

Justice for victims of sexual assault: court or conference?

by Kathleen Daly and Sarah Curtis-Fawley¹

School of Criminology and Criminal Justice
Griffith University
Brisbane, Queensland
Australia 4111

k.daly@griffith.edu.au
scurtisfawley@yahoo.com

This paper is published in Karen Heimer and Candace Kruttschnitt (eds.) *Gender and Crime: Patterns of Victimization and Offending* (pp. 230-65). New York: New York University Press, 2006.

Readers should cite the published version.

Note that some figures in this manuscript differ from the published version. This is because the dataset was revised while the paper was in the process of publication. The changes made to the dataset had a negligible effect on the results presented in earlier publications, but for the sake of accuracy, the correct figures are presented here.

Justice for victims of sexual assault: court or conference?

Kathleen Daly and Sarah Curtis-Fawley

Introduction

Studies of the experiences of sexual assault victims² in the criminal justice process come to similar conclusions: despite decades of legal reform, the police and courts continue to fail victims. To be sure, some cases proceed to court, pleas are entered, and defendants are convicted at trial; but scholars and advocates agree that existing law and procedure, coupled with social attitudes about gender and sexual violence, thwart just outcomes for victims. As we have known for years, the majority of sexual assault victims do not report the offense to the police;³ and for the victims who do report, the likelihood of their case reaching the prosecutor's desk is low. What can and should be done?

On this question, there is considerable debate. Some scholars propose more inclusive definitions of sexual violence, which shift citizens' and criminal justice officials' understandings away from the "real rape template" to "the realities of rape." Added to a more inclusive definition are calls for further legal reform to make court processes more responsive to victims.⁴ Others are skeptical that further legal reform can assist victims. Smart argues that because law disqualifies women's accounts and experiences of sexual violence, thereby further damaging abused women and children, non-legal sites of activism should be pursued.⁵ Likewise, Carrington proposes a shift in emphasis from law, police, and courts to "alternative technologies" for "the policing of sexual violence." This entails a reconstruction of ethical sexual behavior for masculine citizenship in extra-legal sites such as schools, families, and sports activities.⁶

Some propose a blend of state (or legal) and extra-legal intervention.⁷ Assuming that an offender has admitted responsibility for an offense to the police, an alternative to court prosecution is a conference, one type of restorative justice practice.⁸ Still other proposals include specialized courts for sexual violence, the use of civil law, and diversion and treatment programs for specific categories of offenders (e.g., adolescents or intra-familial violence).⁹

Our focus is on the role that restorative justice (RJ) can play in sexual assault cases. RJ can be used when diverting cases from court or as pre-sentencing advice to judicial officers. At present there are only two jurisdictions in the world, South Australia and New Zealand, which routinely use RJ in youth sexual assault cases. In New Zealand, conferences are used in court diversion and for pre-sentencing advice. In South Australia, conferences are currently used largely in court diversion. No jurisdiction currently uses RJ routinely for cases of adult sexual assault.¹⁰

In this article, we describe in detail two sexual assault cases that were diverted to conference. Both cases had youthful male offenders (17 at the time of the offense) and female victims (12 and 13), and both were finalized by a family conference in South Australia. In a conference, an admitted offender, victim (or victim representative), their supporters, and other relevant parties, along with a police officer and a facilitator meet to discuss the offense, why it came about, how it affected the victim and others, and to decide on a penalty.¹¹ We shall document

the victims' experiences with the police and the conference process, what they hoped would happen at the conference, and what did occur in their face-to-face encounter with the offender. Along with the girls' views are the facilitators' thoughts on the case, their concerns in planning and running the conference, and their opinions of the conference dynamics and its benefits (or not) for the victim.

The two cases were drawn from an in-depth study of 14 sexual and family violence cases finalized by a conference in the second half of 2001. Joined with the in-depth study is our archival analysis of 385 sexual offenses involving youthful offenders and finalized over a 6.5 year period (1995 to mid-year 2001) by formal caution, conference, or in the Youth Court in South Australia. From the archival study, we can compare the legal journey and outcomes of court and conference cases; and with the in-depth study, we can explore the aftermath of crime and conference dynamics largely, although not exclusively, from the viewpoint of victims. Ours is the first study to shed light on the potential and limits of court versus conference processes for victims of sexual violence. Before presenting the cases, we review what happens in the criminal justice system in response to sexual assault, and what is known about victims' experiences with the legal process.

Attrition: lost and dropped cases

Any study of sexual assault and the criminal justice process confronts the problem of attrition, which occurs at multiple sites. First, most victims do not report the offense to the police; estimates of rates of report range from 5 to 30 percent.¹² Of cases reported to the police, 22 to 40 percent reach the prosecutor's desk because victims withdraw the complaint, there is insufficient evidence for conviction, no suspect is apprehended, or cases are determined by the police to be "unfounded" or are "no crimed."¹³ Third is the prosecutor's decision to go forward with the case; an estimated 16 to 33 percent of cases reported to the police are prosecuted. Fourth is whether the defendant is convicted (including guilty pleas and lesser included offenses); this figure ranges from 10 to 26 percent of cases reported to the police, and is typically 10 to 15 percent of cases. With substantial attrition at earlier phases of the criminal process, the likelihood of conviction (including guilty pleas and lesser included offenses), once a case is prosecuted, is considerably higher, ranging from 40 to 80 percent, and is typically 65 to 70 percent of cases.

High rates of attrition are well documented in cases involving adult offenders and victims, but less is known about attrition when children or young people¹⁴ are victims or offenders. Piecing together several sources,¹⁵ we find that added to the "downstream" convictability assessments prosecutors make in adult offender-adult victim sexual assault cases¹⁶, there are heightened levels of attrition when cases involve young people or children as offenders and victims. For example, in a re-analysis of Wundersitz's data on sexual offenses with child victims in South Australia in 2000-01,¹⁷ we find that of the cases that were prosecuted, the conviction rate was higher in the Adult Court (66 percent) than the Youth Court (50 percent).¹⁸

Victims' experiences in court

If a case has survived the many hurdles to reach the stage of prosecution, victims "may be dismayed that their identity is a matter of public record, that they are expected to testify about

graphic details of sexual assault in open court, and that rape shield laws fail to protect them from questions about their social and sexual history.”¹⁹ The impersonal and intimidating courtroom environment, defense “attorney questioning that exacerbates self-blame, and [a] perpetrator’s unmoving stance that he is not guilty of a crime” are further sources of legal victimization.²⁰ A major Australian study of 150 sexual assault trials and hearings found that despite legal reform, victims faced the same problems they had decades earlier: inappropriate questions at cross-examination about provocation and the introduction of sexual history evidence.²¹

What, then, of child or youth victims? Eastwood finds that in two of three Australian states, a minority of young victims whose cases went to court said that they would again make the choice to report the sexual abuse because “the process was not worth the trauma.”²² Three problems were repeatedly identified by young victims: long periods of waiting for their cases to proceed, seeing the defendant in the courtroom, and being cross-examined. Eastwood calls for a “paradigm shift,” arguing that “we have lost sight of the fact that what the child wants most of all is to be listened to, and be believed.”²³ Likewise, Morgan and Zedner’s research on child victims in England revealed that “above all child victims want their accusations to be believed.”²⁴ Kelly suggests that the central problem is the adversarial process, in which the “defense’s strongest tactic will be to attempt to undermine children’s credibility.”²⁵

Potential problems and benefits of RJ

In part arising from the failures of the police and courts to respond adequately to sexual violence, RJ has been proposed as an alternative. A good deal of controversy surrounds this idea, although most debate has centered on using RJ for partner violence.²⁶ Critics assume it is another form of diversion, which treats offenders too leniently, or that it is another form of mediation.²⁷ While there is overlap in the dynamics of partner and sexual violence, there are also important points of difference. For example, while partner violence is typically an ongoing pattern, sexual violence may or may not be; and evidentiary problems tend to loom larger in sexual violence cases.

The potential problems of RJ for victims are²⁸

Victim safety. As an informal process, RJ may put victims at risk of continued violence; it may permit power imbalances to go unchecked and reinforce abusive behavior.

Manipulation of the process by offenders. Offenders may use an informal process to diminish guilt, trivialize the violence, or shift the blame to the victim.

Pressure on victims. Some victims may not be able to effectively advocate on their own behalf. A process based on group consensus building may minimize or overshadow a victim’s interests. Victims may be pressured to accept certain outcomes, such as an apology, even if they feel it is inappropriate or insincere. Some victims may want the state to intervene on their behalf and do not want the burdens of RJ.

Mixed loyalties. Friends and family may support victims, but may also have divided loyalties and collude with the violence, especially in intra-familial cases of abuse.

Cheap justice. Offenders may view RJ processes as a “soft option,” reinforcing their belief that their behavior is not wrong or can be justified. Penalties may be too lenient to respond to serious crimes like sexual assault.

In reviewing this list, some of these same elements may also feature in sexual assault cases dealt with in court. Victims can be intimidated by offenders in the court room; there are just as likely to be mixed loyalties; if an offender is not convicted, he may believe he did nothing wrong; and often the penalties handed down in court could be deemed “too lenient,” as the results of our archival analysis (below) suggest.

The potential benefits of RJ for victims are²⁹

Victim voice and participation. Victims have the opportunity to voice their story and to be heard. They can be empowered by confronting the offender, and by participating in decision making on the appropriate penalty.

