

- für ausländisches und internationales Strafrecht Freiburg, vol. S 78, Freiburg im Breisgau, 277–284.
- Ruggiero, V. (1996) *Organized and Corporate Crime in Europe*, Aldershot.
- Schünemann, B. (1979) Unternehmenskriminalität und Strafrecht, Köln.
- Schneider, H.J. (1975) *Viktimologie*, Tübingen.
- Schneider, H. J. (1987) *Kriminologie*, Berlin.
- Tiedemann, K. (1988) Die 'Bebußung' von Unternehmen nach dem 2. Gesetz zur Bekämpfung der Wirtschaftskriminalität, NJW, 1169–1232.
- Zeder, F. (2001) 'Ein Strafrecht juristischer Personen: Grundzüge einer Regelung in Österreich', ÖJZ; 630–642.

Chapter 8

Restorative justice and corporate regulation

John Braithwaite

Justice that empowers the most powerless

Some of the most moving and effective restorative justice conferences I have seen have been business regulatory conferences, especially following nursing home inspections in the US and Australia. After several days inspecting a nursing home that has had serious complaints about neglect of residents – horrible bed sores, residents left to lie for hours in sheets soaked in their own urine – three government inspectors meet with the six people in the nursing home's management team, a staff representative, a lay member of the Board of Management of this church-run nursing home and a representative of the Relative's Committee. They sit in a circle of chairs in a large meeting room. Then three representatives of the Resident's Committee arrive with assistance from staff. One of them has her bed wheeled into the meeting. It is then tilted forward so the resident can see everyone in the circle. The inspectors discuss their findings. There are still some serious deficiencies in the home. By and large, management accepts their findings. But when they dissent that some of the complaints residents have made are exaggerated, the resident in the bed points out that there are other cases that could have been brought to the attention of the inspectors that are even worse. The Relative's Representative concurs. One story is told to illustrate. The representative from the church says he is distressed that residents could be neglected in this way. Management

agrees this is unacceptable and commits to put on some extra staff and introduce a staff training programme to deal with the problem.

Democratic, deliberative empowerment is one of the values of restorative justice. Nowhere is it more profoundly realized than in nursing home regulation at its best, as in the example above. In contemporary societies, no one is more powerless than nursing home residents. As Joel Handler has said, 'even prisoners can riot'. Often residents have no practical capacity to leave a nursing home that is abusing or neglecting them because there is a lot of evidence that such moves can be worse for their health. Often they cannot even speak to complain. Restorative processes like the one described above can compensate by empowering residents and relatives who do have voice to speak up with the stories of those without muscle or voice. This happens during the inspection itself as well. The inspector observes a resident not eating any of her vegetables. They are peas. The resident is no longer able to speak and is very confused. But her roommate speaks up: 'She hates peas but they are always giving her peas.' This view is confirmed with the resident directly. She nods and waves her hand disdainfully across the peas when asked if it is true that she hates them. A citizen who cannot speak has been empowered by this restorative inspection process. In the exit conference it will be agreed that residents must be assured of a capacity to choose an alternative meal. What is restored in this case is a very fundamental right to nourishing food of a kind we choose to eat.

Criminal prosecutions are important in nursing home regulation, but encounters such as that of the conference and the story of the peas are the real stuff of nursing home regulation. Care planning conferences are also important, where best practice is for relatives and residents to meet with the care planning team (nurses, physical therapists, dieticians, etc) to discuss any concerns about neglect and to set new care planning goals. When they are done well, nursing home inspections do a lot to improve nursing home quality of care and compliance with the law. The work of our research group shows that doing nursing home inspection well means the kind of resident empowerment described above, plus giving management a lot of praise when they improve (Makkai and Braithwaite 1993), building the self-efficacy of management – their self-belief in their capacity to improve things for residents (Jenkins 1997), treating management as people who can be trusted (Braithwaite and Makkai 1994), procedural fairness (Makkai and Braithwaite 1996) and practising reintegrative shaming (Makkai and Braithwaite 1994). Figure 8.1 shows the reintegrative shaming result. Inspectors who are stigmatising in their regulatory encounters cause compliance to worsen in the two years following an inspection, as do inspectors who are tolerant and understanding toward

