

A Tale of Two Studies: Restorative Justice from a Victim's Perspective

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Chapter 8

A Tale of Two Studies: Restorative Justice from a Victim's Perspective

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Abstract

This chapter reviews two studies on restorative justice that I have conducted in the past several years. One examines variability in the conference process, and the second compares outcomes for court and conference cases. The studies show the strengths and weaknesses of restorative justice from a victim's perspective. The conference-only study demonstrates the limits of restorative justice in helping victims to recover from crime, and it suggests that some victims are more able to engage in a restorative justice process than others. The conference-court comparison demonstrates the limits of court in attempting to adjudicate and sanction crime, and the court's failure to vindicate victims. Restorative justice advocates and critics must grasp the significance and 'truth' of both studies. Advocates should adopt more realistic expectations for victims in a restorative process, and critics should be mindful of the court's limited ability to vindicate victims.

Introduction

This chapter offers a broad sweep of what I am learning about victims' experiences with court and conference processes, drawing from two major projects. The first is the South Australia Juvenile Justice (SAJJ) Research on Conferencing Project, in which my research group and I observed 89 youth justice conferences and interviewed the victims and offenders associated with the conferences in 1998, and again, in 1999. The second is the Sexual Assault Archival Study (SAAS), in which my research group and I gathered documentation for all youth sexual offence cases finalized over a 6.5-year period (1995-2001) in court and by conference and formal caution, a total of 387 cases. Together, these studies show the strengths and weaknesses of restorative justice (RJ) from a victim's perspective. The conference-only study identifies variability in the conference process, and it reveals the limits of RJ to assist victims in recovering from crime. The conference-court comparison reveals the limits of the court process in responding to sexual assault, especially from a victim's perspective. RJ advocates and critics must grasp the significance and 'truth' of both studies. Advocates should adopt more realistic expectations for victims in a restorative process, and critics should be mindful of the court's limited ability to vindicate victims.

Study One: South Australia Juvenile Justice (SAJJ) Research on Conferencing

SAJJ Methodology

SAJJ had two waves of data collection, in 1998 and 1999 (see Daly, Venables, McKenna, Mumford, and Christie-Johnston 1998; Daly 2001a for project overview, instruments used in 1998 and 1999, and the basis for instrument construction).² In 1998, the SAJJ group observed 89 conferences that were held during a 12-week period in the capital city (Adelaide) and in two country towns. The sample was selected by offence category: eligible offences were violent crimes and property offences having individual victims or community-organizational victims, such as schools or housing trusts. Excluded were shoplifting cases, drug cases, and public order offences. Here are selected features of the 89 conferences and the primary victims³:

- 44 per cent dealt with violence (mainly assaults) and 56 per cent, property offences (mainly breaking and entering, property damage, and theft of a motor vehicle).
- In 67 per cent, the victim was a person; 19 per cent of victims were organizations, and 14 per cent were persons victimized in their occupational role, or the incident victimized a person as well as his or her organization.
- 74 per cent of conferences had a victim (or a family member representing the victim) present, and an additional 6 per cent had a representative from the Victim Support Service.
- In 28 per cent, the offence victims were under 18; 51 per cent of victims were male; 49 per cent, female.
- Of violence victims, 35 per cent needed to see a doctor.
- Of property victims, the total out-of-pocket expenses (that is, after insurance) ranged from none to \$6,000; the mean was over \$900 and the median was \$400.

For each conference, the police officer and coordinator completed a self-administered survey, and a SAJJ researcher completed a detailed observation instrument. When a conference had more than one offender, the observations focused on a designated primary offender. Our aim was to interview all the offenders (N=107) and primary victims associated with the conferences (N=89). Of the 196 offenders and victims, we interviewed 172 (or 88 per cent) in 1998; of that group, 94 per cent were again interviewed in 1999. Both the victims who attended the conference ('conference victims') and those who did not ('non-conference victims') were interviewed. The interview had open- and close-ended items, although the findings presented here rely on the quantitative items. In addition to the observational and interview data, the project analyzed official police data on the offending histories, pre- and post-conference for the 107 offenders.

Established SAJJ Findings

In previous publications (Daly 2001b, 2002a, 2003a, 2003b) analyzing the SAJJ data, I have presented four key findings, which I highlight here.⁴

Procedural justice. The SAJJ observers, conference participants (offender and victim) and professionals (coordinator and police officer) judged conferences to be very high on all indicators of procedural justice. As measured by variables such as being treated fairly and with respect, having a say, and participating in the outcome, procedural justice was present in 80 to 95 per cent of conferences. Conference practices in this jurisdiction (and others studied in Australia and New Zealand) definitely conform to the ideals of procedural justice.

Restorativeness. Compared to the high levels of procedural justice, there was relatively less evidence of restorativeness (present in 30 to 60 per cent of conferences, depending on the variable). The variables tapping restorativeness included the degree to which the offender was remorseful, spontaneously apologized to the victim, understood the impact of the crime on the victim; the degree to which victims understood the offender's situation; and the extent of positive movement between the offender, victim, or their supporters. Although conferences received high marks for procedural fairness and victim and offender participation, it was relatively more difficult for victims and offenders to resolve their differences or to find common ground, at least at the conference itself.

Capacities of victims and offenders. There were limits on offenders' interests to repair the harm and on victims' capacities to see offenders in a positive light. From the 1998 interviews, we learned that the conference process was novel for offenders and victims, and that some victims found it difficult to be generous to offenders. Just under half (47 per cent) of the offenders said they had given any degree of thought to what they would do or say to the victim at the conference, and half said that the victim's story had any degree of effect on them. More victims (66 per cent) had given thought to what they would say to offenders at the conference, but a minority (38 per cent) said that the offender's account of the offence had an impact on them.