Victim validation and offender responsibility. A victim’s account of what happened can be validated, acknowledging that she is not to blame. Offenders are required to take responsibility for their behavior.

Communicative and flexible environment. The process can be tailored to child and adolescent victims’ needs and capacities. Because it is flexible and less formal, it may be less threatening, and better able to respond to the individual needs of victims.

Relationship repair (if this is a goal). The process can address violence between those who want to continue the relationship. It can create opportunities for relationships to be repaired, if that is what is desired by the victim.

When reviewing this list, some factors may feature in court, albeit in an attenuated form. If a case goes to trial, a victim may be able to tell her story of what happened, but this will be constrained by what is deemed to be legally relevant and subject to cross-examination. If an offender pleads guilty or is convicted, the victim may submit a victim impact statement, describing how the offense affected her, portions of which may be read in court before sentencing. Erez suggests that while victims derive satisfaction from participating in the sentencing process, victim impact statements have “little effect on the criminal justice system and on victims’ satisfaction with it.”³⁰ When it is successful, court prosecution can validate a victim’s experience.³¹ However, as the attrition data show, the frequency of a successful prosecution, once a case is reported to the police, is low.

On balance, RJ may have much to offer victims. Its main problems are ensuring safety for victims, overcoming the potential for power imbalances in a face-to-face encounter, and the appearance of too lenient processes and penalties. We must emphasize one crucial advantage for all victims participating in an RJ process: because the offender has admitted to the police that he committed an offense, victims do not experience the negative and disabling consequences of an adversarial process.

Court or conference: which is better for victims? Results from the archival study

One of the major questions posed in our archival study of sexual offenses was, from a victim's point of view, is it better for one's case to be dealt with by way of a restorative justice process (a conference) or to go to court?³² We gathered police documents, family conference files, court records, and criminal histories for all youth sexual offenses finalized from 1 January 1995 to 1 July 2001 in South Australia, which began with one or more sexual offenses charged by the police. There were a total of 226 court cases, 118 conferences, and 41 formal cautions. A detailed coding scheme containing over 200 variables was created, which described the offender's biography and orientation to the offense, the number of victims (with detailed information on the primary victim), the context and elements of the offense, how the offense was reported to the police and the time from offense to disposition, the legal history of court cases from initial charges to finalization (including whether an offense was proved or not), the features of conference cases, and penalties imposed. In addition, the offenders' criminal histories (for all types of offending behavior) were coded.

Overall, we found that victims were better off if their case went to conference rather than court. The principal reason was that in conference cases, *something happened*, that is, there was an admission by the offender, and a penalty (also termed an "undertaking" or "agreement") was decided. If the case went to court, the chances of any sexual offense being proved was 51 percent,³³ with the remaining cases being withdrawn or dismissed. We concluded that the potential problems of RJ in sexual assault cases (that is, the potentially re-victimizing dynamics or power imbalances of a face-to-face encounter) may be less victimizing than what occurs in a court process. So long as those accused have the right to deny offending, a right enshrined in the adversarial process, a court process can do little for victims of sexual assault. The potential of RJ is that it opens up a window of opportunity for those who have offended to admit to what they have done.

Using several measures of seriousness (legal and offense elements), we found that the cases referred to court started out as more serious than those referred to conference. However, by the time the cases were finalized as proved (convicted), the court and conference cases were of similar seriousness.³⁴ Cases that began with the most serious charge (rape) were the least likely to be proved of *any* sexual offense in court. While the more serious cases, and those with extra-familial victim offender relations and non-admitting offenders were more likely referred to court, the cases *proved* in court were *less* serious and involved *intra*-familial victim-offender relations. Court cases took over twice as long to finalize compared to conference cases: using the mean, the time from a report to the police to case finalization was 6.6 months for court cases and 3.2 months for conference cases. Victims would have had to attend court, on average, six times to follow their case to finalization, and nearly 20 percent would have had to attend ten or more hearings. If victims came to court on the day of finalization, half would learn that their case had been dismissed or the charges withdrawn. On all our measures of the legal process from a victim's point of view, the court appeared to be less validating and more difficult for a victim to negotiate.

Contrary to Coker's notion that RJ may be "cheap justice,"³⁵ we found that conference penalties did more for victims than those imposed in court. A higher share of conference than court offenders apologized to victims, carried out community service, were ordered to stay away from the victim, and undertook an intensive counseling program for adolescent sex offenders, the Mary Street Programme.³⁶ The court's greater power is its ability to impose a detention sentence. However, of the 115 proved court cases, 18 percent of offenders received

a detention sentence; in all but two, the sentence was suspended. A small number of court cases was set for trial ($N=18$). Of these, four offenders eventually pled guilty, and 14 entered no plea or a not guilty plea. Of the 14, eight were dismissed and three were found not guilty. Three cases were proved at trial. Thus, the likelihood of conviction at trial in the Youth Court was infinitesimal: just one of the 226 offenders in our sample was.

From the archival study, we learned about the character of youth sexual offending, the kinds of cases that move through the system or are dropped, the circumstances in which offender admissions are more likely, among many other elements. We came away from the study with a degree of confidence that conferences have the potential to offer victims a greater degree of justice than court. However, the study design did not permit us to interview victims retrospectively, and we felt it was inappropriate to do so as a matter of ethical research practice.

In-depth study of conference cases

In order to document the experiences of victims, we decided to track a set of conference cases as they moved contemporaneously through the system during a 6-month period, 1 July to 31 December 2001.³⁷ Our in-depth study had eight cases of sexual assault, and six of family violence. Of these, we have selected two sexual assault cases for analysis in this article; both involved older child victims (12 years or older), whom we interviewed directly.³⁸ Interviews were carried out with the victims two to six weeks after the conference, and with each Youth Justice Coordinator (YJC) both before and after the conference.

Because so little is known about RJ in cases of sexual assault, this paper chronicles the cases as they moved through the conference process in considerable detail. In doing so, the emotions and effects of the crime and the legal process can be brought to light more fully. The two cases show complexity and ambiguity; they challenge proponents and skeptics alike to reconsider their claims of the benefits and problems of RJ in cases of sexual assault.

Rosie's case: sexual assault at a military camp

Rosie was a strong and confident young teenager, who knew what she wanted from the conference process. Her experiences with it were generally positive, although she was critical of several aspects.

The offense, report to the police, and immediate aftermath

Rosie, who was 12 at the time of the offense, and Rick, who was 17, were attending an Army cadet training camp. One evening, the cadets were participating in an exercise in which they were to go to a site by using cover and concealment techniques. Rosie had injured her ankle earlier in the day and had difficulty walking; Rick ordered the other cadets to go ahead, leaving Rosie alone with him. As Rosie and Rick walked up a hill, Rick pushed her to the ground and lay down next to her. He began to rub Rosie's breasts and her bottom through her clothing. He then pushed his hand between her legs and grabbed her in the vaginal region. According to Rosie, this continued for about 4 minutes. Rick attempted to undo her pants, but she resisted. Rosie then elbowed Rick in his stomach, stood up, and tried to run away. Rick

reached up and grabbed her belt to prevent her from running, but Rosie was able to get away. She immediately reported the assault to another cadet.

About 3 hours later, a police officer came to the camp to interview Rosie. Rosie was highly positive toward the officer, remembering, “I had a female police officer and she was really good about it. She spoke to me because I was still shaking, and she could get it out of me. She was really nice.” Rick was taken to a local police station to be interviewed with his parents present. He admitted that he had rubbed Rosie’s breasts and back, but denied touching her in the vaginal area. He was charged with indecent assault.

In her statement to the police, Rosie’s grandmother said that when she saw Rosie the next day, she had two small bruises on her inner left thigh.³⁹ A strong and disturbing memory for Rosie was that the Army would not let her leave to go home right away; rather, she had to sit alone in a room at the camp for most of the next day while various Army officials spoke to her about what had happened. This made her feel that she had done something wrong.

Rosie reported a variety of effects from the offense, including a fear of being alone, an increased distrust of others, a loss of self-confidence, problems concentrating, and a fear of men, including her grandfather. She began to have panic attacks and was referred to a psychiatrist, who prescribed anti-anxiety medication. She was very angry and frightened of Rick before the conference. He was known for wearing a red baseball cap, and Rosie recalled that every time she saw a male wearing a red cap, she would become scared and anxious.

Leading up to the conference

The period of time between Rosie’s report to the police and the date of the conference was very long: nearly 15 months.⁴⁰ The case was delayed partly because the police were slow to refer the matter to court (it took 4 months); and once it was in court, Rick’s case was listed four times. The case was then referred from court to conference. The YJC was concerned with the lengthy delay, thinking the conference “would have been more useful 12 months ago.” She said that both Rick and Rosie had “suffered a lot because of the delay” and that Rick’s father was particularly angry about it.

Before the conference, Rick met with Gwen, a counselor at the Mary Street Programme, several times. Gwen told the YJC that Rick was taking responsibility for the assault, and because of this, she did not believe he required long-term therapy: “he’s taken responsibility, he knows he did the wrong thing, and he just wants to get on with his life.”