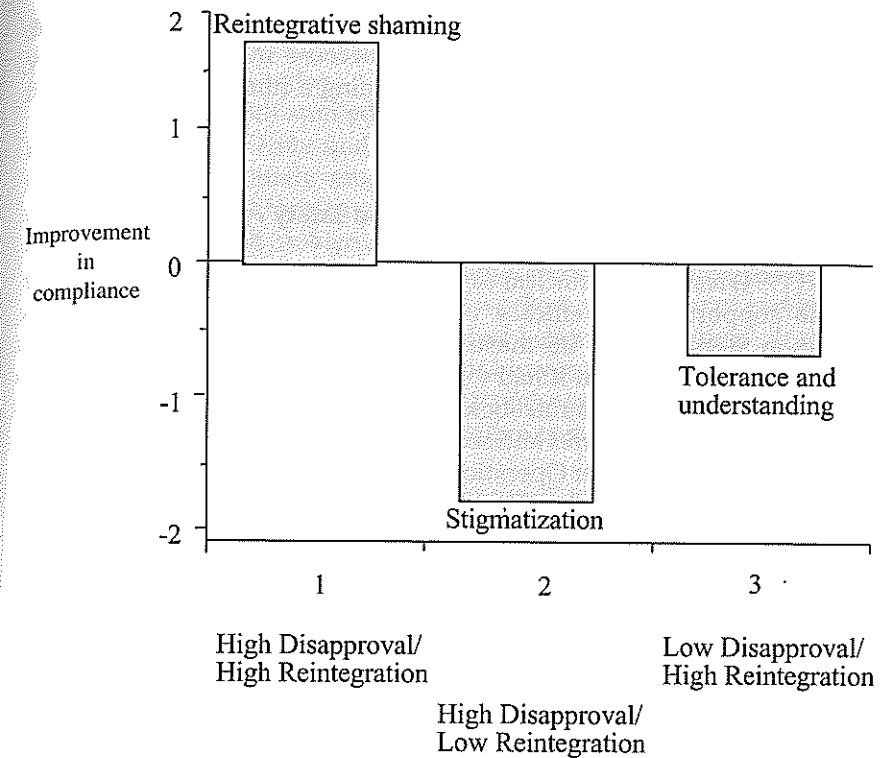


Figure 8.1. Mean improvement in compliance for nursing homes where inspectors used high disapproval and high reintegration styles; high disapproval and low reintegration styles; low disapproval and high reintegration styles ($N = 129$; F -value = 3.58; $p = 0.03$) (from Makkai and Braithwaite 1994)

neglect or abuse of the vulnerable. The inspectors who accomplish improvement have a philosophy of communicating clear disapproval of instances of neglect, while at the same time expressing confidence in the integrity of nursing home staff and management, to improve compliance with the law. Good inspectors treat managers with respect, with a rule of optimism at first, even when their belief is they are greedy, rapacious operators who care about the bottom line to the neglect of their residents' needs. The assumption of the sophisticated inspector is that we all have multiple selves – greedy egoistic selves, incompetent selves and socially responsible, caring selves. A sophisticated regulatory strategy can entice the worst of us to put our best self forward. If it fails to do so, as it often will, then it may be necessary to escalate up an enforcement pyramid (Ayres and Braithwaite 1992) to strategies based on deterrence, and then if

deterrence fails, by incapacitation. Just as restorative justice will often fail, so deterrence will often fail, for example because managers are simply incompetent to meet the challenges of running a nursing home. Then it may be necessary to take away their licence.

