Megan Kokontis

Restorative Justice and Sexual Assault:
A Proposal to Supplement the Criminal Justice System

The National Organization for Women reports that 232,960 women, more than 600 each day, were raped or sexually assaulted in the United States in 2006. The National Violence Against Women Survey revealed that 18% of surveyed women had been raped and over eighty-five percent of those rapes involved a victim and an offender who knew one another. Almost half of all women have encountered an indecent exposure or experienced other kinds of sexual assault. In a 2001 report that gathered information from convicted rapists about their sexual deviance, many reported multiple acts of sexual violence or deviance that occurred before the convicted rape. Given the prevalence of the problem, there needs to be a strategy to help women cope with the after-effects of an assault and help rehabilitate offenders to avoid recidivism. Women who have been the victims of sexual assault have already experienced a traumatic ordeal by the nature of the crime committed against them. It only seems appropriate that whatever type of justice a victim pursues after her assault treat her with as much dignity and respect as is possible. Unfortunately, however, the criminal justice system fails to treat victims of sexual assault with the kind of respect and dignity which they are owed. Further, available civil remedies are similarly problematic.

Problems pervade the criminal justice system. They begin when a victim first reports the crime. While many victims do not even report the offense to the police, only 22 to 40 percent of those reported are ever referred to a prosecutor 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-crime.””

Only 16 to 33 percent of cases that are reported ever end in prosecution. Studies have shown that “rape attributions are affected by the race, age, and occupation of the perpetrator and the victim; their relationship; the severity of the violence; and the victim’s risk-taking behavior, drug use, reputation or moral character.” Only 10 to 26 percent of cases reported to the police end in a conviction.

Victims have little control over what happens to their case once they report it. First, the state brings charges in its name. If the victim tries to withdraw from the process, she can still be subpoenaed to testify. If the victim wants to pursue the case, she has very little influence over whether her case is pursued by a prosecutor. When a defendant chooses to plead guilty, “victims have a right to be informed, . . . but typically have little recourse to oppose it.”

If a victim’s case does reach court, a new set of problems and potential traumas present themselves. Victims may begin the process expecting to retain some privacy and dignity and “may be dismayed that their identity is a matter of public record.” They may be shocked 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.” In order to “obtain a successful conviction, women have to accommodate themselves to the category of ‘ideal’ victim,’ which means presenting themselves as nearly as possible to the virgin or the respectable married women . . . .” Questioning from the defense attorney “exacerbates self-blame,” and many feel that their role at the trial is just to “serve as evidentiary cannon fodder.” Further, the criminal justice system is designed to protect defendants and many victims experience re-
victimization from the “perpetrator’s unmoving stances that he is not guilty of a crime.”

Many victims have even expressed that they feel “rapists had more rights” than they did. Although it is the defendant’s Constitutional right to be presumed innocent and to have the privilege against self-incrimination, this can be extremely harmful to the victim. Participation in the trial process is so traumatic for some victims that they develop Post-Traumatic Stress Disorder (PTSD). Victims whose cases go to trial suffer “increased nightmares, decreased social activities, more dissatisfaction with heterosexual relationships, loss of appetite, recurrence of phobias, and greater psychological distress.” Some experience feelings of “shame, lack of trust, fear of reliving bad memories, fear of reprisals and suicide attempts.”

Under the current system, there are civil remedies available if the victim is not satisfied with the criminal justice process. However, this option presents its own set of problems. While theoretically, “the survivor is more in control of decision making and is better informed of case progress, . . . the process is nevertheless adversarial.” The problems associated with questioning by the defense attorney persist and according to the U.S. Department of Justice, the victims do not get the justice they are seeking. The Department of Justice estimates “that the out of pocket expenses of rape are $7.5 billion per year and when pain, suffering, and lost quality of life were monetized, they reached $127 billion. Few of these costs were ever compensated.” Further, many of these victims were not even seeking monetary compensation. Instead, they just wanted their voices heard and were “searching for validation of the wrong that they suffered.”

The civil justice system also introduces some unique anti-victim biases: the doctrine of comparative fault “partially blames a victim for rape.” Finally, some victims are not
able to pursue civil remedies because the costs are prohibitive. Some are not able to afford the hourly attorney’s fees. In other cases, offenders are not wealthy enough to motivate attorneys to take the victim’s case when “compensation is contingent on the amount of money awarded in a settlement or judgment.” Therefore, although civil remedies are theoretically a viable alternative, they fail to provide the victim what she is really seeking.