In the 1999 interviews, the apology process was explored in detail. We found that while most victims thought the offender's apology was insincere, most offenders said they apologized because they really were sorry. For a subset of cases in 1999, in which the victims were present at the conference and the primary offender and victim were interviewed (N=47), 61 per cent of offenders said they were really sorry, but just 27 per cent of victims thought that offenders were really sorry. I pursued this mismatch of perception by drawing on the conference observations, interview material, and police incident reports for the victims and primary offenders to make inferences about the apology process for all 89 conferences. The results reinforce the findings above, revealing that communication failure and mixed signals are present when apologies are made and received. Such communication gaps are overlaid by the variable degree to which offenders are in fact sorry for what they have done. In 34 per cent of cases, the

offenders and victims agreed (or were in partial agreement) that the offender was sorry, and in 27 per cent, the offenders and victims definitely agreed that the offender was not sorry. For 30 per cent, there was a perceptual mismatch: the offenders were not sorry, but the victims thought they were (12 per cent); or the offenders were sorry, but the victims did not think so (18 per cent). For the remaining 8 per cent, it was not possible to determine. This is but one example of the gaps that exist between the ideals of RJ and what actually occurs in a conference process in a high-volume jurisdiction (see Daly 2002a, 2003b).

High and low conferences. Does it matter if a conference is a 'good one' or not? The SAJJ data suggest it does.⁵ To capture the varying degrees of restorativeness, along with the differing interests and capacities of victims and offenders to see each other in positive and other-regarding ways, I devised a global conference measure. It combined the SAJJ observer's judgment of the degree to which a conference 'ended on a high, a positive note of repair and good will' with one that rated the conference on a 5-point scale ranging from poor to exceptional. The first measure depicted the degree of movement of victims and offenders (or their supporters) toward each other, and the second, elements of procedural justice and coordinator skill in managing the conference. This global conference measure had four levels: ended on a high and rated very highly (10 per cent), ended on a high and rated good (40 per cent), did not end on a high and a fair or good rating (20 per cent), and did not end on a high and a fair or poor rating (30 per cent). I collapsed these into two groups: high/good (N=45) and low/mixed (N=44). For ease of presentation, I term the conferences 'high' and 'low'.

Bivariate analyses showed no association of the global conference measure with characteristics of the offence (including the victim-offender relationship, type of offence, type of victim, and number of offenders in the whole offence); or with other conference measures (such as the number of people attending, whether the victim was present, or the degree of emotionality present (such as participants crying). Although these characteristics of offences and conferences were unrelated to the high/low conference measure, the many indicators of procedural justice, restorativeness, and coordinator skill were: all of the 'restorative' behaviours and movements one ideally hopes to see in conferences⁶ occurred to a significantly greater degree in the high than the low conferences. The measure therefore has excellent construct validity (see Daly 2003b: 29-36).

Does it matter, then, if a conference is high or low for how offenders and victims viewed the conference experience and its impact? The answer is yes, it does matter. For offenders interviewed in 1998, significantly higher proportions in the high conferences said that they felt sorry for the victim, and that what happened in the conference would encourage them to obey the law. Significantly lower proportions of those in the high conferences re-offended during an 8-12 month period after the conference.⁷ For victims interviewed in 1998, significantly higher proportions in high conferences were less frightened of offenders and held less negative attitudes toward them; they were more satisfied with how their case was handled and less likely to see the conference as a waste of time. In 1999, they were more likely to say the conference was worthwhile. These

findings suggest that the theory of RJ is correct: when conferences proceed in optimal ways, they have more favourable results for victims and offenders.

Despite this, a puzzling set of findings emerged for victim recovery. In 1998, high conferences were more likely to be associated with victims saying that the conference was helpful in overcoming emotional or psychological effects of crime. But when we asked victims in 1999 if they had fully recovered from the incident or not, high conferences were not related to their recovery. One interpretation is that the conference process may have immediate, positive effects on victims, but over time other elements may make more of a difference.

In general, although high conferences are associated with increased levels of positive 'effects' for victims and offenders, I would caution against making causal claims about such effects. One reason is that conferences succeed or fail (or are high or low) because victims and offenders come to them with varied degrees of readiness to make the process work. Victims and offenders are not equally disposed to be restorative toward each other, to listen to each other, or to be willing to repair harms. Some come to conferences with negative orientations and closed minds that cannot be changed, and others come with positive orientations and open minds.

New SAJJ Findings: Victim Distress and Offence Recovery

The established SAJJ findings centred on the variable capacities and interests of offenders and victims to think and act restoratively in the conference process itself. However, a major element was missing: the differential effects of crimes on victims (e.g., how deeply the victimization touches and distresses them), and how this may structure victims' orientations to offenders and the conference process. Further, it was unclear why victim recovery in 1999 was not related to the global conference measure. Was it because high conferences had temporary positive effects, which were not enduring? Or, was the process of victim recovery related to other phenomena? To address these questions, I carried out analyses of the degree of victim distress from the offence as indicated from their interviews in 1998,⁸ their recovery as indicated from their interviews in 1999, and the relationship between the two.

Victim distress. In the 1998 interviews, we asked the conference victims if they had experienced any non-material harm as a result of the offence, and to key their answer to the period of time after the incident but before the conference.⁹ We asked: During that time, did you suffer from any of the following as a result of the offence?

- fear of being alone?
- sleeplessness or nightmares?
- general health problems (headaches, physical pain, trouble breathing or walking)?
- worry about the security of your property?
- general increase in suspicion or distrust?
- sensitivity to particular sounds or noises?
- loss of self-confidence?