Reintegrative shaming, empowerment and safety regulation

Rees's (1994) research on nuclear safety regulation was also interpreted by him as supporting the efficacy of reintegrative shaming in business regulation. Rees studied US nuclear regulation after Three Mile Island. The industry realized that it had to transform the nature of its regulation and self-regulation from a rulebook, hardware orientation to one oriented to people, corporate cultures and software. The industry's CEOs set up the Institute of Nuclear Power Operations (INPO) to achieve these ends. Peers from other nuclear power plants would take three weeks off their own jobs to join an INPO review team which engaged the inspected facility in a dialogue about how they could improve. Safety-performance ratings were also issued by the review team; comparative ratings of all the firms in the industry were displayed and discussed at meetings of all the CEOs in the industry and at separate meetings of safety officers. Rees (1994) sees these as reintegrative shaming sessions. Here is an excerpt from a videotape of a meeting of the safety officers:

It's not particularly easy to come up here and talk about an event at a plant in which you have a lot of pride, a lot of pride in the performance, in the operators ... It's also tough going through the agonizing thinking of what it is you want to say. How do you want to confess? How do you want to couch it in a way that, even though you did something wrong, you're still okay? You get a chance to talk to Ken Strahm and Terry Sullivan [INPO Vice Presidents] and you go over what your plans are, and they tell you, 'No, Fred, you've got to really bare your soul.' ... It's a painful thing to do. (Rees 1994: 107).

What was the effect of the shift in the centre of gravity of the regulatory regime from a Nuclear Regulatory Commission driven by political sensitivities to be tough and prescriptive to INPO's communitarian regulation (focused on a dialogue about how to achieve outcomes rather than rulebook enforcement)? Rees (1994: 183-6) shows considerable improvement across a range of indicators of the safety performance of the US nuclear power industry since INPO. Improvement has continued since the completion of Rees's study. For example, more recent World Association

of Nuclear Operators data show scrams (automatic emergency shut-downs) per unit declined in the US from over seven per unit in 1980 to one by 1990 and 0.1 today.

Earlier Rees (1988) studied the 'Cooperative Compliance Program' of the Occupational Safety and Health Administration between 1979 and 1984. OSHA essentially empowered labour-management safety committees at seven Californian sites to take over the law enforcement role, to solve the underlying problems revealed by breaches of the law. These were similar in the essentials to the restorative nursing home regulatory processes discussed above. Satisfaction of workers, management and government participants was high because they believed it 'worked'. It seemed to. Accident rates ranged from one-third lower to five times as low as the Californian rate for comparable projects of the same companies, as the rate in the same project before the cooperative compliance programme compared with after (Rees 1988: 2-3).

Even less deliberative forms of occupational health and safety inspection seem to have an effect in reducing accidents. Workplace injuries fell after OSHA inspections or when inspection levels increased (Scholz and Gray 1990), even when the penalties imposed were far too small to be a credible deterrent to business, similar results to the coal mine inspection results (Braithwaite 1985). John Scholz and other business-regulatory scholars think this might be because inspectors simply remind employers of their obligations, prick their consciences. Qualitative fieldwork, including my own with both occupational health and safety and nursing homes, suggests that employers have good strategies for protecting themselves from day-to-day knowledge of their organization's failures to meet its legal obligations. The primary function of restorative inspection is therefore simply to squarely draw the attention of chief executives to these failures. In my theoretical terms, this means making it impossible for managers to avoid confronting their shame over failures to keep their organizations safe for people. Deterrence is only needed in cases where this restorative approach repeatedly fails. In another theoretical frame, it is what Black (1997, 1998) has called 'conversational regulation' that does the real work of regulatory inspection.

I found the safety leaders in the coal industry were companies that not only thoroughly involved everyone concerned after a serious accident to reach consensual agreement on what must be done to prevent recurrence, they also did this after 'near accidents' (Braithwaite 1985: 67) and they discussed safety audit results with workers even when there was no near-accident. The same analysis applies to why commercial air travel is so safe today. Airlines and their regulators learnt early that it was a mistake to discourage the reporting and open discussion of near misses by punishing those responsible.

