PART IV:
BEYOND INTENTION?
16 Intention Versus Reactive Fault

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Building on ideas initially developed by Brent Fisse, 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. 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. Because the poor are disproportionately both victims of crime and convicted offenders, 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.

2 Ibid 1201.
3 I am indebted to a talk I once heard Howard Zehr deliver for the idea of hurt begetting hurt.
Heal the victims.

The theory of resorative justice says that (a) the best path for revenge is the path of reparation, and (b) the best path for reparation is through a process that brings the parties together to repair the harm caused by the wrongdoing. In resorative justice, the emphasis is on repairing the harm that has been done, rather than on punishing the wrongdoer. This approach places the focus on the needs of the victims and the community, rather than on the needs of the state or the criminal justice system.

In this case, the President is responsible for the actions of the subordinates who committed the crimes in the Philippines. The President should take steps to address the human rights abuses that occurred, including providing reparations to the victims and their families. The President should also take responsibility for the actions of their subordinates and ensure that they are held accountable for their actions.

The President's responsibility extends to the actions of their subordinates, as those subordinates were acting on the President's behalf. If the President is not held accountable for the actions of their subordinates, it sends a message that such abuses are acceptable, and encourages others to commit similar acts.

In conclusion, the President's responsibility is to ensure that human rights are respected and protected, and to take steps to prevent such abuses from occurring in the future. This includes providing reparations to the victims and their families, and holding those responsible accountable for their actions.
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. 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 criminality 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). 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. 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.

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 fault (further developed in Corporations, Crime and Accountability) 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.

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.
From denial to active responsibility

Justice for victims...

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"The second part of this amendment will be developed under in both the United States and Canada, where it is understood that it may be necessary to establish a special court to try the case. The court will be composed of judges from both countries, who will be selected by mutual agreement. This court will have jurisdiction over all cases involving the use of chemical weapons in these countries. It is expected that this court will begin its work in 1995."
how does restorative justice do things differently? Restorative justice privileges active over passive responsibility. 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 acquires 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’. 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. 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. 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. 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 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.

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. 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.

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).
24 This idea is being developed further in a forthcoming book by Eliza Ahmed, Nadia Harris, John Braithwaite and Valerie Braithwaite, Shame Management Through Reintegration.
27 For a number of examples, see ch 3, box 3.3 of Braithwaite, above n 9.
The beauty of restorative justice is that it is based on the principle of forgiveness and rehabilitation. In this approach, the emphasis is on repairing the harm caused by criminal behavior rather than punishing the offender. This is in contrast to traditional justice systems, which focus on retribution and the punishment of the offender.

Restorative justice aims to heal the harm caused by crime and to promote healing and reconciliation between the victim, the offender, and the community. It does this by involving all parties in the process of healing and by emphasizing the importance of forgiveness and accountability.

The diagram illustrates the different components of restorative justice. At the top, there is the concept of forgiveness, which is central to the restorative justice approach. At the middle, there is the concept of accountability, which involves taking responsibility for one's actions and making amends for the harm caused. At the bottom, there is the concept of participation, which involves all parties in the process of healing and reconciliation.

Restorative justice is a philosophy that is gaining popularity as a way of addressing crime and promoting healing and reconciliation.
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.  

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.

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*.

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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.