The YJC spoke by phone with Rick three times before the conference. She said he was placing high priority on the conference and was taking full responsibility for his behavior. Rick’s mother told the YJC that the incident had “rocked the whole family, giving up Rick’s hopes for going into the Army.” According to the YJC, Rick’s mother was “very supportive” of the conference process. “She is very grateful it’s out of court and so is Rick.” At the same time, the YJC believed that Rick’s mother was minimizing the assault, saying things like “there are much worse types of assaults.” The YJC recalled that she “did a lot of work” to counter these views from Rick’s mother.

In her pre-conference phone conversations with Rosie, the YJC could sense that she was nervous about attending the conference because Rosie had expressed concerns that she’d have to stand up and give evidence. This misconception about the conference process gives us

insight into those aspects of a court process that can trouble victims: the courtroom is an intimidating environment, and yet it is only this setting that victims can imagine, if they should decide to engage the criminal process. The YJC explained the conference process again, reminding Rosie that she was the victim and hadn't done anything wrong. The YJC was concerned that she wasn't able to meet Rosie before the conference (the distance was too great because Rosie lived in a country town over 5 hours' drive from the city), and she had deliberately not met with Rick for this reason. Typically, a YJC will meet with both the victim and the offender at least once when preparing for a conference for a serious offense.

Rosie said she was "all for" the conference, and when the YJC proposed that she could participate by video link-up (rather than a face-to-face meeting), Rosie was adamant that she wanted to come to Adelaide "to face up to it." She had some idea of what would happen at the conference and what her role was, but she didn't know what the possible outcomes could be. She hoped that by attending the conference she would be able to "get my side across" and that everyone would listen to her story. Her comments show the importance to victims of recounting what happened, of being heard and believed.⁴¹ She hoped that the details of the offense wouldn't be discussed because she'd feel "weird" about this: "you just feel really weird when they talk about it; it's a mixture between embarrassment and shame." She also worried that Rick's parents would "glare" at her.

The conference

On the day of the conference, Rosie and her grandmother took an early morning bus to Adelaide from their home, a trip that took over 5 hours. After the conference was over, they returned by plane that evening. They bore all the costs of the trip; the YJC could only offer to pay for a taxi fare to the airport. The conference participants were Rick, his mother and father, his Mary Street counselor (Gwen), Rosie, and her grandmother. Some imbalance in conference participation was evident in that Rosie's counselor could not attend (due to the travel distance); thus Rosie had only one supporter, her grandmother, while Rick was supported by both of his parents and a counselor. The YJC ran the meeting, and a male police officer, who had considerable experience working on the police force's sexual assault team, was present.

By this time, Rick was 18 years old and Rosie, 13. Going into the conference, Rosie said the most important thing was to tell Rick how the offense affected her. She also wanted answers from him about the offense, to hear his account of what happened, to have him apologize, and to be reassured that he wouldn't do it again.

Rosie said that when she walked into the conference room, Rick and his parents were already there, and this was "intimidating" for her. During the conference, she felt "scared and angry" when Rick talked about what had happened. He disagreed with part of the police statement, maintaining that there had been no vaginal contact. When this was being discussed, Rosie recalled that Rick "crossed his arms like he was blocking it out." She believed that Rick minimized the offense through his denials of vaginal contact, and she was upset that his parents and Gwen concentrated on how the experience had affected Rick, "like he was the victim."

At the same time, Rosie was surprised to learn that the incident affected Rick "in all sorts of ways" and felt that he "showed heaps of remorse" through his body language and the way he talked. She "definitely" was able to say everything that she wanted and said she never felt

controlled or frightened by Rick during the conference, saying that he was “very placid.” She expected Rick to act “cocky, big, and tough,” but instead he was like a “gentle giant.”

Rosie said that it occasionally felt like Rick’s parents were “ganging up” on her. She also found Gwen to be intimidating, and was angry that she repeatedly defended Rick. Unfortunately, in the middle of Rosie’s account of the offense, the YJC had to stop her because Gwen had to leave to attend another appointment and wanted the chance to talk about Rick’s participation in the Mary Street Programme. Gwen shared how hard Rick was working in counseling; she suggested that he didn’t need a whole year of sessions, but that a few would suffice. Gwen’s ability to interrupt Rosie’s story suggests that professionals may be granted concessions and priority over victims during a conference.

In the early phase of the conference, Rick’s father acted withdrawn and angry. The YJC recalled that his “body language through all of this was significant. He had his arms folded and had his back pushed so far back against the chair that the chair was leaning backwards, and he was really pushing away from everything. It was remarkable. He did talk later, but he had a hard time coming into the conference, and he was really angry.”

When the YJC asked Rick about the assault, he didn’t use specific language, saying things like “when it happened.” The YJC did not permit this evasiveness and corrected him by saying “when you indecently assaulted Rosie.” These comments reveal that the YJC can and does intervene in conferences when the offender or his supporters are attempting to minimize the offense. The police officer was also highly supportive of Rosie: he was firm in explaining to Rick that he had broken the law and was lucky his case was referred to a conference.

When Rosie began to tell her story, the YJC observed that

Rick didn’t see Rosie as a human being at all. He was there for himself, and there were some things he said that indicated that if she hadn’t have struggled [during the assault], he would have gone further. . . . Although he wasn’t uninvolved, you could tell he was quite anxious about the whole thing. It [the conference] was meaningful to him, but he didn’t show empathy to Rosie.

The YJC was concerned that Rosie would have difficulty talking about the offense, but her stance was confident and forthright. “She talked about how frightened she was, and she talked directly to Rick, and that was the significant thing. I would ask her a question and she would turn directly to Rick and say ‘you did this.’” The YJC remarked that Rosie is “so much the winner in all of this.” She continued:

The most significant moment for me . . . was when Rosie turned to Rick and said, “you’re so much bigger than me, I was frightened of you and I couldn’t get away from you, I had to fight you, and I’m a really little person.” You know she said those things, and it was absolutely amazing, really amazing, and I guess for me the conference gave her a chance to express that, and I think that must have been a really satisfying moment for her.

Ultimately, Rick didn’t admit to Rosie’s version of events (touching her in the vaginal area, trying to undo her pants). While this could be interpreted as re-victimization, the YJC felt this did not occur because everyone believed Rosie: “It was giving him an opportunity, and Rosie

knows he didn't take it, but it gave her the opportunity to say 'well, I know from my point of view this is what happened and I put it to this group of people'." In her strength and presence, "Rosie was far more powerful in the conference than Rick," according to the YJC.

Apology and the agreement

Rick did not apologize directly to Rosie. Rather, according to the YJC, "he apologized and he did that spontaneously . . . He regretted having done it, and he sort of again apologized into the ether, but saying he wished that he hadn't done it." At this point in the conference Rick's mother said, "Rick, turn and talk to Rosie". She was absolutely aware that Rosie had been contained enough to turn and speak to Rick, but that Rick had never spoken to Rosie." The YJC continued:

He regretted it off into some distant corner. . . . And he talked about it ruining his life too, you know, it was all me, me, me. And Rosie knew that, she was amazing. She just floated above it. She said "look Rick, I'm not afraid of you anymore, I accept your apology, and I know you'll never do this to anyone again." Those were the three things she said to him, straight to his face. What a powerful thing to give her, what a powerful thing for her to be able to have achieved. Amazing!

At the moment of the apology, the YJC remembered that

Rosie just soaked it in. She leaned toward him and just took it in, it was just what she wanted to hear. You could see she had been waiting for this moment when he responded to her. It was really incredible, she just changed completely. She put her glass of water down on the table and she actually leaned forward and she accepted his apology. She told him she believed he was never going to do it again and told him she wasn't afraid of him anymore. It was really significant. It absolutely burned in my memory that kid moving towards him.

The main criticism Rosie had of the conference was that the undertaking was unfair in two respects. First, she felt that it was procedurally unfair. She thought "we would all have a say," but in fact she had no say during the discussion of what should be included in the agreement. Rather, Rick's parents and Gwen were the main people who decided the content of the agreement. Rosie recalled that she was thinking, "What's the point of being here if they already know what should happen to him?" Rosie wanted Rick to do community service, perhaps in a nursing home, but she felt that the YJC was not supportive of her suggestion. Moreover, Rick's mother said he occasionally visited his grandmother after work, so he shouldn't have to do any more community service. Second, Rosie believed the agreement was too lenient. Another young person she knew had been in court for a similar offense, and "he got 100 hours of community work." However, she was not given an opportunity to object to what was finalized in the agreement, in which Rick was to (1) continue counseling at Mary Street for a period of time to be determined by Gwen, Rick, and his parents and (2) send a written apology to Rosie.

Respect and safety

Rosie said the YJC and police officer treated her in a respectful manner, she felt safe at the conference, and it helped her to resolve important issues.

Post conference

Rosie left the conference feeling better, saying it was a “fresh start. Now I can put it behind me . . . I felt like the world had been lifted off my shoulders.” Talking about what happened, hearing what Rick had to say, and seeing his remorse were very helpful. She left the conference feeling that “it just helped me get over it. It was like, hearing everything, it just helped me close the book. That was like the last chapter.”

After the conference, Rosie was not at all angry or frightened of Rick, and she had a more positive attitude toward him because he seemed remorseful. The conference had helped her to deal with the negative effects of the assault: she could concentrate better, felt more self-confident, and was more trusting of others. She was “a lot happier,” although she was still taking anti-anxiety medication.