In a remarkable foreshadowing of what we now believe to be reasons for the effectiveness of whole-school approaches to bullying and family group conferences, Davis and Stahl's (1967: 26) study of twelve companies which had been winners of the US coal industry's two safety awards, found one recurring initiative was 'Safety letter to families of workers enlisting family support in promoting safe work habits.' That is, safety leaders engaged a community of care beyond the workplace in building a safety culture. In *To Punish or Persuade* (Braithwaite 1985), I shocked myself by concluding that after mine disasters, so long as there had been an open public dialogue among all those affected, the families of the miners cared for, and a credible plan to prevent recurrence put in place, criminal punishment served little purpose. The process of the public enquiry and helping the families of the miners for whom they were responsible seemed such a potent general deterrent that a criminal trial could be gratuitous and might corrupt the restorative justice process that I found in so many of the 39 disaster investigations I studied.

Just as with the nursing home work, I found that when trade unions were empowered to be involved in the coal-mine inspection process, inspections were more effective in improving safety. DeMichie et al.'s (1982: i) comparison of mines with exceptionally high injury rates with matched mines with exceptionally low injury rates found that at the low injury mines: 'Open lines of communication permit management and labor to jointly reconcile problems affecting safety and health; Representatives of labor become actively involved in issues concerning safety, health and production; and Management and labor identify and accept their joint responsibility for correcting unsafe conditions and practices.'

The ideas of regulation that is conversational and empowering reducing corporate harmdoing are related ideas. The relationship is established by Pranis's (2000) contribution to restorative-justice theory that storytelling is empowering. Let the workers, the consumers, the nursing home residents tell their story and they are empowered. Pranis says you can tell how much power a person has by how many people listen to their stories and how attentively they listen. It follows that an effective path to empowerment is simply to listen. Wheeling the bed of that nursing home resident into a room full of fairly important people who listen attentively to her stories of neglect is extraordinarily empowering.

Building democracy, building community

Giving the least powerful people in our societies voice – like nursing home residents, workers in dangerous industries, children in whole school anti-bullying programmes (see generally Morrison 2002) – is an important

restorative justice value. Storytelling is the simple method that can move us from a thin form of representative democracy for people such as these who do not or cannot vote to a thicker form of deliberative democracy. Moreover, people who are unsafe in their nursing home, their workplace or their school tend to want to be heard about safety. Restorative justice circles therefore can deliver a kind of deliberative democracy that matters to some of our least powerful citizens.

At the same time, such regulatory conversations can build micro-communities in contexts where they are sorely needed. Community-building in schools is vital to the development of the young; community-building in workplaces is vital to creating employment; community-building in nursing homes has a special significance for people who have been wrenched late in life from the communities that have given their lives meaning for decades. Representatives of staff, management, the church, the government, the Relatives Committee sharing the stories of residents in a healing circle can have profound effects in building micro-community in nursing homes. The discussion of community in criminology is deeply distorted by its utter preoccupation with the geographical community of neighbourhood. In late modern conditions this is not nearly as important as the local democracy of schools, workplaces or nursing homes that have a much more profound grip on peoples' lives.

Political scientists may say that such local conversations do not go to the heartland of the democratic process. True. But how can citizens hack a path to the heartland of the democracy if the democracy has no strategy for teaching them how to be democratic citizens? Circles and conferences about matters ordinary people care about in their lived experience can teach them. If all students experience and witness serious acts of bullying at school and care about this, then before they reach adulthood, all can have the experience of participation in a circle that solves a difficult problem on which there are multiple perspectives. If they then move into workplaces where they have opportunities to tell their stories of abuse or neglect of their needs, the democratic lessons of their school experience can be reinforced.

And democracy is something that must be taught. We are not born democratic. We are born demanding and inconsiderate, disgruntled whiners, rather than born listeners. We must learn to listen, to be free and caring, through deliberation that sculpts responsible citizenship from common clay (Barber 1992).