Both the civil and the criminal justice systems are plagued by the problem of jury leniency which leads to accountability problems. Jury leniency for simple rape “is tied for the highest of any crime and is much higher than any other crime against one’s person of equivalent severity.” For aggravated rape, however, the jury leniency rate is near the bottom. For juvenile offenses, “rape was the least likely to be proved in trials,” and is the “least reported, least indicted and least convicted non-property felony.” This can lead to disastrous consequences for society because “laws cannot successfully achieve their envisioned aims when a citizenry condones sexual violence and is reluctant to convict in sexual assault cases.” This moots any possible deterrent effect of prosecution and punishment because “the current system fails to hold most offenders accountable and sends a message that juvenile crime is not a big deal.” Further, the criminal justice system does not appropriately stigmatize “minor” sexual offenses. “Minor” offenses, like “nonpenetration offenses [are] at the lowest level of criminal culpability, punishable by a fine.” These minor cases usually do not even go as far as to impose a fine and are adjudicated with “one year unsupervised probation, and no mandated treatment.” This leads to a perverse cost-benefit analysis for the offender, “and behavior is driven by a calculated assessment of the risks versus the perceived
benefit... When the perceived costs of sexual offenses against women fail to outweigh the rewards, continued intentional injury and abuse of women is predicted.\textsuperscript{43} Low accountability eventually results in “citizen acceptance [that] supports and maintains sexual offending.”\textsuperscript{44}

The problems for victims in the criminal justice system have led to several reform initiatives. These include “increase[ing] the sentences for rape, remov[ing] spousal exclusions in rape laws, chang[ing] requirements that victims [of rape] resist, remov[ing] corroboration requirements, add[ing] partial shields against revealing victims’ sexual and social history, creat[ing] civil commitment options for sex offenders, and establish[ing] mandatory sex offender registration and notification.”\textsuperscript{45} The United States, Canada, New Zealand and Australia have also established victim participation status which gives “survivors the right to communicate with their case’s judge in writing and to speak at or attend the sentencing hearing.”\textsuperscript{46} But these victims are unable to change decisions that have already been made.\textsuperscript{47} There have also been attempts at substantive reform, including crime compensation schemes, to give victims monetary compensation for their material losses or medical treatment.\textsuperscript{48} However, these schemes are viewed as “welfare schemes, because crime victims must come begging for help, the eligibility criteria are restricted, and they are vulnerable to political expediency.”\textsuperscript{49} They also do not compensate victims whose offenders were friends or family or who did not report the crime to the police, so only victims of “stranger assault” or “stranger rape” are helped.\textsuperscript{50} Crime compensation schemes “also fail when evaluated from the perspective of restoring control to those who have been made helpless, because they do not involve victims in the decision-making process.”\textsuperscript{51} There have been some efforts to introduce shaming\textsuperscript{52} as a
punishment, but “shaming expresses no genuine concern for the condemned, seeks humiliation, lacks a dues-paid endpoint from which the perpetrator is reintegrated into society, departs from social norms of privacy, and erodes standards of decency and respect for dignity.” 53 Unfortunately, these reforms have only had a limited effect 54 and “even at its best, victim support throughout adversarial processes has a flavor of hand-holding on a walk through hell.” 55

Not only have these reforms not made the adversarial process easier on the victim, but they have also not successfully prevented future sexual violence. The 25-year rate of recidivism upon release for rapists is 39%. 56 There is evidence suggesting that “rearrest rates are higher” in groups with mandatory sexual offender notification. 57 This implies that notification “may have unintended effects on rehabilitation.” 58 In fact, “over 90% of sexual offenders state that notification severely affected their ability to reintegrate into the community, leading to ostracism, harassment, loss of employment, eviction from housing and breakup of relationships.” 59 The criminal justice system is clearly failing both its victims and its offenders.

This failure requires a search for new solutions to the problems faced by victims of sexual assault. Restorative justice is one possible solution. Restorative justice requires four basic elements: the offender must acknowledge his wrongdoing; he must accept accountability and agree to make reparations to those who have been injured; he must express a willingness to take corrective action; and the community must pardon him for his actions. Instead of the retributive justice that is favored in the current criminal justice system, restorative justice views crime as a “violation of people and relationships. It creates obligations to make things right. Restorative justice involves the victims, the
offender, and the community in a search for solutions which [sic] promote repair, reconciliation, and reassurance.”60 Restorative justice allows the victim to confront the offender and address the harm she suffered.61 It strives to maintain a balance between the “three customers” of the criminal justice system: the victim, the offender and the community.62 Restorative justice allows for “offender accountability through reparations and rehabilitation rather than punishment and aims to transform the community’s role in addressing crime;”63 and seeks to help victims by allowing them to participate in the process, giving them an opportunity to ask the offender any questions that have been plaguing them and thereby repair emotional losses, allowing them to conquer their fears of their offenders, all of which hopefully increases victims’ “perceptions of a fair participation process.”64 To be effective restorative justice must further three principles.65 The first principle is that “justice requires that we work to heal victims, offenders, and communities that have been injured by crime.”66 The second principle is that “victims, offenders, and communities should have the opportunity for active involvement in the justice process as early and as fully as possible.”67 Finally, the third principle is that the “relative roles and responsibilities of the government and the community [must be rethought.] In promoting justice, government is responsible for preserving a just order and the community for establishing peace.”68 Popular models of restorative justice include Victim-Offender Mediation or Victim-Offender Dialogue,69 Sentencing Circles70 and Family Conferencing.71