- loss of self-esteem?
- other problems?

The respondent answered 'yes' or 'no' after each item was mentioned. I constructed a scale by assigning a one for each 'yes', and it initially ranged from zero to nine. I then collapsed the nine categories into four, and included a companion 'distress' item asked of the victims who didn't attend the conference.¹⁰ Of the conference and non-conference victims interviewed in 1998, 28 per cent reported no distress; 12.5 per cent, low distress; 36.5 per cent, moderate distress; and 23 per cent, high distress. I collapsed the four categories in two, the no/low distress (40.5 per cent) and the moderate/high distress (59.5 per cent),¹¹ and then analyzed the relationship of the two groups to other measures. For ease of presentation, I use the terms 'low' distress (or non-distressed) victims to refer to those in the no and low distress groups, and 'high' distress (or distressed) victims to refer to those in the moderate and high distress groups. Readers will appreciate that these terms are a shorthand way (albeit one-dimensional and infelicitous) to depict and compare victims' experiences in the aftermath of crime.

The high distress group was significantly more likely to be composed of female victims, personal crime victims (including those victimized in their occupational role or at their organizational workplace), violent offences, and victims and offenders who were family members or well known to each other.¹² Put another way, female victims were more likely to be distressed (69 per cent) than male (50 per cent); personal crime victims (70 per cent) more than organizational (19 per cent), victims of violence (72 per cent) more than property (49 per cent), and victims of family members or those well known (80 per cent) more than causal acquaintances or those known by sight (53 per cent) or strangers (also 53 per cent). The offences most likely to cause victims distress were assaults on family members or teachers (89 per cent); adolescent punch-ups (76 per cent); and breaking into, stealing, or damaging personal property (75 per cent). By comparison, the offences least likely to cause victims distress were breaking into, stealing, or damaging organizational property (19 per cent) and stranger assault (33 per cent). Theft of bikes or cars was midway (55 per cent of victims indicated distress).¹³

For the global conference measure, high conferences were just as likely to be composed of low distress (51 per cent) as high distress (49 per cent) victims; but the low conferences were more likely to be composed of high distress victims (72 per cent). Put another way, whereas 45 per cent of high distress victims were in high conferences, nearly 70 per cent of low distress victims were. This finding is instructive: it suggests that the capacity of victims and offenders to engage in restorative behaviour is increased when victims are less distressed in the aftermath of victimization. Additionally, I found that a higher proportion of distressed (27 per cent) than non-distressed (4 per cent) victims left the conference feeling upset by what the offender or supporters said, and a higher proportion of distressed (62 per cent) than non-distressed (17 per cent) victims were angry toward the offender after the conference. Remarkably, it was only the high distress victims who remained frightened of the offender after the conference: over 40 per cent were, compared to none of the low distress victims. It is not surprising, then, that of the conference victims indicating any distress (N=47 ranging from low, moderate, to

high), just under half (47 per cent) said the conference was not at all helpful in overcoming these difficulties; 19 per cent said the conference was helpful or very helpful, and 34 per cent said it was a little helpful. Depending on how one decides to interpret this finding (see Morris 2002), we could say (less generously) that a conference was helpful for about 20 per cent of victims with any distress, or (more generously) that it was a little helpful or helpful for over half of these victims (53 per cent). Although most conference victims said they would recommend conferencing to other victims of crime (87 per cent), the per cent was greater for low distress (96 per cent) than high distress (81 per cent) victims. And although most victims (73 per cent) were satisfied with how their case was handled, satisfaction was greater for low distress (91 per cent) than high distress (62 per cent) victims.

Victims' distress was significantly linked to their attitude toward offenders and their interest to find common ground. For the 1998 conference victims, 43 per cent of high distress victims had negative attitudes toward the offender after the conference, but the corresponding per cent for low distress victims was just 8 per cent. And while 71 per cent of low distress victims had positive attitudes toward the offender after the conference, 49 per cent of high distress victims did. We asked the conference victims, 'When you look back at the conference and your feelings about what happened, can you tell me which was more important to you, that you be treated fairly or that you find common ground with the offender?' Most distressed victims said it was more important to them to be treated fairly (67 per cent) than to find common ground with offenders; whereas most non-distressed victims (71 per cent) said it was more important to them to find common ground.¹⁴ This is a key finding. What crime victims hope to achieve from a conference, that is, whether to seek mutual understanding with offenders (other-regarding victims) or to be treated well as individuals (self-regarding), is related to the character and 'experience' of their victimization.¹⁵ The victims of the adolescent punch-ups and assaults on teachers and family members were split on their other-regarding interests: half were interested in finding common ground, and half were not.¹⁶ For the personal property crime victims (theft and damage, including cars and bikes), about one-fifth were interested in finding common ground. Two-thirds of the low distress organizational victims were interested to find common ground with the offender, but this orientation was absent for the small number of high distress organizational victims. All of the stranger assault victims were interested to find common ground. Thus, victims' other- and self-regarding interests and orientations varied by the offence and the degree of distress the victim felt. Organizational and stranger assault victims were most likely to be other-regarding, that is, to want to find common ground; personal property crime victims were least likely; and adolescent, family, and teacher assault victims fell in between.

When absorbing these results for the first time, they are simultaneously surprising and expected. They are surprising because RJ scholars have not discussed the differing effects of crime (and types of crimes) on victims, and how this affects victims' abilities and interests to engage in an RJ process. I had not anticipated these results, but now see that they are a crucial area for further investigation. And although with the benefit of hindsight, the results may seem obvious, they also challenge the RJ field in many ways.