Despite her criticism of the agreement, Rosie was satisfied with how her case was handled. She was glad she didn’t have to go to court because she would “have [had] to stand up and talk in front of everyone” and the court requires that “you prove your side.” She recommended conferencing to other victims of sexual assault because the conference process is “so laid back” while the court is “scary.”

Reprising problems and benefits through Rosie’s case

Let’s now consider the list of problems and benefits of RJ in light of Rosie’s experience.

Problems. Contrary to the concerns of RJ critics, Rosie felt safe at the conference. However, power imbalances were evident in the larger number of people supporting the offender, including his counselor. Rosie was initially intimidated by their presence, body language, and the things they said; but over time, Rick was increasingly isolated in his efforts to minimize the assault. Although he attempted to downplay the effects and extent of his offending, the YJC, police officer, Rick’s mother, and Rosie effectively checked this. Rosie felt pressure to accept the agreement, but contrary to the concerns of critics, the apology process was a significant triumph for her. She took charge of the conference in ways that Rick could not. In so doing, she redefined herself away from the status of “victim.” Thus, the conference process helped her “to close the book.” She willingly accepted the burdens that the conference process required, traveling at great distance and at significant expense to attend it. She faced no divided familial loyalties since the offense was extra-familial, and her grandparents (her primary caretakers) supported her fully. We do not know if Rick thought the outcome was a “soft option,” but we do know that the official response to his sexual assault had already hurt him considerably. Rosie wanted a stiffer penalty to be imposed and saw the conference outcome as too lenient.

Benefits. Rosie was definitely able to tell her story effectively and to be heard by Rick and the other conference participants. Although she felt empowered by participating in the conference, she was disappointed that her views on the agreement were not considered. Rosie validated her own account of what happened, with the encouragement of the YJC and her grandmother. However, Rick only took partial responsibility for what he did, denying any vaginal contact. Rosie said the conference process was more comfortable (“laid back”) than what she imagined court would be (“scary”). There was no aim of relationship repair in this case.

Tanya's case: intra-familial sexual intercourse

Compared to Rosie, Tanya's experience was less positive. There was victim blaming by her mother, her step-father, and her step-father's parents; a pathologizing and medicalizing of the offender's behavior; and conflict between the offender and his father before and during the conference.

The offense, report to police, and immediate aftermath

When Tanya was 12 years old, her mother Nancy married Nick; and he and his two sons, Andy (11 years) and Zac (16 years), moved into the house. A year later, Tanya (now 13) said that her step-brother Zac (now 17) began to touch her sexually, initially over her clothing. Over the next 5 to 6 months, this sexual contact occurred from time to time, but then increased in frequency. It escalated one day when Zac asked Tanya to come to his trailer, where he lived in the family's backyard. Zac began to touch and kiss her, and because Tanya did not want anything else to happen, she went back into the house. Zac persuaded her to come back out to his trailer and had sexual intercourse with her. This occurred several more times over the next 3 months. In her interview, Tanya recounted that Zac was "a very violent person" and would "throw you against the wall and knock you out . . . A few times I had all these bruises and cuts on my back." Thus, while she appeared to "go along" with the sexual activity, it occurred in a context of fear and intimidation.

About 4 months later, Zac was interviewed by the police. He admitted to having sexual intercourse with Tanya six times, but claimed she consented. He also said that he was using marijuana or alcohol each time. He was charged with unlawful sexual intercourse.

After the offenses were reported, Tanya moved to her grandparents' home. Zac was kicked out of the parental home because he was constantly fighting with his father and step-mother (but notably not due to Tanya's disclosure of the sexual contact between herself and Zac). He moved to his mother's house, but after he held a knife to her throat, she asked him to leave. He had no fixed address at this point. He was hospitalized in a mental facility for a short period of time after he was charged, and his father was sure that this was caused by the stress of police involvement. Zac did not attend Mary Street pre-conference, but was seeing a psychiatrist for treatment of bipolar disorder.

Initially Tanya didn't tell anyone about the sexual relations because she was scared of Zac. The disclosure came about when Tanya's teacher called her mother because Tanya had been acting up in school. Her grandmother picked her up at school and wanted to know why she wasn't behaving, and Tanya told her about Zac. She was unsure who made the police report, but thinks it was her grandmother. She was glad it was reported because "I don't really like Zac, and he shouldn't just get away with it." She was satisfied with the way the police handled the case, but then frustrated because it seemed to take a long time for anything to happen.⁴² The conference was held 4 months after Zac was charged by the police.

After the police report, Tanya broke out in scabs and sores over her body and face, which her doctor said was caused by stress. She took over 3 weeks off from school for police interviews, counseling sessions, and for general stress-related reasons. She was fearful of being alone, had headaches and difficulty sleeping, increased suspicion of others, problems concentrating at school, and a loss of self-confidence: "I sort of think I'm dirty." Zac had been spreading rumors about her in their school, and she was embarrassed.

Leading up to the conference

In the pre-conference period, there was a good deal of conflict between Tanya, her mother, and step-father; and between her step-father and Zac. Her parents didn't fully believe she was a victim in that they assumed she and Zac had both played a role in initiating sexual relations.

The YJC asked a female police officer to be part of the conference process to balance his male presence. "I knew that if Tanya decided to come to the conference, that a female perspective was needed and a connection could be made." The YJC and police officer made a home visit to meet Tanya, and they also visited her mother and step-father. The YJC "wanted to give Tanya the chance to make an informed decision about whether or not to come to conference, given her age and given that this is a case of family sexual abuse; and in the long term, this family is still together, mum and dad, it may be that here was an opportunity for her to confront Zac and say what she wanted to say." The YJC had initially spoken by phone with Tanya's grandfather, who was adamant that Tanya didn't want to attend the conference.

Tanya recalled the YJC's home visit. She was upset to learn the case was going to a conference because she had believed that Zac would be imprisoned as a result of the police report. She felt that by going to conference, Zac was "just getting away with it because it's the easiest thing to do, and like yeah, I was really mad." It was clear to her that Zac had committed a crime, and she didn't understand why he wasn't going to get "a life sentence." She didn't want to attend the conference because "I didn't want to see him. I didn't want to speak to him." The YJC recalled that Tanya "had said something like 'Zac should be punished, and he should be jailed, and I shouldn't have to bother with this'."

Tanya was content living with her grandparents and didn't want to go back to her mother and step-father's house because, in the YJC's words, her grandparents "strongly validated her as a victim in all this." Her mother Nancy and step-father were not as supportive. Her mother viewed the sexual activity as caused by "rampant hormones" of both Zac and Tanya and recalled a time when she walked into a room and found Tanya sitting on Zac's lap. She described Tanya as "having been quite prudish until all this, and now all of a sudden she is running around in a negligee." When the YJC told Nancy that Tanya might not attend the conference, her response was "that's wrong. They should both have to be there, and they should both have to apologize." In her mind, there was mutual culpability for the sexual activity and the fallout it caused in the family.

Tanya recalled that before the conference she was not getting along with her mother, mainly because her mother believed Tanya had seduced Zac. Tanya felt that Nick had convinced Nancy that Tanya had been lying about Zac's taking advantage of her. In fact, Tanya said that Nick came to her grandparents' home one day, telling them, "she's a stupid liar."

Tanya had not planned to attend the conference, but the police officer spoke with her again. At first, her aim was to help Tanya prepare a victim impact statement to be read at the conference. During their conversation, she encouraged Tanya to attend, reminding her of what could happen. Tanya changed her mind, thinking that "maybe I should go 'cause if I'm not there, then they could decide stuff, which I didn't want to happen." She said she had sufficient information about how the conference would work, her role, and possible outcomes. She hoped that Zac would have to do community service and that the offense would be "on his record."

Before the conference, Tanya felt angry towards Zac and frightened of him, and she worried that at the conference “he would start yelling and stuff. He is a scary person.” Thus, there were good reasons for Tanya’s anxiety about attending the conference: she was fearful of Zac, she had little support from her mother and step-father, and her grandparents would not be there. She asked to have her social worker attend as her supporter.

The YJC had one phone conversation with Zac before the conference. He believed that Zac was giving “good to high” priority to the case because “he was stressed about what was going to happen to him.” However, he was not taking responsibility for his offending because he viewed Tanya as a willing participant. His grandmother defended him and called Tanya “a slut.” Thus, Zac’s denials were reinforced by several family members. His father Nick was concerned about the nature of the potential conference outcomes. He believed that if Zac had to participate in Mary Street counseling or carry out community service, that this would further stress Zac and exacerbate his mental illness. At the same time, there was a good deal of conflict between Nick and Zac. Several days before the conference, Zac unexpectedly dropped by his parents’ house, and Nick became very angry with him, and they fought physically.

Before the conference, Zac apologized to Nancy for his role in everything that had happened in the family. Despite Nancy’s view that Tanya was partly to blame, the YJC anticipated that during the conference, she would “go to bat for her daughter.” Nancy “saw the conference as a family conference, in the sense that the family would talk about it, as a clearing of the air, more than a legal process.”

The conference

About 16 months after the initial sexual contact, the conference was held. In addition to the YJC and female police officer, those attending were Zac, his father, Tanya, her mother, and Tanya’s social worker. In light of the conflicts, fights, and angry words during the pre-conference period, we might anticipate their emergence at the conference. And indeed, they appeared early on.

