a way as was possible or reasonable, if conscientious steps were taken to right the wrong, there is no reactive fault and there should be no escalation beyond restorative justice to a further punitive response. If reparation is spurned, apology scoffed at, steps to prevent recurrence not taken, escalation to a punishment that might achieve social control through deterrence or incapacitation might be justified. So might giving the offender a second chance to acquit his or her reactive fault.

This gives us an answer to the retributivist who says: 'Where is the justice with two offenders who commit exactly the same offence: one apologises and heals a victim who grants him mercy; the other refuses to participate in a restorative justice conference and is punished severely by a court?' The answer is that, while the two offenders are equal in causal fault, they are quite unequal in reactive fault. It is not the whole answer, however. The other part of it is that the just deserts theorist may be morally wrong to consider equal justice for offenders a higher value than equal justice for victims.²⁰

From Denial to Active Responsibility

If the argument is that conducting an enquiry into who intended to commit a crime triggers defensiveness, denial and pointing the finger at others,

18 Functionally, New Zealand law already accomplishes this result in the *Children, Young Persons and Their Families Act 1989* by putting cases into family group conferences not on the basis of an admission of criminal guilt, but on the basis of formally 'declining to deny' criminal allegations.

19 Brent Fisse has been known to advance the more radical view that if criminal liability is about punishing conduct known to be harmful and if failure to respond responsibly is harmful, then such reactive fault can be sufficient to establish criminal liability.

20 The second part of this argument will be developed further in Braithwaite, above n 9.

how does restorative justice do things differently? Restorative justice privileges active over passive responsibility.²¹ Passive responsibility means holding someone responsible for something they have done in the past. Active responsibility means the virtue of taking responsibility for putting things right for the future. It is taking active responsibility that acquits reactive fault.

Good training manuals in restorative justice processes urge participants not to point the finger of responsibility at others. Rather the idea is that through the simple process of discussing the consequences, what the victim and the offender's family have had to endure as a result of the crime, the offender will accept responsibility. In part we rely here on Carol Heimer and Lisa Staffen's insight that 'it is the humanity of other people that inspires responsibility'.²² In the toughest cases of everyone wanting to deny responsibility, in advance of the conference, Ted Wachtel and Paul McCold suggest asking participants to consider if there is even a small part of the responsibility that they would be willing to own at the conference.²³ The idea is that taking responsibility is contagious, is reciprocated. Instead of a vicious circle of unacknowledged shame and anger, we get a virtuous circle of acknowledged shame and mutual acceptance of responsibility.²⁴ In the famous Hollow Water program, there was the extraordinary accomplishment of persuading 52 adults in a community of 600 First Nations people to admit that they had sexually abused children.²⁵ Much of this was accomplished by making admission easier for offenders by putting them in the circle with other sexual abuse offenders who had already confessed, who were reaping the benefits of acknowledging their shame. These ex-offenders could also 'get under the

21 This distinction is developed in John Braithwaite and Declan Roche, 'Responsibility and Restorative Justice' in Mara Schiff and Gordon Bazemore (eds), *Restorative Community Justice: Repairing Harm and Transforming Communities* (forthcoming). It in turn builds on distinctions in Mark Bovens, *The Quest for Responsibility* (1998).

22 Carol Heimer and Lisa Staffen, *For the Sake of the Children: The Social Organization of Responsibility in the Hospital and the Home* (1998) 369.

23 Ted Wachtel and Paul McCold, 'Restorative Justice in Everyday Life' in Heather Strang and John Braithwaite (eds), *Restorative Justice and Civil Society* (forthcoming).

24 This idea is being developed further in a forthcoming book by Eliza Ahmed, Nathan Harris, John Braithwaite and Valerie Braithwaite, *Shame Management Through Reintegration*.

25 See Berma Bushie, 'Community Holistic Circle Healing: A Community Approach' in T Wachtel (ed), *Proceedings of Building Strong Partnerships for Restorative Practices* (1999); Rupert Ross, *Returning to the Teachings: Exploring Aboriginal Justice* (1996).

skin' of the offenders, see through their tactics of denial, explaining that they had used the same tactics in their own denial.