For example, the SAJJ findings show that it is misleading to compare violence and property offences because some property victims (personal property) are more highly distressed than others (organizational property). Moreover, while assaults by adolescents on their peers, family members, and teachers cause victims high distress, those on strangers are far less likely to do so. It may be unwise to say that 'highly emotional' and 'serious' offences are best served by RJ practices. Surely, many are, and I would be the first to say that RJ processes are misspent on shoplifting cases. However, the SAJJ data show that in the context of youth justice, victims who are 'lightly touched' by a crime orient themselves more readily to the ideal RJ script.¹⁷ Compared to the distressed victims, it is easier for this group to be other-regarding because the wrong has not affected them deeply. It is more difficult for the distressed victims to be empathetic and positive toward offenders; and therefore, we should not expect restorativeness to emerge easily in conferences with these victims. A striking result from the SAJJ data was that after the conference ended, the high distress victims were far more likely to remain angry and fearful of offenders, and to be negative toward them, than the low distress victims. This result anticipates findings on victim recovery a year later, when the victims were re-interviewed.

Victim recovery. In 1999, we asked victims, 'Which of the following two statements better describes how you're feeling about the incident today? Would you say that it is all behind you, you are fully recovered from it; or it is partly behind you, there are still some things that bother you, you are not fully recovered from it'. Two-thirds said that they had recovered from the offence and it was all behind them.¹⁸ Thus, most victims had recovered from the offence a year later, but which victims? And did the conference process assist in their recovery?

An examination of victim distress in 1998 as compared with victim recovery in 1999 reveals dramatic and striking results. The greater the distress indicated in 1998, the less likely victims had recovered in 1999 (Table 1).

Table 1. Victim distress in 1998 and victim recovery in 1999

	all	per cent fully recovered			all	male	female
		male	female				
no distress	95	92	100	low	90	83	100
low distress	78	67	100				

moderate distress	63	71	54	high	50	68	36
high distress	29	60	17				

Whereas 63 to 95 per cent of the moderate to no distress victims had recovered in 1999, 71 per cent of the high distress victims had not. For this latter group, an RJ process may be of little help for victim recovery. The relationship between distress indicated in 1998 and recovery in 1999 was especially strong for the female victims: the majority of high

distress female victims (64 per cent) said they had not recovered from the offence, whereas the majority of high distress male victims (68 per cent) said they had recovered. Personal crime victims were less likely to have recovered (58 per cent) than organizational victims (93 per cent), and again, the relationship was even stronger for female victims. These and other gender differences in the experience of victimization and recovery from crime invite further analysis. In part, the differences are caused by a different mix of types offending against the male and female victims in the sample, and in part, by the ways in which gender and culture structure the 'experiences' of victimization, vulnerability, and recovery.

In 1999, we asked victims, 'Would you say that your ability to get the offence behind you was aided more by your participation in the justice process or things that only you could do for yourself?' Half (49 per cent) said their participation in the justice process, and 40 per cent, only things they could do for themselves; 11 per cent said both were of equal importance. The recovered victims were more likely to say participation in the justice process (72 per cent) than the non-recovered victims (38 per cent).¹⁹ Likewise, the low distress victims were more likely to say participation in the justice process (77 per cent) than the high distress victims (49 per cent). The conference process can have a constructive impact on distressed victims, but not in most cases. For example, of the distressed victims of adolescent punch-ups, assaults on family members or teachers, and theft or damage of personal property (including cars and bikes), one-third said their participation in the justice process was important in getting the offence behind them. When we asked all victims (both those who had recovered and those who did not) which things (from a long list of items) were most important in aiding their recovery, about 30 per cent cited a variety of conference-related elements, including participation in the conference, contact with the coordinator and police officer, and meeting the offender.

Non-recovered (or only partly recovered) victims held more negative views of the offender and how their case was handled compared to the recovered victims. They were significantly more likely to see the offender as a 'bad' person rather than a 'good' person who had done a bad thing, less satisfied by how their case was handled, and more likely to say they wished their case had gone to court. When asked what was the most important thing hindering their recovery, 74 per cent cited financial losses, injuries, and emotional harms arising from the offence.

The new SAJJ findings on victim distress and recovery pose significant challenges to the RJ field. They invite reflection on the variable effects of victimization for the ways in which victims orient themselves to a restorative process. For the distressed victims in the SAJJ sample, it was harder to act restoratively at the conference, and it was more difficult to be generous to offenders. The effects of victimization did not end with the conference, but continued to linger for a long time. A process like RJ, and indeed any legal process (such as court) may do little to assist victims who have been deeply affected by crime. Improving practices by conference facilitators may help at the edges, but this too is unlikely to have a major impact. Victims who are affected negatively and deeply by crime need more than RJ (or court) to recover from their

victimization. And as we shall see, having one's case go to court is not without significant problems.

Study Two: The Sexual Assault Archival Study (SAAS)

Study Two shifts the spotlight from variation in the conference process and how victims experience crime, to differences in how cases are handled in court and conference. The spotlight also shifts from a range of violent and property offences to an examination of sexual assault offences, although there is a good deal of variability within this category. With the shift from a conference-only study to a conference-court comparison, it becomes clear that despite the difficulties some victims (especially distressed victims) experience in the aftermath of crime, and the limits of conferencing to assist highly distressed victims' recovery, the formal court process also fails many victims.