The YJC said it was a “very dramatic” conference. Zac arrived about 30 minutes early, and the YJC reported that “my very strong first impression was that this kid was quite unwell.” Zac started to write things on the white board in a “manic” manner, and initially, the YJC wondered if Zac was competent to participate. In hindsight, the YJC believed it was the right decision to go forward with the conference.

The YJC had to re-arrange the seating in the conference room, and then decided to move to another room. “We wanted a bigger table so we could separate people more. We went to a bigger room, and we worked out that it was better for Tanya to be on the end of the table. She needed to be away from the intensity of Zac and his rantings.” Later the seating arrangements were again changed when Nick got very upset with Zac and threatened to hit him.

Going into the conference, it was important for Tanya to be able to tell Zac how the incidents affected her. It was also important to hear his side of the story because she thought it would reveal “how messed up” it was. “I knew he was going to lie, but I wanted to hear what he was saying and see if he was going to lie, which I knew he was, but I wanted to hear his side of the story, how messed up his side of the story is.” It was also important to be reassured that it wouldn’t happen again, and for him to apologize, although she expected that his

apology would be insincere. Tanya was hoping that Zac would be punished for his actions, recalling “I wanted the punishment . . . but that didn’t work out.”

Right from the start of the conference, Tanya reported feeling intimidated by Zac. “When I walked in the door, he gave me the biggest scariest look. After that, I was scared. I didn’t want to go in . . . and I’m like, I’m not going in, I’m not going in, but I did. I was really scared.” She had thought a lot about what she wanted to say at the conference, but “when I got there, I forgot everything I was going to do.”

In the first phase of the conference, a discussion of the offense normally occurs. The YJC decided not to dwell on the offense facts because before the conference, Zac “said to me that ‘I’m the victim here.’ You know, he actually used that phrase, and we had to pull him up and say, ‘no, you’re not the victim, you’re the offender. Tanya is the victim’.” The YJC was worried that “it would just blow the whole thing up straight away,” so after the police report was read briefly, he steered the conversation in a different direction.

In the YJC’s mind, the most important aims for the conference were “to make Zac understand how he’s affected Tanya” and “to put into place the things the family wants for him.” She felt embarrassed discussing what happened in front of everyone because “everyone was an adult except for me.” The YJC felt that Zac was affected by what Tanya said, and having to sit across from her was powerful because they had not seen each other for about 6 months. “I think being there, he could see the effects of what he’s done.”

Tanya felt that Zac didn’t fully acknowledge his offending. In her interview, Tanya repeatedly said that he “lied” and “is a liar.” She wanted to object when he downplayed the seriousness of the offense, but worried that “we would get into a fight” if she said anything. The police officer warned Zac several times about his behavior, and threatened to end the conference if he didn’t behave appropriately.

The YJC said that Zac acted and spoke in ways that could be interpreted as intimidating and victim-blaming, but Tanya didn’t react strongly: “I think she let it wash over her, and the fact that no one let him get away with it made her feel supported.” The YJC surmised that Tanya was not bothered by Zac’s actions because “she knew to some degree we were dealing with a person who was unwell and that these were rantings.” According to the YJC, Zac didn’t acknowledge responsibility for the offense and did not even agree that he had broken the law. “His concept of Tanya was that she wasn’t a sister, that there was no sister type relationship, so she was fair game.” However, the YJC believed that “as the conference moved on, he expressed more and more remorse.”

When other people asked Zac questions, he would respond using strange voices (like “a robot,” according to Tanya) or by making “weird” faces. When asked why he had initiated sex with Tanya, Zac said “because I thought about that” (pointing to crotch) “instead of like that” (pointing to head). The YJC said it was difficult to manage the conference because “at times Zac seemed to be quite lucid, and then at times he would slip out and say something out of left field or quite over the top. So he’d flip flop between making headway in the conference to strong victim blaming.” Tanya thought that the YJC could have done a better job to “control” Zac and to allow her to speak more.

In light of Tanya’s parents’ judgments of her before the conference, their behavior at the conference was more supportive. The YJC said that “Nancy was highly effective as a victim

supporter. She was very balanced, and I thought she was quite caring to Zac.” Nick also showed support for Tanya, and was quick to reproach Zac when he said inappropriate things. “He was showing her support, that what his son had done was wrong, and there was no victim blaming at all.”

The YJC found that Tanya “was actually very reasonable at the conference and in fact, quite helpful.” She was “highly effective” in discussing the impact of the offense. “She was balanced. I don’t think she overstated things, and I think she [focused] on understandable impacts. She was talking about the effects on the family.” According to Tanya, however, she was fairly passive. “Everybody was talking to everybody else, and I’m just sitting there and I’m like listening.”

Apology and the agreement

Zac tried to apologize to Tanya and reached out to shake her hand, but she said the apology was insincere:

He was just saying all that stuff . . . to make, to make the people think that he’s trying to make it better, but he was just lying like he does. And [the police officer] said “Zac, if you’re going to say something, please try and say it truthfully.” She knew that he was lying.

Zac’s agreement contained these elements: (1) apologize to Tanya at the conference, (2) attend drug and alcohol counseling for 12 months, (3) attend a psychiatric consultation, to be arranged by his father, (4) purchase a card and gift for Tanya, including a hand written apology, (5) obey house rules when visiting his parents’ home, (6) not be with Tanya unless under the supervision of a parent, and (7) attend one session of Just Consequences (a program on why young people should avoid offending). Tanya felt that the conference agreement was unfair because Zac didn’t have to do very much. She wanted him to do community service, but felt that no one paid attention to this suggestion. She also felt that the part of the agreement which required Zac to buy her a gift was “stupid.” (For this element, Zac was to draw up a list of ten gift suggestions, and his step-mother was to select and approve a gift for Tanya.)

When discussing the agreement, Nick did not want Zac to do community service because of his poor mental health. The YJC suggested that Zac purchase a gift for Tanya because he knew that she felt he “should do something apart from counseling stuff.” Zac suggested gifts like roses or a teddy bear, but the police officer pointed out that he was not purchasing a gift for a girlfriend and needed to choose something appropriate. During this discussion, it came out that Tanya’s grandparents would be angry if they found out she had accepted a gift from Zac. Tanya didn’t want to tell her grandparents anything about the conference. They were upset with Zac and didn’t want her engaged in a process that could be seen as letting him off too easily.

Tanya was not satisfied with how her case was handled, and her dissatisfaction was directly related to her perception that the conference agreement was too lenient. “The whole thing [the agreement] he had to do was really crap.” Had the case gone to court, she assumed “it would have been a lot messier, but the agreement would have been a lot better.” She understood that she would be required to testify in court, but she preferred this path because

she assumed it would result in a harsher penalty. “I wanted him to do community service so, like, he could pick up rubbish on the roofs.”

Respect and safety

Tanya said the YJC and police officer treated her in a respectful manner. She felt safe at the conference because her social worker and mother were there. One problem Tanya raised was the length of the conference. It lasted over 3 hours, and she was very hungry, but there was no food available during the conference.

Post conference

Tanya was glad she decided to attend the conference because if she hadn’t, everyone would have talked about her without knowing what she thought. After the conference, Tanya felt “pretty mad” towards Zac, as compared to being “very angry” before it. Overall, her feelings towards him didn’t change because “he’s an idiot and a liar.” She still had a variety of negative psychological and emotional effects (e.g., fear of being alone, lack of self-confidence, among others) and said the conference was not at all helpful in dealing with them. However, she felt “a bit better” after she had seen him at the conference.

The YJC and Tanya had different views of the benefits of the conference: he saw more positives than she did. When asked if he thought the conference validated Tanya and her account of the victimization, he said it did. “That’s why it was helpful for her to be there. I think she made a good decision in coming because she did get all that validation. She got it strongly from Nick, she got it strongly from her mum . . . At various times and increasingly toward the end of the conference, from Zac himself.” In contrast, Tanya was “sort of disappointed, but it was OK. It wasn’t really a waste of time.” She left the conference feeling better because “I finally saw him, not that I was looking forward to it . . . We spoke about what happened and stuff.” Whereas the YJC thought that Tanya could see that Zac’s behavior at the conference was largely “rantings,” a sign of mental imbalance, Tanya’s view was less sanguine and more punitive. To her, although she saw Zac as “messed up,” this did not mitigate his responsibility for what he had done; consequently, Tanya believed he deserved to be punished.

The YJC believed that more was achieved in the conference than could have been achieved in court. “I think the victim was able to overcome more this way.” In contrast, Tanya wanted the case to go to court. She assumed, perhaps wrongly in light of our archival study, that Zac’s case would be proved in court. She also assumed, again perhaps wrongly, that had the case been proved, Zac would have received a more serious penalty.

Reprising problems and benefits through Tanya’s case

Let’s now consider the potential problems and benefits of RJ in light of Tanya’s experience.

Problems. Zac posed danger to Tanya’s safety and to others in the room. His father was threatening to hit Zac, as well. The power imbalance Tanya felt was not only between her and Zac, but also between her and the other adults in the room. Zac’s “power” was mixed: he attempted to intimidate Tanya, but he was perceived by her and others as mentally unstable. Nick’s father and the police officer checked him when he acted or spoke

inappropriately. Zac minimized his offending, and he engaged in victim-blaming, although his attitude and words were checked by his father, his step-mother, the YJC, and the police officer. Tanya assumed that Zac would lie about his behavior, but hoped that this would demonstrate to others “how messed up” his story was. She viewed his apology as insincere, but assumed that it would be. Her interests were not minimized by the other conference participants except in the agreement discussion. She initially didn’t want to participate in the conference because she didn’t want to see Zac, but afterwards, she was glad she was there to confront him.