In more standard juvenile justice conferences we often observe victims own some responsibility ('I should not have left the keys in the car') and see that this can immediately trigger the reaction: 'It's not your fault. I am the one who is responsible.' These are virtuous circles of acknowledgment rather than vicious circles of denial. Or we see parents accept responsibility. Again it is easier to see dramatic manifestations of this in Japanese culture than in our own:

The boy was a troublemaker in school who intimidated his classmates and extorted money from them. His father, who was a former school principal, went to see the son's homeroom teacher in response to the latter's request. When he was told of his son's robbery, he apologised with a deep bow, saying 'I am very sorry.'

Watching his father thus apologizing on his behalf, the offender was moved to tears. This was a turning point for him that changed his way of life completely.²⁶

In many of the world's cultures, it is common to see attributions of intent for wrongdoing eschewed in favour of giving the offender gifts.²⁷ For example, in the highlands of New Guinea when one tribe is owed substantial compensation by another who has wronged them, the process that leads to the paying of that compensation starts with the wronged tribe offering a gift to the wrongdoer. In New Guinea even when the offender acts first by offering compensation to a victim, the preserving of relationships will often also involve the expectation of a smaller but significant reciprocal gift back to the offender by the victim. Such a way of thinking is not unknown in the West. We see it in *Les Misérables*, part of the Western literary canon, and in Pope John Paul bringing a gift to the man who shot him. The message of *Les Misérables*, and the biblical one, is that the grace of the gift, refraining from casting the stone, nurtures the voluntary acceptance of responsibility and the need to transform a life to a caring path.

26 T Lebra and a letter to the editor of the *Asahi Shinbun*, quoted in John Haley, 'Apology and Pardon: Learning from Japan' in Amitai Etzioni (ed), *Civic Repentance* (1999) 105.

27 For a number of examples, see ch 3, box 3.3 of Braithwaite, above n 9.

Moving Up the Pyramid

Restorative justice is a way of doing justice designed to focus on the *actus reus* of the offence, on its consequences and how to repair them, normally to the exclusion of a discussion of *mens rea*. If the wrongdoer takes responsibility for repairing the harm that has been done, apologises and remorsefully commits to reform, we will say that his reaction means that we should no longer hold him at fault for the crime. More than that, according to the theory of reintegrative shaming we must commit to rituals to decertify the deviance of the wrongdoer.²⁸ This theory says that reintegrative shaming can prevent crime, but that shaming will increase crime if ceremonies that certify deviance (like laying of charges by the police) are not terminated by ceremonies to decertify deviance. These can be very minor rituals, as in the police officer after a recent restorative justice conference in Canberra who said to a shaken young man walking out of the conference 'When you walk out of that door this is all over.' It can take the emotional form of a hug. It can take standard ritual forms of sharing a beverage or meal or a speech of reconciliation by an indigenous elder about making a fresh start.

The reaction of the offender (and the reaction of the community to that reaction) signifies that there is no longer any criminal fault to be found in the case. If in contrast the reaction of the offender was to scoff at the suffering of the victim, to refuse compensation or community work, to refuse to change, the reactive fault has not been acquitted. Nor have the features of restorative justice that theorists like myself believe assist in the prevention of crime been delivered. These are remorse,²⁹ the acknowledgement of shame,³⁰ and the experience of loving acceptance and commitment to preventive measures freely chosen and embedded in social support.³¹ What then?

Then restorative justice has failed morally and preventatively. One option is to try again, perhaps with some different supporters who can offer special kinds of support to the victim and the offender that might draw out active responsibility. On my consequentialist view, if restorative justice fails repeatedly, it will be best to seek to prevent further crime with a strategy that operates with a very different psychology from restorative

justice. This strategy is deterrence and it involves a shift to the psychology of self-interested calculation, a shift from the psychology of the gift of the ethic of care with restorative justice. Then, when deterrence fails, it will be best to shift to a strategy that assumes no psychology at all. This is incapacitation, which by forbidding the fraudulent director from holding the office of director, stripping the incompetent nursing home owner of their licence, locking up the armed robber, renders the offender incapable of committing this kind of offence again. This is the crime prevention story of the pyramid (see figure 15.1).³² What of the story on fault as we move up the pyramid?