A central question posed in the archival study was, from a victim's point of view, is it better for one's case to be dealt with by way of a RJ process (a conference) or to go to court? There is a good deal of controversy surrounding the use of RJ for cases of family and sexual violence. Critics cite the potential power imbalances in face-to-face encounters, threats to victim safety, pressure on victims to accept certain outcomes, mixed loyalties of family members toward victims and offenders, and the potential for too lenient penalties that may 'send the wrong message' to offenders (for debates, see Curtis-Fawley and Daly 2004; Daly and Curtis-Fawley, forthcoming; Hudson 2002). The many positions taken 'against' and 'for' RJ in these cases is matched by the dearth of empirical evidence. There are currently only two jurisdictions in the world, South Australia and New Zealand, which routinely use RJ to respond to youth sexual assault cases. In New Zealand, conferences are used when diverting cases from court and for pre-sentencing advice. In South Australia, conferences are currently used largely in the context of court diversion. No jurisdiction currently uses RJ routinely for cases of sexual assault involving adult offenders.²⁰ The archival study is the first to shed light on the potential and limits of court and conference processes from the perspective of sexual violence victims.

SAAS Methodology

We gathered police documents, family conference files, court records, and criminal histories for all youth sexual offences finalized from 1 January 1995 to 1 July 2001 in South Australia, which began with one or more sexual offences charged by the police. There were a total of 227 court cases, 119 conferences, and 41 formal cautions.²¹ A detailed coding scheme containing over 200 variables was created, which described the offender's biography and orientation to the offence, the number of victims (with detailed information on the primary victim), the context and elements of the offence, how the offence was reported to the police and the time taken from police report to finalization, the legal history of court cases from initial charges to finalization (including whether an offence was proved or not), the features of conference cases, and penalties imposed. In addition, the offenders' criminal histories (for all types of offending behaviour) were

gathered and coded (see Daly, Curtis-Fawley, and Bouhours, 2003a, 2003b, respectively, for summary findings and research methods). The study's strength lies in depicting the variable character of offending and in charting the legal journey of sexual offence cases finalized in court and by conference. Its limitation is that we could not interview victims retrospectively about their court and conference experiences. This would have been impossible for many reasons and inappropriate as a matter of ethical research practice.²²

SAAS Findings

When analyzing the data with a focus on factors that matter to victims, 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'). If a case went to court, the chances of any sexual offence being proved was 51 per cent,²³ with the remaining cases being withdrawn or dismissed. From these results, we concluded that the potential problems of RJ in sexual assault cases (e.g., 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 of crime have the right to deny offending, a right enshrined in the adversarial legal process, the court 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, without the potential risks associated with a court-imposed sentence.

Using several measures of seriousness (legal charges and offence 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),²⁴ the court and conference cases were of similar seriousness.²⁵ Cases that began with the most serious charge (rape) were the least likely to be proved of any sexual offence 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. (Extra-familial relations included any non-family person such as casual acquaintance, friend of the offender, or a stranger; intra-familial relations were typically siblings and step relations.)

Court cases took over twice as long to finalize as conference cases: using the mean, the time from a report to the police to case finalization was 6.6 months for court 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 per cent 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 (1999: 85) evocative notion that RJ may be a form of 'cheap justice', 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 counselling program for adolescent sex offenders, the Mary Street Programme.²⁶ The court's greater power is its ability to impose a detention sentence. However, of the 116 proved court cases, 20 per cent of offenders received a detention sentence; in all but three, the sentence was suspended. A small number of court cases (eighteen) was set for trial. Of these, six offenders eventually pleaded guilty, and twelve entered no plea or a not guilty plea. Of the twelve, eight were dismissed and three were found not guilty. One case was proved at trial.

The archival study found that conferences outperform court on measures that matter to victims: acknowledgement of the wrong (rather than offender denial or court dismissal), timely disposition, and undertakings that are meaningful and reduce the chances of re-offending, especially when tied to a therapeutic intervention.²⁷

Summary and discussion

The SAJJ study shows that conferences can have positive effects and outcomes for victims, but they can be modest and may not occur in most cases. The SAAS study shows that victims are better served when their case goes to conference rather than court for two reasons. First, something happens at a conference (that is, an offender admits responsibility for an offence and a penalty is agreed to), whereas about half of court cases are dismissed or withdrawn. Second, conference undertakings do more for victims than penalties imposed in court.

The conference-only study reveals the variable nature of restorative processes, which can be contingent on the offence, the kind of victim (individual or organization), and the subjective impact of the victimization. In general, an other-regarding and empathetic victim orientation is more likely present when victims are lightly touched by crime, a result that was especially apparent for the organizational victims. The conference process can have a positive influence on victim recovery a year later, but it is contingent on the degree of distress victims experienced after the offence and how often it continues to bother them.

A flaw with experimental study designs, which aim to compare court and conference cases, is that they ignore a crucial difference between the two legal sites.²⁸ Courts deal with the adjudication and penalty phase of the criminal justice process, whereas conferences deal only with the penalty phase. The adjudication phase is hard on victims, arguably even harder than the penalty phase. Courts fail victims when proceedings go on for a long time, when victims are not kept informed about the status of their cases, and when prosecutors withdraw cases for reasons that victims may interpret as being on 'technical grounds'. Research comparing victims' experiences with court and conference, in which offenders have admitted offences to the police at an early stage of the legal process (e.g., Strang 2002, analyzing Re-Integrative Shaming Experiments [RISE] data) has merit. However, such research overlooks a broader failure of the court process from a victim's perspective. Offenders may not speak to the police or make

admissions to offending at an early stage of the legal process, and prosecutors may not have sufficient evidence to ensure conviction at trial; these and other elements are major sources of case attrition prior to sentencing.²⁹ Of course, some youthful court offenders may have been wrongly or unfairly accused, but this alone cannot account for the high degree of attrition seen in SAAS.