Mixed loyalties were evident leading up to the conference with Tanya’s mother and step-father thinking the sexual activity was consensual. Tanya’s grandparents, on the other hand, were always behind her, even though they were not invited to the conference.⁴³ Tanya wanted Zac to be punished; indeed, she assumed he would be jailed. The conference outcomes were therefore too lenient in her opinion. We do not know if Zac viewed the conference as a “soft option.” His father appeared to be protecting him from Mary Street counseling or community service by suggesting that this would cause his son further stress.

Benefits. While Tanya was effective in describing the impact of the offense, she wanted to say more. From her perspective, she was marginally empowered by attending the conference. She was glad she was there to present her side of the story, and the conference wasn’t a waste of time, but it didn’t bring her the things she wanted. From the YJC’s perspective, Tanya’s account was validated by conference participants (except Zac); but for Tanya, it was simply “OK.” Zac did not take responsibility for what he did, but his stance was countered by others in the room.

It’s difficult to know if Zac’s erratic behavior would have been more restrained in the court; it’s likely his father would not have threatened violence. Tanya acknowledged that had the case gone to court, “it would have been messier.” She would have preferred this because she assumed that a court outcome would have been more punitive on Zac. Relationship repair between Zac and Tanya was not a goal, although Tanya was glad for the opportunity to confront Zac in a controlled environment. Relationship repair between Zac, his father, and his step-mother, and between Tanya, her mother, and her step-father, were goals, but it is unclear the degree to which they were realized. We do know that after the conference, Tanya’s mother took her out to lunch, and Tanya identified this as a positive step in rebuilding their relationship.

Discussion and implications

In the debates over the appropriateness of RJ for cases of sexual and family violence, a lack of evidence has fed speculation and polarized positions. The archival and in-depth studies are the first to explore the relative merits of court and conference in sexual assault cases and to document victims’ experience with the conference process. The archival study suggests conferences may outperform courts on things that matter to victims: an admission to offending and penalties that may do more to change an offender’s behavior. Our examination of Rosie’s and Tanya’s experiences with and judgments of the conference process adds another layer of understanding. Their cases challenge some of our own presuppositions about the problems and benefits of conferences.

Taking responsibility

Foremost are contested meanings of an offender's "taking responsibility for an offense" and "an admission." Eligibility for a conference requires that an offender has "admitted" some elements of the offense to the police, but he may deny other elements (as in Rosie's case) or not view what he did as wrong (as in Tanya's case). While Rick and Zac did not take full responsibility for their behavior, Rosie, Tanya, other conference participants, the YJC, and police officer challenged and checked their denials. One can interpret this in two ways: as a source of re-victimization of victims or as a validation of their accounts by everyone except the offender. These findings also raise questions about the character of an "admission" when offenders plead guilty in court. We suspect (but do not know) that the same level of denial may be present for these offenders. The difference is that denials and minimizations can be aired and then appropriately checked in a well-run conference, but there is no opportunity for this in a courtroom.

A victim's "interest in punishment"

A major theme for Rosie and Tanya was their desire to see stronger penalties imposed. Rosie wanted a considerable number of community service hours, and Tanya wanted to see Zac jailed, but would have accepted a punitive form of community service ("picking up rubbish") as acceptable. Both assumed that had the cases gone to court, Rick and Zac would have received tougher penalties; and both believed their views on penalty were not discussed adequately. Setting aside their erroneous assumption that their cases would definitely have been proved in court, several observations can be drawn about their views. First, contrary to the claims of RJ advocates, Cretney and Davis are correct in saying that a "victim has an interest in punishment," not just restitution and reparation, because punishment "can reassure the victim that he or she has public recognition and support."⁴⁴ RJ proponents are on weak grounds when they take a principled stand against punishment, although this debate has been stymied by differing definitions of punishment.⁴⁵ Second, like some critics of RJ, Rosie and Tanya assumed that court penalties would be tougher than those decided in a conference.⁴⁶ Our archival study suggests that such views are inaccurate, especially in South Australia, where the maximum length of time that a conference agreement can operate is longer than other Australian or New Zealand jurisdictions.⁴⁷ To be sure, the court has *the potential* to impose a severe sanction of detention time to serve, but the reality is that the Youth Court we studied rarely exercised this option. Third, while RJ proponents emphasize that victims "have a say" in penalty setting, when a victim wants harsher penalties than a facilitator or police officer think appropriate, the victim's views will be "listened to," but re-channeled. This is an appropriate role for a facilitator and police officer; in this jurisdiction, they are bound by law to ensure that a conference penalty is no higher than one imposed in court for a similar offense. Another dynamic arose in the conference process for these adolescent victims: compared to the adults present, Rosie and Tanya felt that they lacked authority and power. They "couldn't object" to what the adults were saying (Rosie) and "everyone was talking, and I was listening" (Tanya). The same experience holds for child and youth victims in court.⁴⁸

Individual differences and offense contexts

Rosie had a far more positive experience with the conference process than Tanya. She left the conference feeling "the world had been lifted off my shoulders," she was able to tell her story and be believed, she thought that Rick was remorseful for his actions, and she neither feared him nor was angry toward him after it was over. In contrast, Tanya remained angry and

frightened of Zac. While she was glad she attended the conference, it seemed to do little to assist her psychologically or emotionally. Rosie's circumstances and positive attitude suggests that she was able to use the conference process more effectively than Tanya.

While we would expect to see individual differences in the ways in which victims cope with and recover from crime, Rosie's and Tanya's cases also exemplify the differing impacts of sexual assault, which are dependent on the contexts and duration of the sexual violence. Rosie's sexual assault was a discrete incident, whereas Tanya was drawn into, manipulated, and groomed by her step-brother for sexual relations over a considerable period of time. There were elements of partner violence between Zac and Tanya as well: she feared Zac's potential for physical violence and said he had thrown her against a wall on at least one occasion. Her account of going to his trailer, then wanting to return to the house, and then being convinced to go back to the trailer suggest she was conflicted about what they were doing. She knew it was wrong and was afraid of him; she seemed to be both fearful of him and yet flattered by his attention. As a consequence, Tanya felt an even greater degree of shame and embarrassment than Rosie.

Another difficulty that Tanya faced, which Rosie did not, were her mother's and step-father's views that she had seduced Zac rather than being assaulted by him. Tanya left her parents' home to live with her grandparents; she did not have the consistent familial support that Rosie had leading up to the conference, and it took some courage for her to attend the conference, knowing that her main source of support, her grandparents, would not be present. In other research we have conducted on victim advocates' views of conferencing for gendered violence,⁴⁹ the advocates believed that strong support networks were required for conference cases to be successful. Tanya's experience underscores this point. It would have been preferable to have had another victim supporter at her conference (perhaps a sexual assault counselor), and to have had firmer messages reinforcing the inappropriateness of Zac's behavior (and even that of his father). These practice areas can and should be improved.⁵⁰

Conclusion

As advocates and critics debate the merits of RJ for sexual violence, we would do well to heed the complexity and variety of victims' experiences in the aftermath of crime, not just with the legal process, but also with everything surrounding it. When reading these cases, we come away less sure of the meaning of "re-victimization," "power imbalances," "victim empowerment," or "victim recovery." These are analytical short-cuts, and they are necessary for understanding and making sense of "victims' experiences," especially when drawing from detailed materials. However, as Rosie's and Tanya's cases show, these concepts are not static or settled experiences for victims, nor are they produced solely by the legal process. It is possible that had Rosie's and Tanya's cases gone to court and been proved, Rosie would have also judged the court process more positively than Tanya. In other words, what victims bring to a legal process (whether court or conference)--memories of the assault and its contexts, their resilience and outlook, and other people who surround the case--all of these things may be just as consequential as the legal process itself.

We can be more sure that a victim's account of the offense and its impact can be brought forward in a conference in a way not currently possible in court. We also know that a key source of victim validation and vindication is an offender's admission of wrong doing. When a case is prosecuted in court, victims cannot be sure that an offender will be convicted (or

plead guilty) of an offense; the probabilities of conviction (and associated victim validation) range from 40 to 80 percent of adult cases, and just over 50 percent in the South Australian Youth Court. A case can only go to conference if an offender has admitted that he has committed an offense and is willing to accept responsibility for his behavior. While such admissions may later be contested by an offender, they are checked and challenged by conference participants and professionals. This is the power of the conference process in cases of sexual assault, although it is dependent on the participants' and the professionals' modes of intervention. Yet, this fragile power may be one way of redefining the realities of rape and sexual assault.

¹ We thank the members of the South Australian Family Conference Team, the South Australian Police, and the South Australian Courts Administration Authority for their assistance and support in conducting this research; and Brigitte Bouhours for research assistance. An Australian Research Council grant and Australian-American Fulbright Fellowship provided funding for the research.

² Throughout this article we use the term sexual assault to be inclusive of rape and other forms of sexual violence; we use the term victims rather than survivors; and we use the male pronoun for offenders, and the female pronoun for victims of sexual assault.