ASSUMPTION

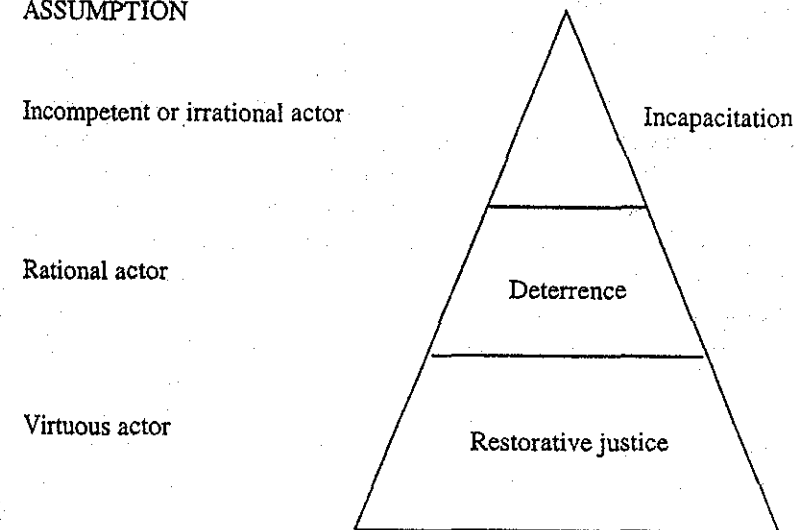


Figure 15.1: Towards an integration of restorative, deterrent and incapacitative justice

The beauty of restorative justice at the base of the pyramid is that it gets us out of the sometimes messy adjudication of *mens rea*. Was there intention? Yes but were there any of a raft of defences in play: coercion, duress, mistake, self-defence, provocation, insanity, necessity, and so on? When there were multiple actors involved, as there usually are, how do we sort out the various intended and unintended contributions to the

28 Braithwaite, above n 17.

29 See Gabrielle Maxwell and Alison Morris, *Reducing Reoffending* (1999).

30 See Ahmed *et al.*, above n 22, pt III.

31 See above, notes 17, 24, 27.

32 See Ian Ayres and John Braithwaite, *Responsive Regulation* (1992); Braithwaite, above n 9, ch 2.

wrongdoing of the different actors? But if there is still reactive fault, if there is a need to escalate to deterrence, we have seen that we need to revert to *mens rea*. Deterrence will not work unless there is a freely chosen action (or omission to act) to deter. An accidental death that was intended by no one and was not caused even by the negligent action of another cannot be deterred. In consequentialist terms, it is therefore necessary to establish some sort of *mens rea*, the most important variant of which is intent. Of course desert theorists and other deontologists reach the same conclusion about punishment via a different route. They say it is morally wrong to punish unless the punishment is deserved and the most standard reason for punishment to be deserved is that a wrong has been done intentionally. However one gets there, it seems uncontroversial that it is wrong to purposely inflict hard treatment without fault on the part of the agent who is punished.³³

Hence in a regime of restorative justice and responsive regulation, reactive fault supplants intention at the base of the regulatory pyramid, but intention or some other form of *mens rea* is needed before moving up the pyramid to deterrence as a strategy. Since restorative justice is how most law breaking is dealt with in such a regime, reactive fault replaces intention in most cases as the dominant fault paradigm. However, in that minority of cases where there is a need to escalate up the pyramid to deterrence or incapacitation, intention replaces reactive fault as the dominant paradigm.

Summary

1. Attempts to impose intentionality-based fault lead to vicious circles of mutual recrimination, condemnation of the condemners in what shame scholars call shame-rage spirals. It tends to worsen the evil we seek to prevent.
2. Intentionality-based fault results in punishment focused on society's scapegoats. Justice has little to do with it in practice. It is a coherent theory for some possible world, but not for any existing world of serious imbalances of power.

³³ Of course a standard charge of retributivists against utilitarians and other consequentialists is that they have an inferior theory of why it is wrong to punish the innocent. Beyond noting it, this tedious debate need not delay us here.

3. Reactive fault does less injustice at lower cost and fosters virtuous spirals of active responsibility rather than vicious circles of passive responsibility such as shame-rage spirals. Reactive fault helps healing to beget healing while passive responsibility helps hurt to beget hurt.
4. It follows that restorative justice is much more than just a new technology of disputing. It involves a radically transformed jurisprudence where intention and *mens rea* are pushed off a centre stage that is occupied by the cultivation of restorative virtues.
5. At the same time, restorative justice needs a theory of when it should be abandoned because it fails to do the work claimed of it in this essay. Responsive regulation is such a theory. One of its implications is that, as we move away from the restorative base of a regulatory pyramid, intention is reinstated as the paradigmatic form of *mens rea*.