We learn different things from the conference-only and the court-conference comparison. The conference-only study foregrounds the variable nature of victims' experiences with crime, the variable interests and capacities of victims to act and feel in restorative and other-regarding ways toward offenders, and the variable impact of the conference process. All of these elements have a bearing on the likelihood of victim recovery a year later. Some critics may interpret the SAJJ findings as proof that conferences do not assist victims, especially those distressed by crime. The evidence is mixed and equivocal. Conferences can benefit some victims, but there are limits on what the process can achieve for all victims. At the same time, and of equal importance, the court-conference comparison shows the drawbacks of the adversarial process from a victim's perspective. In the adjudication phase, a defendant is entitled to remain silent, the state must prove its case, and a victim may be required to serve a role as witness, if the case proceeds to trial. But, in this phase, the major activity for victims is waiting; and based on SAAS, half waited an average of 6 months to then learn that their case had been dismissed or withdrawn. Although many victims may believe otherwise, the court is not likely to be a site of their vindication, not a place where they will routinely 'get justice'.³⁰ Critics of conferencing often forget this limitation of the court process from a victim's perspective. Although both RJ critics and victims imagine that the court is a place where serious offences are treated seriously, actual court practices often suggest otherwise.

What lessons can be drawn from my tale of two studies? Imagine you were a victim of sexual assault, and you could choose to have the case diverted to a conference or go to court. If the case goes to a conference, you know that the offender has already admitted to the offence, some penalty or outcome will be agreed to, and you will have a say in deciding an outcome or penalty. If the case goes to court, you cannot be sure what will occur, but there is a 50-50 chance that it will be dismissed and no penalty will be imposed at all. In the real world, victims do not have this power. It rests instead with an offender, who, at a minimum, must make an admission to the police (or court) for a case to be referred to an RJ process. It also rests with a police or judicial officer, who make referrals to conferences on other factors that they deem relevant (such as previous offending, the victim's wishes, and case severity). If the sexual assault case does go to a conference, you as the victim run the risk of potentially experiencing re-victimization during a face-to-face encounter with the offender, but at least you know the offender has admitted the offence. Having all of this information before you, along with the power to make the decision, what would you decide to do?

Endnotes

¹ Professor, School of Criminology and Criminal Justice, Griffith University, Brisbane, Australia. Contact by email: k.daly@griffith.edu.au. My appreciation and thanks to Brigitte Bouhours and Sarah Curtis-Fawley for their assistance and comments in preparing this chapter. *Please note:* The Sexual Assault Archival Study statistics given in this paper were correct as of November 2004 when this paper went to press. Subsequent analyses and data cleaning show that there were 385, not 387 cases in the total sample (one less court and conference case each). Three cases, not one, were proved at trial. Two, not three court youth, were sentenced to serve time in detention. These small N changes have a negligible effect on the results. Subsequent papers will present the data with these changes in N size.

² Conferencing practices in Australia and New Zealand are varied (see Daly 2001b; Daly and Hayes 2001). Conferencing in South Australia (as in all other jurisdictions in the region) is 'New Zealand' style with two professionals (a police officer and coordinator) present. The Re-Integrative Shaming Experiments (RISE) in Canberra studied 'Wagga' style conferencing, where a police officer runs the conference.

³ These are conference-based percentages, not offender-based.

⁴ Unless otherwise noted, the per cents in 1998 are of 79 victims (including conference and non-conference victims), 61 conference victims, and 93 offenders; and in 1999, they are of 73 victims (including conference and non-conference victims), 57 conference victims, and 88 offenders. The analytical emphasis in this paper is on victims, but some of the variables discussed were constructed from interviews and observations of the offenders, as well.

⁵ The following distils from Daly (2003a), which had many errors in the tables. Interested readers are encouraged to view the web version of the paper (www.griffith.edu.au/school/ccj/kdaly.html) or to write to Willan Publishing to obtain a detailed errata sheet.

⁶ The relevant variables for each of the three variables in the global conference measure were as follows: (1) *restorativeness variables* (offender was remorseful, actively involved, made spontaneous apology, assured the victim the offence wouldn't happen again, and understood the impact of the crime on the victim; the victim was effective in describing the offence and its impact, the victim understood the offender's situation, there was positive movement between offender and victim, in words and symbolically, and positive movement between the offender's supporters and the victim or victim supporters); (2) *procedural fairness variables* (process of deciding the outcome was fair, police and coordinators treating offenders and victims with respect, coordinators permitting everyone to have their say, decision-maker neutrality, among many others); and (3) *coordinator conference management variables* (managed movement through stages and negotiated outcome well). Note that because observed procedural justice and coordinator skill were evident in a high share of conferences (80 to 95 per cent), whereas

observed restorativeness was more varied and relatively less frequent (30 to 60 per cent of conferences), high conferences are those having a greater degree of restorativeness, along with very high levels of procedural justice and coordinator skill.

⁷ See Hayes and Daly (2003) for an analysis of conferencing and re-offending, using the SAJJ data.

⁸ I constructed the distress variable after exploring other ways to depict the effect of the crime on victims. The distress variable was a more powerful indicator than the type of legal charge or the property/violence dichotomy.

⁹ This question was taken from the victim interview instrument used in RISE, and I thank Heather Strang for providing me with a copy.

¹⁰ The non-conference victims were asked a reduced version of the distress question: 'Crime victims suffer other kinds of harm as a result of an incident, for example, fear of being alone, sleeplessness, general health problems, concern about security of their property, loss of confidence, or other kinds of difficulties. To what degree did you experience any of these problems as a result of the incident?' The anchored responses were 'not at all', 'a little, but not much', 'to some degree', and 'to a high degree (a lot)'. The four categories for the conference and non-conference victims were no distress (none for the conference or non-conference victims), low distress (one item for the conference victims and 'a little' for the non-conference victims), moderate distress (two to four items for the conference victims and 'to some degree' for the non-conference), and high distress (five or more items for the conference victims and 'to a high degree' for the non-conference).