Punitive criminal justice, like the accountability mechanisms of the contemporary state more generally, teach us not to be democratic, not to be citizens. This is because of their passive model of responsibility (Bovens 1998). Passive responsibility occurs when we hold someone responsible for what they have done in the past. Circles and conferences, in contrast,

teach active responsibility (Braithwaite and Roche 2000). Active responsibility means taking responsibility. In a healing circle, most citizens in the circle are not passively responsible for any wrongdoing; they are certainly not held responsible for criminal wrongdoing. Yet the hope so often realized is that they will take active responsibility for solving the problem. This is part of the ambition of putting the problem rather than the person in the centre of the circle. In the most moving conferences, participants take active responsibility for confronting structural problems like racism in a community (see the Country Womens' Association case study on the Real Justice website: realjustice.org), sexual exploitation and domination of girls by boys in a school (Braithwaite and Daly 1994), even a Prime Minister taking responsibility for restructuring the regulation of the Australian insurance industry (Braithwaite 2002: Chapter 1). But mostly the active responsibility is more banal – the nursing home laundry worker who proposes a new system for turning around soiled sheets to prevent residents from having to put up with lying in their own urine; the environmental manager of a factory who proposes a new system for recycling waste that will both reduce pollution and the risks of chemical exposures for workers. The lesson that democracy requires active responsibility is being learnt in the banal and personal cases just as it is in the less common cases that grapple with structural change. The outputs we hope for are not only solving the problem but also building community and building democracy or at least the competence to be democratic.

To rebuild a rich democracy, we need to do more than motivate people to participate in circles that address problems of living which directly affect their personal relationships. The extra step to democratic citizenship is taken when the citizen moves from participating in a restorative justice conference to being active in some way in the social movement for restorative justice. The extra step is taken when a citizen moves from supporting the residents of mum's nursing home in an exit conference following an inspection, to being an aged-care advocate. It is taken when a young woman who learns in a whole school anti-bullying programme how to confront bullying and then applies those skills to confront corporate bullies who destroy forests on which our wildlife depends.

Of course restorative-justice experiences will never be the principal way that social movement activists acquire the consciences and skills to be actively responsible. On the other hand, when we broaden our conception of restorative justice to include the learning of restorative practices in everyday life (Wachtel 1997), it may be that much of the learning to be actively responsible has always arisen from restorative everyday practices in families, workplaces and peer groups.

A civic republican programme for restorative problem-solving can help

teach active responsibility, thereby motivating the making of the personal political, thereby motivating social movement politics and grass-roots engagement with the representative democracy. Elsewhere (Ayres and Braithwaite 1992: Chapter 3; Braithwaite 1998) I have made the case that active social movement politics is the key to controlling corporate abuses of power. Without an environmental movement, environmental crimes would never be shameful and our environmental problems would spiral more deeply into crisis.

Learning from corporate crime

Shearing's (1997: 12) historical analysis of the rise of restorative justice is more about governmentalities of post-Fordist capitalism than the history of pre-capitalist village moots: 'Restorative justice seeks to extend the logic that has informed mediation beyond the settlement of business disputes to the resolution of individual conflicts that have traditionally been addressed within a retributive paradigm ... In both a risk-oriented mentality of security [actuarialism] and a restorative conception of justice, violence loses its privileged status as a strategy to be deployed in the ordering of security'. My own story of the history of coal-mine safety regulation in the British Commonwealth is one of extraordinarily punitive regulation in the late nineteenth and early twentieth century that was not very effective, followed by moves toward more restorative forms of regulation that were more effective in saving lives (see Braithwaite 2002: Chapter 1). In Australia, for example, black lung, which still afflicts generations of former and current miners in the United States and elsewhere, had mostly, though not universally disappeared as a health problem by the 1950s. The empowerment of union-elected safety inspectors whose salaries were paid by the state to coordinate the conversational regulation of coal mines was an important part of this accomplishment (Braithwaite 1985).