³ Kelly, Liz. 2001. *Routes to (In)justice: A Research Review on the Reporting, Investigation and Prosecution of Rape Cases*. London, UK: Her Majesty Crown Prosecution Services Inspectorates (HMCPSI), 9-10, lists and discusses the reasons for reporting and not reporting sexual assault, concluding that the "closer the circumstances are to the real rape template, the greater the likelihood that it will be reported."

⁴ Ibid., 43. The real rape template has these elements: committed by a stranger, outdoors, with a weapon, and with victim injury. By contrast, these "conditions are rare" for the reality of most rape victims (5). See also Kelly, Liz and Jill Radford. 1996. "'Nothing Really Happened': The Invalidation of Women's Experiences of Sexual Violence." Pp. 19-33 in *Women, Violence, and Male Power*, edited by M. Hester, L. Kelly, and J. Radford. Philadelphia, PA: Open University Press, 32; Lees, Sue. 1996. "Unreasonable Doubts: The Outcomes of Rape Trials." Pp. 99-115 in *Women, Violence and Male Power*, edited by M. Hester, L. Kelly, and J. Radford. Philadelphia, PA: Open University Press, 112.

⁵ Smart, Carol. 1989. *Feminism and the Power of Law*. London, UK: Routledge, 161 (disqualification) and 26 (pursue non-legal sites). See also Heath, Mary and Ngaire Naffine. 1994. "Men's Needs and Women's Desires: Feminist Dilemmas about Rape Law 'Reform'." *The Australian Feminist Law Journal* 3:30-52, on this point.

⁶ Carrington, Kerry. 1997. "Governing Sexual Violence: Criminalisation and Citizenship." Pp. 219-231 in *Women's Encounters with Violence: Australian Experiences*, edited by S. Cook and J. Bessant. London, UK: Sage, 228-231. See also Carrington, Kerry and Paul Watson. 1996. "Policing Sexual Violence: Feminism, Criminal Justice and Governmentality." *International Journal of the Sociology of Law* 24:253-272. Such positive images and practices for male sexuality can be joined with those for female sexuality. See Lacey, Nicola. 1998. "Unspeakable Subjects, Impossible Rights: Sexuality, Integrity, and Criminal Law." *Canadian Journal of Law and Jurisprudence* 11(1):47-68.

⁷ Braithwaite, John and Kathleen Daly. 1994. "Masculinities, Violence and Communitarian Control." Pp. 189-213 in *Just Boys Doing Business? Men, Masculinities, and Crime*, edited by T. Newburn and E.A. Stanko. London, UK: Routledge; Daly, Kathleen. 2002. "Sexual Assault and Restorative Justice." Pp. 62-88 in *Restorative Justice and Family Violence*, edited by H. Strang and J. Braithwaite. Cambridge, UK: Cambridge University Press; Hudson, Barbara. 1998. "Restorative Justice: The Challenge of Sexual and Racial Violence." *Law and Society* 25:237-256; -----, 2002. "Restorative Justice and Gendered Violence: Diversion or Effective Justice?" *British Journal of Criminology* 42:616-634; Koss, Mary. 2000. "Blame, Shame, and Community: Justice Responses to Violence against Women." *American Psychologist* 55:1332-1343; Martin, Dianne L. 1998. "Retribution Revisited: A Reconsideration of Feminist Criminal Law Reform Strategies." *Osgoode Hall Law Journal* 36:151-188; Mills, Linda G. 2003. *Insult to Injury: Rethinking our Responses to Intimate Abuse*. Princeton, NJ: Princeton University Press; Morris, Allison and Loraine Gelsthorpe. 2000. "Re-visioning Men's Violence Against Female Partners." *Howard Journal of Criminal Justice* 39:412-428. Presser, Lois and Emily Gaarder. 2000. "Can Restorative Justice Reduce Battering? Some Preliminary Considerations." *Social Justice* 27(1):175-195.

⁸ A key element in any RJ practice is that an offender has admitted to an offense; thus the focus is on the penalty, not fact finding phase of the criminal process.

⁹ Crime and Misconduct Commission (CMC). 2003. *Seeking Justice: An Inquiry into the Handling of Sexual Offences by the Criminal Justice System*. Brisbane, Australia: Crime and Misconduct Commission, Queensland, 149-156. See also Kelly, *Routes to (In)justice*, 37, on sexual violence courts.

¹⁰ For exceptions, see Hopkins, Quince C., Mary Koss, and Karen J. Bachar. 2004. "Restorative Justice and Sex Offenses: A Challenge for Feminist Theory." *Violence Against Women*, forthcoming, for Tucson RJ pilot in adult sexual assault cases, and Lajeunesse, Therese. 1996. *Community Holistic Circle Healing, in Hollow Water Manitoba: An Evaluation*. Ottawa, Canada: Solicitor General Canada, Ministry Secretariat, for a Canadian First Nations response to sexual abuse of women and children (on file with the senior author).

¹¹ For an introduction to the RJ literature, see Johnstone, Gerry, ed. 2002. *Restorative Justice: Ideas, Values, Debates*. Cullompton, UK: Willan Publishing and -----, 2003. *A Restorative Justice Reader: Texts, Sources, Context*. Cullompton, UK: Willan Publishing; and Morris, Allison and Gabrielle Maxwell, eds. 2001. *Restorative Justice for Juveniles: Conferencing, Mediation and Circles*. Oxford, UK: Hart Publishing. One major benefit for an offender of court diversion to conference is that no conviction is noted.

¹² Kelly, *Routes to (In)justice*, 16; Koss, Mary. 1995. "Hidden Rape: Sexual Aggression and Victimization in a National Sample of Students in Higher Education." Pp. 35-50 in *Rape and Society: Readings on the Problem of Sexual Assault*, edited by P. Searles and R.J. Berger. Boulder, CO: Westview Press, 36; Lees, *Unreasonable Doubts*, 101-102.

¹³ Statistical data for this outcome, prosecution, and conviction come from sources in England and Wales, the United States, and Australia. For England and Wales, they are Kelly, *Routes to (In)justice*, 15; Gregory, Jeanne and Sue Lees. 1996. "Attrition in Rape and Sexual Assault Cases." *British Journal of Criminology* 36:1-17, 14; and Lea, Susan, Ursula Lanvers, and Steve Shaw. 2003. "Attrition in Rape Cases." *British Journal of Criminology* 43:583-599, 595; for the United States, Frazier, Patricia A. and Beth Haney. 1996. "Sexual Assault Cases

in the Legal System: Police, Prosecutor, and Victim Perspectives." *Law and Human Behavior* 20:607-628, 608-609; and for Australia, CMC, *Seeking Justice*, 58, and Wundersitz, Joy. 2003. "Child Victims of Sexual Offences: Tracking from Police Incident Report to Finalisation in Court - Briefing Paper. " Adelaide: Office of Crime Statistics and Research, 9. "Unfounded" and "no crimed" are US and UK police terms, respectively, for dropping cases.

¹⁴ Children and young people are those under the age of 17 or 18, depending on the jurisdiction. It is of some interest to observe that in analyzing victimization, most researchers use "child," whereas in analyzing offending, most use "young people" (to refer to those 10 years of age or older).

¹⁵ Brownlie, Julie. 2003. "'An Unsolvable Justice Problem'? Punishing Young People's Sexual Violence." *Journal of Law and Society* 30:506-531, 511-514; CMC, *Seeking Justice*, 59 on child prosecution in South Australia; Hudson, *RJ and Gendered Violence*, 622. For contrary view, see Kelly, *Routes to (In)justice*, 16, "cases involving children [as victims] are more likely to be prosecuted and to result in conviction. "

¹⁶ Frohmann, Lisa. 1991. "Discrediting Victims' Allegations of Sexual Assault: Prosecutorial Accounts of Case Rejections." *Social Problems* 38:213-226; Spohn, Cassia and David Holleran. 2001. "Prosecuting Sexual Assault: A Comparison of Charging Decisions in Sexual Assault Cases Involving Strangers, Acquaintances, and Intimate Partners." *Justice Quarterly* 18:651-688.

¹⁷ Wundersitz, *Child Victims of Sexual Offences*, 9.

¹⁸ Our calculations assume that the 22-23 percent of unfinalized cases in each court will result in convictions (or case proved). Overall, convictions (or case proved) were 15 percent of incidents reported to police.

¹⁹ Koss, *Blame, Shame, and Community*, 1335.

²⁰ Ibid. See also Kelly, *Routes to (In)justice*, 30-38.

²¹ New South Wales Department for Women. 1996. *Heroines of Fortitude: The Experiences of Women in Court as Victims of Sexual Assault*. Woolloomooloo, Australia: Department for Women, New South Wales Government.

²² Eastwood, Christine. 2003. "The Experiences of Child Complainants of Sexual Abuse in the Criminal Justice System." *Trends & Issues in Crime and Criminal Justice* 250, 2. Canberra, Australia: Australian Institute of Criminology, 2. See also the larger report by Eastwood, Christine and Wendy Patton. 2002. *The Experiences of Child Complainants of Sexual Abuse in the Criminal Justice System*. Canberra, Australia: Criminology Research Council.

²³ Eastwood and Patton, *Experiences of Child Complainants*, 34.

²⁴ Morgan, Jane and Lucia Zedner. 1992. *Child Victims: Crime, Impact, and Criminal Justice*. Oxford, UK: Clarendon Press, 101. See also 116-117 for the problems that child victims of sex abuse face in the prosecution and sentencing phases of the court process.