¹¹ The non-conference victims were more likely to report 'no' or a 'high degree' of distress, compared to the conference victims. However, when the four categories are collapsed into two (no/low and moderate/high distress), the distributions are similar (61 per cent and 56 per cent of conference and non-conference victims, respectively, reported moderate/high distress).

¹² I have refrained from presenting all the results of the victim distress and recovery analyses in tabular form, with the resulting tests of statistical significance. Rather, when I say that one group of victims is higher or lower, I report only those results that are statistically significant at the .10 error level or less.

¹³ These six categories of 'real offence' were constructed to reflect actual offending patterns and their contexts. Although often related to statutory charges, the two are not identical. For example, in the assault on family and teachers category, there were two cases with property damage charges.

¹⁴ There were four anchors for this variable: fair treatment, common ground, both equally, and neither. In the results reported here, the four categories were collapsed into two: fair treatment and neither; and common ground and both.

¹⁵ By comparison, the self- and other-regarding orientations of offenders at conferences are unrelated to victim distress. The relevant items in the 1998 offender interview asked, 'In general, at the conference, was it more important for you to do or to say something to make the victim feel better or to make sure that you got what you wanted?' (72 per cent said to make victim feel better or both; 70 per cent and 75 per cent for high and low distress victims, respectively) and 'When you look back at the conference and your feelings about what happened, can you tell me which was more important to you, that you be treated fairly or that you were able to do something for the victim?' (55 percent said to do something for the victim or both; 58 per cent and 50 per cent for high and low distress victims, respectively). The analysis is of a subset of 53 primary offenders at conferences where victims (or a family member representing the victim) were present.

¹⁶ For each of these offence categories, the low distress victims were more likely to say 'find common ground' than the high distress victims, although the number of cases in each cell is too small to make strong claims.

¹⁷ I use the term 'script' here to refer to behaviours and orientations that are optimally expected for victims in the conference process, not to a scripted model of conferencing.

¹⁸ Recovery was somewhat higher for non-conference (75 per cent) than conference (63 per cent) victims, but it was not statistically significant.

¹⁹ The victims who said 'both equally' were included in the 'participation in the justice process' group. No victim said 'neither'.

²⁰ For exceptions, see Hopkins, Koss, and Bachar (2004) for the RESTORE project (RJ pilot project for adult sexual assault cases in Tucson, Arizona) and Lajeunesse (1996) for the Hollow Water healing circles in Canada.

²¹ For the 387 cases, the original charges filed were rape and a variety of sexual assaults (43 per cent), indecent assaults (42 per cent), indecent behaviour type offences (such as exposing a penis in public, 14 per cent), and 1 per cent other offences. The term 'sexual offences' includes all the behaviours, whereas 'sexual assault' includes the first two categories, comprising 85 per cent of all cases. I used the terms 'sexual offences' and 'sexual assault' interchangeably because a small share of court (8.5 per cent) and conference (12 per cent) cases involved indecent behaviour offences, although they were a much higher share (just over half) of the formal cautions.

²² It would have been impossible to locate victims for offences that had occurred many years before, but the more important consideration was ethical. To redress this problem, the research group followed fourteen cases of sexual assault and family violence, disposed during the second half of 2001; and we attempted to interview the victims in these cases (see Daly and Curtis-Fawley, forthcoming). We were able to carry out the in-depth study of conference cases while we were based in Adelaide gathering data and documents for the archival study.

²³ An additional 4 per cent were proved of a non-sexual offence. In an earlier study of sexual offence cases in court and conference, using data from 1998, I reported that one-third of cases were proved in court (Daly 2002b: 78). However, this figure excluded cases that were proved of a less serious offence (although it was not clear from the Office of Crime Statistics report what the charge was). Based on the archival study, I would say it is more accurate to include the less serious sexual offences. For example, in the SAAS dataset, 12 per cent of the rape cases filed were proved of rape, but another 28 per cent were proved of a less serious sexual offence.

²⁴ In this Youth Court jurisdiction, a case can be proved 'with' or 'without conviction'. The latter is a legal device to protect a young person's criminal record. A 'proved' case means the same thing as a conviction or guilty plea in Adult Court.

²⁵ This was caused by guilty pleas to less serious offences and by the more serious cases being dismissed or withdrawn.

²⁶ 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 offences can receive counselling before or after a conference or court sentencing. Without a treatment programme like Mary Street in place, I would hesitate to support conferencing for sex offences. For a summary of the programme, see Daly et al. (2003b), p. 45; or visit the Mary Street website: <http://www.wch.sa.gov.au/dmh/asapp.html>

²⁷ In analysing only those cases where any sex offence was proved (in court, N=116) or admitted to (in conference, N=112), the prevalence of re-offending (all types of offending, not just sexual offending) was higher for court offenders and for those who did not attend the Mary Street Programme. For conference cases, of those who attended Mary Street, 42 per cent re-offended; for those who did not, 60 per cent re-offended. For court cases, of those who attended Mary Street, 49 per cent re-offended; for those who did not, 75 per cent re-offended. These results are preliminary; further analyses will be carried out to correct for the different time periods that offenders were at risk to re-offend. In Daly et al. (2003a: 18-19), the per cents were based on all court (N=227) and conference (N=113) cases; the N's shown in Table 6b should be corrected to reflect this.

²⁸ For example, in RISE, offenders were randomly assigned to court or to conference only after they had admitted the offence to the police. As an ethical matter, this is appropriate. As an empirical matter, it cuts out a large set of court cases that remain in the system for some time without guilty pleas or are eventually dismissed. A preferable research design when studying conferences as diversion from court (as compared to pre-sentencing advice to judicial officers) would be to compare conferences with two kinds of court cases, those in which the accused admitted early on and those in which admissions were made much later.