Another lesson we have learnt from the conversational regulation of corporate abuses of power is the value of widening the circle. Orchestrated scapegoating is one reason why circle-widening is so important with corporate crime. In my fieldwork 20 years ago, I discovered several pharmaceutical companies who had 'vice presidents responsible for going to jail' (Braithwaite 1984). They were promoted to vice president on the basis that they would take the blame if corporate crime were detected; after a period of faithful service as the vice president responsible for going to jail, they would be promoted sideways to a safe vice presidency. Elsewhere (Braithwaite 2002: Chapter 4) I have discussed my experiences

both as a regulator and an observer of regulatory encounters where initially the state meets implacable resistance when it sits down with responsible business executives in the hope of negotiating a restorative resolution. The regulator invites the boss of the responsible executive into the circle and he proves an even tougher nut who even more strongly rejects any corporate responsibility for the harm that has occurred. But the strategy is to keep widening the circle, going right up to inviting the Chairman of the Board into the circle if you have to, until you find a soft target who is moved by a sense of shame, by moral reasoning about ethical corporate conduct. There have been instances where, using this method, Chairmen of Boards who were socially responsible targets fired CEOs who were hard targets (Fisse and Braithwaite 1993). Many kinds of common crime, for example school bullying, are also collective phenomena. Even if they are not, for example a husband acting alone beating his wife, it may still be necessary to keep widening and widening the circle again until responsible members of the extended family are found who will disapprove of the violence and offer to take active responsibility for putting preventive measures in place.

A theoretical conclusion

There has been important evidence under our noses for a long time that restorative practices can help prevent corporate crime. It is rather like the overwhelming evidence from developmental psychology that restorative child-rearing practices prevent violence and other forms of misbehaviour in children, when compared with punitive and laissez-faire child-rearing (Braithwaite 1989). Because they are not 'criminological' forms of evidence, even though they might involve superior measurement than the notoriously unreliable measurement of crime, even though they might be utterly apposite to assessing restorative justice theory, criminologists ignore them.

Underlying the evidentiary claims of this essay, there is a theoretical proposition. This is that regulatory theory needs restorative theory. I have tried to illustrate this, for example, by marrying Black's (1997, 1998) theory of conversational regulation with Pranis's (2000) thinking on restorative storytelling. Second, the subtext has been that restorative justice can learn from regulatory theory, particularly from responsive forms of regulatory theory – widening the circle in response to ears that are deaf to stories of oppression, deploying advocacy NGOs to hold regulatory processes accountable, seizing terrible instances of oppression as an opportunity to build democracy, to strengthen communities and to make the personal political.

References

- Ayres, I. and Braithwaite, J. (1992) *Responsive Regulation: Transcending the Deregulation Debate*. New York: Oxford University Press.
- Barber, B. R. (1992) *An Aristocracy of Everyone: The Politics of Education and Future of America*. New York: Oxford University Press.
- Black, J. (1997) *Rules and Regulators*. Oxford: Oxford University Press.
- Black, J. (1998) 'Talking About Regulation', *Public Law Spring*, 77–105.
- Bovens, M. (1998) *The Quest for Responsibility*. Cambridge: Cambridge University Press.
- Braithwaite, J. (1984) *Corporate Crime in the Pharmaceutical Industry*. London: Routledge.
- Braithwaite, J. (1985) *To Punish or Persuade: Enforcement of Coal Mine Safety*. Albany: State University of New York Press.
- Braithwaite, J. (1989) *Crime, Shame and Reintegration*. Cambridge: Cambridge University Press.
- Braithwaite, J. (1998) 'Institutionalizing Distrust, Enculturating Trust' in *Trust and Democratic Governance* V. Braithwaite and M. Levi (eds). New York: Russell Sage Foundation.
- Braithwaite, J. (2002) *Restorative Justice and Responsive Regulation*. New York: Oxford University Press.
- Braithwaite, J. and Daly, K. (1994) 'Masculinities, Violence and Communitarian Control' in T. Newburn and E. Stanko (eds) *Just Boys Doing Business*. London and New York: Routledge.
- Braithwaite, J. and Makkai, T. (1994) 'Trust and Compliance', *Policing and Society*, 4: 1–12.
- Braithwaite, J. and Roche, D. (2000) 'Responsibility and Restorative Justice' in M. Schiff and G. Bazemore (eds) *Restorative Community Justice*. Cincinnati, OH: Anderson.
- Davis, R. T. and Stahl, R. W. (1967) 'Safety Organization and Activities of Award-Winning Companies in the Coal Mining Industry', *Bureau of Mines Information Circular 8224*. Washington, DC.
- DeMichiei, J. M., Langton, J. F., Bullock, K. A. and Wiles, T. C. (1982) *Factors Associated with Disabling Injuries in Underground Coal Mines*. Washington, DC: Mine Safety and Health Administration.
- Fisse, B. and Braithwaite, J. (1993) *Corporations, Crime and Accountability*. Cambridge: Cambridge University Press.
- Jenkins, A. L. (1997) 'The Role of Managerial Self-Efficacy in Corporate Compliance with Regulatory Standards'. Unpublished PhD Dissertation, Australian National University.
- Makkai, T. and Braithwaite, J. (1993) 'Praise, Pride and Corporate Compliance', *International Journal of the Sociology of Law*, 21: 73–91.
- Makkai, T. and Braithwaite, J. (1994) 'Reintegrative Shaming and Regulatory Compliance', *Criminology*, 32(3): 361–85.
- Makkai, T. and Braithwaite, J. (1996) 'Procedural Justice and Regulatory Compliance', *Law and Human Behavior*, 20(1): 83–98.