²⁵ Liz Kelly. 2002. "Remembering the Point: A Feminist Perspective on Children's Evidence." Pp. 361-376 in *Children's Testimony: A Handbook of Psychological Research and Forensic Practice*, edited by H. Westcott, G. Davies, and R. Bull. Chichester, UK: John Wiley & Sons, 375.

²⁶ For example, all but one contribution to the Strang, Heather and John Braithwaite, eds. 2002. *Restorative Justice and Family Violence*. Cambridge, UK: Cambridge University Press volume (Daly) analyzed RJ and partner, domestic, or family violence.

²⁷ Lewis, Ruth, R. Emerson Dobash, Russell P. Dobash, and Kate Cavanagh. 2001. "Law's Progressive Potential: The Value of Engagement for the Law for Domestic Violence." *Social and Legal Studies* 10:105-130; Kelly and Radford, *Nothing Really Happened*, 31 (critiques of diversion). Presser and Gaarder, *Can RJ Reduce Battering?* (comparing mediation and RJ).

²⁸ Note that in the string of citations in this and the next note, problems and benefits can feature in any one article, and advocates and critics of RJ may identify both benefits and problems; it is a matter of emphasis. Busch, Ruth. 2002. "Domestic Violence and Restorative Justice Initiatives: Who Pays if We Get it Wrong?" Pp. 223-248 in *Restorative Justice and Family Violence*, edited by H. Strang and J. Braithwaite. Cambridge, UK: Cambridge University Press; Coker, Donna. 1999. "Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking." *UCLA Law Review* 47:1-111; -----, 2002. "Transformative Justice: Anti-Subordination Processes in Cases of Domestic Violence." Pp. 128-152 in *Restorative Justice and Family Violence*, edited by H. Strang and J. Braithwaite. Cambridge, UK: Cambridge University Press; Lewis et al., *Law's Progressive Potential*; Shapland, Joanna. 2000. "Victims and Criminal Justice: Creating Responsible Criminal Justice Agencies." Pp. 147-164 in *Integrating a Victim Perspective within Criminal Justice: International Debates*, edited by A. Crawford and J. Goodey. Aldershot, UK: Ashgate. Stubbs, Julie. 1997. "Shame, Defiance, and Violence Against Women: A Critical Analysis of 'Communitarian' Conferencing." Pp. 109-126 in *Women's Encounters with Violence: Australian Experiences*, edited by S. Cook and J. Bessant. London, UK: Sage; -----, 2002. "Domestic Violence and Women's Safety: Feminist Challenges to Restorative Justice." Pp. 42-61 in *Restorative Justice and Family Violence*, edited by H. Strang and J. Braithwaite. Cambridge, UK: Cambridge University Press and -----, 2004. *Restorative Justice, Domestic Violence and Family Violence*. Issues Paper 9. Sydney, Australia: Australian Domestic and Family Violence Clearinghouse (<http://www.austdvclearinghouse.unsw.edu.au/publications.htm>).

²⁹ Braithwaite and Daly, *Masculinities, Violence and Communitarian Control*; Daly, *Sexual Assault and RJ*; Hudson, *The Challenge of Sexual and Racial Violence, RJ and Gendered Violence*; Koss, *Blame, Shame, and Community*; Martin, *Retribution Revisited*; Mills, *Insult to Injury*; Morris and Gelsthorpe, *Re-visioning Men's Violence*; Presser and Gaarder, *Can RJ Reduce Battering?*

³⁰ Erez, Edna. 2000. "Integrating a Victim Perspective in Criminal Justice through Victim Impact Statements." Pp. 165-184, in *Integrating a Victim Perspective within Criminal Justice: International Debates*, edited by A. Crawford and J. Goodey. Aldershot, UK: Ashgate, 178.

³¹ Morgan and Zedner, *Child Victims*, 115, citing arguments for prosecution, when it is successful, but noting it "is always fraught with difficulties."

³² See Daly, Kathleen, Sarah Curtis-Fawley, and Brigitte Bouhours. 2003a. *Sexual Offence Cases Finalised in Court, by Conference, and by Formal Caution in South Australia for Young Offenders, 1995-2001: Final Report*. Brisbane, Australia: School of Criminology and Criminal Justice, Griffith University and ----- 2003b. *SAJJ-CJ Technical Report No. 3: Archival Study of Sexual Offence Cases Disposed of in Youth Court and by Conference and Formal Caution*. Brisbane, Australia: School of Criminology and Criminal Justice, Griffith University for major findings and study methods (<http://www.griffith.edu.au/school/ccj/kdaly.html>).

³³ An additional 4 percent were proved of a non-sexual offense.

³⁴ This was caused by guilty pleas to less serious offenses and the more serious cases being dismissed or withdrawn.

³⁵ Coker, *Enhancing Autonomy*, 85.

³⁶ The Mary Street Adolescent Sexual Abuse Prevention Programme "promotes safety in families and communities by helping young people to stop sexual abuse and sexual harassment of others." Young people charged with sexual offenses can receive counseling before or after a conference or sentencing. Without a treatment program like Mary Street in place, we would hesitate to support conferencing for sex offending. Further information at website address <http://www.wch.sa.gov.au/dmh/asapp.html> and see also summary in Daly et al., *SAJJ-CJ Technical Report No. 3*, 45.

³⁷ During September to December 2001, the research group was based in Adelaide, and we were able to conduct this study as cases were referred to the Family Conference Team.

³⁸ For the remaining cases, the average victim age was 6 years; for these cases, we interviewed a victim representative, typically a parent or close family member.

³⁹ Rosie had lived with her grandparents since she was an infant.

⁴⁰ From the archival study, the span of time from report to the police to holding a conference ranged from .5 to 11.2 months; thus, this case is well outside the range for conference cases.

⁴¹ Konradi, Amanda and Tina Burger. 2000. "Having the Last Word." *Violence Against Women* 6:351-395, 365, find that there are three sets of reasons victims give for participating in the sentencing process: to influence the outcome, to tell their story and monitor the process, and to overcome negative psychological effects of the assault. See also Erez, *Integrating a Victim Perspective*, 175-178.

⁴² File information is not precise on dates. It appears that the first sexual contact began in July, escalated to the trailer sex in December and ending in March or April. The disclosure and police apprehension occurred in July, and the conference was held in November.

⁴³ The YJC was concerned that their presence would create even greater conflict and animosity in the conference.

⁴⁴ Cretney, Antonia, and Gwynn Davis. 1995. *Punishing Violence*. London, UK: Routledge, 178. This "interest in punishment" is also evident in Konradi and Burger's, *Having the Last*

Word, study of rape victims' reasons for participating in sentencing. Ten of the 25 victims said "they wanted substantial prison time for their assailants" (366).

⁴⁵ For overviews and debate, see Daly, Kathleen. 2000. "Revisiting the Relationship Between Retributive and Restorative Justice." Pp. 33-54 in *Restorative Justice: Philosophy to Practice*, edited by H. Strang and J. Braithwaite. Dartmouth, UK: Ashgate; Duff, Anthony R. 2002. "Restorative Punishment and Punitive Restoration." Pp. 82-100 in *Restorative Justice and the Law*, edited by L. Walgrave. Cullompton, UK: Willan Publishing; Walgrave, Lode. 2002. "Restorative Justice and the Law: Socio-Ethical and Juridical Foundations for a Systemic Approach." Pp. 191-218 in *Restorative Justice and the Law*, edited by L. Walgrave. Cullompton, UK: Willan Publishing, 197-202. The importance of punishment for sexual assault victims is discussed in Daly, *Sexual Assault and RJ*.

⁴⁶ For example, Kelly and Radford, *Nothing Really Happened*, 31, discuss the problems of "diversion" in cases of domestic violence and incest. They say that "diversion suggests that 'nothing really happened' or that 'something which happened' is less deserving of legal sanction than other offences." This article, first published in 1990, was written before the advent of RJ, but other critics such as Lewis et al., *Law's Progressive Potential*, continue to assume diversion from court will mean less harsh penalties. See Hudson, *RJ and Gendered Violence*, for a thoughtful review.

⁴⁷ The maximum length of an agreement in South Australia is 12 months; in other jurisdictions, it is normally no more than 6 months. The maximum length is important when considering the viability and effectiveness of treatment programs. See Daly, Kathleen, Michele Venables, Liz Mumford, Mary McKenna, and Jane Christie-Johnston. 1998. *SAJJ Technical Report No. 1: Project Overview and Research Instruments in Year 1*. Brisbane, Australia: School of Criminology and Criminal Justice, Griffith University, 7, comparing maximum penalties that can be imposed in conference and court in South Australia (<http://www.griffith.edu.au/school/ccj/kdaly.html>).

⁴⁸ Eastwood, *Experiences of Child Complainants*; Morgan and Zedner, *Child Victims*.

⁴⁹ Curtis-Fawley, Sarah and Kathleen Daly. 2004. "Gendered Violence and Restorative Justice: The Views of Victim Advocates." *Violence Against Women*, forthcoming.

⁵⁰ In fairness to the South Australian facilitators, we note that they have no power to challenge a police referral to conference, if they believe the case does not have the necessary elements to make a conference successful. In other Australian jurisdictions, such as New South Wales and Queensland, facilitators can decide that a case is not appropriate for a conference.