²⁹ Case attrition is high for all offences, not just sexual assault. However, as Bryden and Lengnick (1997) argue in their comprehensive review and discussion of this question in adult cases, case attrition in sexual assault is unique because the prosecutor's burden of proof (that is, to prove victim non consent) makes conviction difficult, especially in acquaintance cases (see also Kelly 2001 on this point). This burden of proof is not relevant, however, to child or minor victims (age varies by jurisdiction, but it is under 17 for South Australia), for whom at law it is assumed that a victim cannot consent to sex. However, in an analysis of whether a court case was proved or not in court by victim-offender relation and age difference, I found that cases involving friends of a similar age were far less likely to be proved (23 per cent were) compared to friends, for whom the age difference was more than 2 years (53 per cent proved), or those between strangers (59 per cent proved).

³⁰ I would assume a good deal of variation in victims' knowledge of the legal process, especially in sexual assault cases, where victim support agencies can provide clients with a realistic assessment of how the police and courts are likely to respond.

References

Bryden, D. P. and Lengnick, S. (1997) 'Rape in the Criminal Justice System', *Journal of Criminal Law and Criminology*, 87: 1194-1384.

Coker, D. (1999) 'Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking', *UCLA Law Review*, 47: 1-111.

Curtis-Fawley, S. and Daly, K. (2004) 'Gendered Violence and Restorative Justice: The Views of Victim Advocates', *Violence Against Women*, forthcoming.

Daly, K. (2001a) *SAJJ Technical Report No. 2: Research Instruments in Year 2 (1999) and Background Notes*. Brisbane: School of Criminology and Criminal Justice, Griffith University, available at www.aic.gov.au/rjustice/sajj/index.html

Daly, K. (2001b) 'Conferencing in Australia and New Zealand: Variations, Research Findings, and Prospects' in A. Morris and G. Maxwell (eds) *Restoring Justice for Juveniles: Conferencing, Mediation, and Circles* (pp. 59-83). Oxford: Hart Publishing.

Daly, K. (2002a) 'Restorative Justice: The Real Story', *Punishment and Society*, 4(1): 55-79.

Daly, K. (2002b) 'Sexual Assault and Restorative Justice' in H. Strang and J. Braithwaite (eds) *Restorative Justice and Family Violence* (pp. 62-88). Cambridge: University of Cambridge Press.

- Daly, K. (2003a) 'Making Variation a Virtue: Evaluating the Potential and Limits of Restorative Justice' in E. Weitekamp and H.-J. Kerner (eds) *Restorative Justice in Context: International Practice and Directions* (pp. 23-50). Cullompton: Willan Publishing.
- Daly, K. (2003b) 'Mind the Gap: Restorative Justice in Theory and Practice' in A. von Hirsch, J. Roberts, A. E. Bottoms, K. Roach and M. Schiff (eds) *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?* (pp. 221-36). Oxford: Hart Publishing.
- Daly, K. and Curtis-Fawley, S. (forthcoming) 'Justice for Victims of Sexual Assault: Court or Conference?' in K. Heimer and C. Kruttschnitt (eds) *Gender, Offending, and Victimization* (working title). New York: New York University Press.
- Daly, K., Curtis-Fawley, S. and Bouhours, B. (2003a) *Sexual Offence Cases Finalised in Court, by Conference, and by Formal Caution in South Australia for Young Offenders, 1995-2001: Final Report*. Brisbane: School of Criminology and Criminal Justice, Griffith University, available at <http://www.griffith.edu.au/school/ccj/kdaly.html>
- Daly, K., Curtis-Fawley, S. and Bouhours, B. (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: School of Criminology and Criminal Justice, available at <http://www.griffith.edu.au/school/ccj/kdaly.html>
- Daly, K. and Hayes, H. (2001) 'Restorative Justice and Conferencing in Australia', *Trends and Issues in Crime and Criminal Justice No. 186*. Canberra: Australian Institute of Criminology.
- Daly, K., Venables, M., Mumford, L., McKenna, M. and Christie-Johnston, J. (1998) *SAJJ Technical Report No. 1: Project Overview and Research Instruments in Year 1*. Brisbane: School of Criminology and Criminal Justice, Griffith University, available at www.aic.gov.au/rjustice/sajj/index.html
- Hayes, H. and Daly, K. (2003) 'Youth Justice Conferencing and Re-Offending', *Justice Quarterly*, 20(4): 725-64.
- Hopkins, Q. C., Koss, M. and Bachar, K. J. (2004) 'Restorative Justice and Sex Offenses: A Challenge for Feminist Theory', *Violence Against Women*, forthcoming.
- Hudson, B. (2002) 'Restorative Justice and Gendered Violence: Diversion or Effective Justice?', *British Journal of Criminology*, 42: 616-34.
- Kelly, L. (2001) *Routes to (In)justice: A Research Review on the Reporting, Investigation and Prosecution of Rape Cases*. London: Her Majesty Crown Prosecution Services Inspectorates (HMCPsi), available at <http://www.hmcpai.gov.uk/reports/Rapelitrev.pdf>

Lajeunesse, T. (1996) *Community Holistic Circle Healing, in Hollow Water Manitoba: An Evaluation*. Ottawa: Solicitor General Canada, Ministry Secretariat, unpublished (on file with the author).

Morris, A. (2002) 'Critiquing the Critics: A Brief Response to Critics of Restorative Justice', *British Journal of Criminology*, 42: 596-615.

Strang, H. (2002) *Repair or Revenge: Victims and Restorative Justice*. London: Oxford University Press.