- Pranis, K. (2000) 'Democratizing Social Control: Restorative Justice, Social Justice, and the Empowerment of Marginalized Populations' in M. Schiff and G. Bazemore (eds) *Restorative Community Justice*. Cincinnati, OH: Anderson.
- Rees, J. V. (1988) *Reforming the Workplace*. Philadelphia: University of Pennsylvania Press.
- Rees, J. V. (1994) *Hostages of Each Other: The Transformation of Nuclear Safety Since Three Mile Island*. Chicago: University of Chicago Press.
- Scholz, J. T. and Gray, W. B. (1990) 'OSHA Enforcement and Workplace Injuries: A Behavioral Approach to Risk Assessment', *Journal of Risk and Uncertainty*, 3: 283-305.
- Shearing, C. (1997) *Violence and the Changing Face of Governance: Privatization and Its Implications*. Cape Town: Community Peace Foundation.
- Wachtel, T. (1997) *Real Justice. How we can Revolutionize our Response to Wrongdoing*. Bethlehem, PA: The Piper's Press.

Chapter 9

Confession, apology, repentance and settlement out-of-court in the Japanese criminal justice system – is Japan a model of 'restorative justice'?¹

Toshio Yoshida

Introduction

Apart from bodily injury or manslaughter caused by negligence in traffic offences, the Japanese police registered 2,033,546 Criminal Code offences in 1998. The ratio of frequency, that is, the number of criminal cases registered by the police per 100,000 residents amounts to 1,608. Japan's crime rate decreased from 1948 to 1978 almost continuously (1948: 2,000; 1973: 1,091), but since then it has gradually increased (1974: 1,095; 1997: 1,506). Still, Japan shows lower figures when compared to Western industrialized states (Research and Training Institute of the Ministry of Justice 1999).² Japan's crime rate, being the lowest of all advanced nations, may astonish Western observers. Some criminologists in foreign countries, such as Haley (1989, 1991, 1999) from the United States and Braithwaite (1989) from Australia have looked for the causes of the low Japanese crime rate. They say that it results mainly from the underlying assumption of 'restorative justice' that has traditionally been practised in Japanese criminal justice. Haley states that 'victim-offender mediation' 'is an essential feature of Japan's success and should be expanded in the United States and other criminal justice systems along with other elements of the restorative model, while 'there are no victim-offender mediation programs in Japan. No mediator training agencies exist. There are no statistics or studies. Mediation is a normal aspect of daily life.' So the practice and theory of Japanese criminal justice deserves a closer look.