One of the primary goals of restorative justice is for the victim to receive an apology after the offender admits his wrongdoing. In court, a victim will rarely receive an apology.72 But apologies are an important part of the victim’s healing. It is also
important to restoring the offender.\textsuperscript{73} An apology has three core elements: “(1) acknowledgement of the legitimacy of the violated rule; (2) admission of fault and responsibility; and (3) expression of genuine regret and remorse for the harm done followed by acceptance or rejection by the injured party”\textsuperscript{74} The offender’s apology should abide by the following guidelines: it should never be an “isolated ‘quick fix;’” offenders should not be forced to apologize nor should victims be forced to receive apologies; the harm is identified before the apology is given; offenders should be educated “that an apology is more than saying you are sorry with an emphasis on actions;” “victims should be provided an opportunity to opt in or out;” and finally, “all apology letters should be screened by agency staff.”\textsuperscript{75} Apologies reduce victims’ feelings of anger and resentment and help restore the imbalance of power the offender created by assaulting the victim.\textsuperscript{76} Many victims accept the offender’s apology and are “relieved of their anger and bitterness that results from having their emotional hurt acknowledged.”\textsuperscript{77}

The ability to receive an apology is one of the most important advantages to restorative justice but there are many additional advantages to restorative justice. First, the victim is given a voice and the opportunity to participate in the process.\textsuperscript{78} This allows victims to explain what they have gone through; gives them the ability to speak with their offender directly; allows them to participate in determining what reparations must be made; and empowers them and assists them in overcoming their fears.\textsuperscript{79} Assisting in playing a role in determining what restitution will be made is critical to many victims’ recoveries.\textsuperscript{80} While restitution should not be the primary goal of restorative justice, it does allow the victims to “feel empowered and satisfied when they choose a form of
restitution that is personal to them.” 81 The remunerations are generally financial, but can involve either community service or “personal service for the victim.” 82 Restorative justice also validates the victims’ experiences. 83 This assures the victim that she is not to blame for what happened and instead, forces the offender to take responsibility for what happened. 84 Restorative justice also provides for more communication and flexibility than court. 85 The form restorative justice takes as well as each step along the way can be individualized to the specific needs of the victim. 86 Many victims find it “less threatening, and better able to respond to [their] individual needs.” 87 Finally, restorative justice allows the victim and the offender to begin to repair their relationship if that is a necessary part of the healing process. 88

Restorative justice is not without its problems or concerns, however. Concerns about restorative justice used in the context of violent crime, especially sex crimes, fall into three basic categories. First, there are concerns about the physical and emotional safety of the victim. 89 Next, there are concerns that power imbalances might skew the parties’ agreements regarding reparations. 90 Finally, critics of restorative justice cite concerns about the effectiveness of the intervention. 91

Victims of sexual assault have already experienced significant trauma and their advocates want to avoid further abuse and trauma to the victim; therefore, critics of restorative justice are concerned that the format might lead to re-victimization. A primary concern of critics is the physical safety of the victim. Many forms of restorative justice involve a face-to-face meeting between the victim and the offender which could “create a contact point where the perpetrator might engage in further violence against [the victim].” 92 The offender could potentially “abuse the system” 93 and use what is intended
to be a meeting to make reparations to the victim as a “new logistical opportunity for
further acts of violence against the victim.”94 Finally, the offender might use the meeting
“as a strategy to locate victims who have gone into hiding.”95

Another concern is that the offender will exploit the restorative justice system
even after admitting his wrongdoing and use it as an opportunity to emotionally abuse the
victim. The same concerns about physical safety in a face-to-face meeting persist for
emotional safety.96 When the offender is an acquaintance of the victim, it is very
common for the relationship to already be characterized by “psychological [abuse] and
emotional coercion.”97 Post assault or rape, it is not uncommon for the offender to
engage in “postassault abuse, such as belittling threats to ensure silence or other forms of
emotional abuse.”98 The offender might use the meeting as a chance to engage in further
emotional abuse. Further, if the offender continues to deny parts of the accusations or
“trivialize his violence,”99 the victim might experience the same self-blame or shame she
would experience in court when the defender pleads innocent.100 Critics are also
cconcerned that restorative justice could result in the victim being manipulated into going
back to a relationship where she might be physically or psychologically hurt.101

Restorative justice presents several concerns about the overall emotional and physical
well-being of the victim that must be addressed before it can supplant the criminal justice
system.

Critics are also concerned that the agreement between the parties might not
adequately reflect the needs of the victim. Crimes like sexual assault are heavily
gendered and involve complicated power dynamics.102 If the assault was between
acquaintances who have a continued relationship, the victim might agree to a
compromised version of her ideal terms in a hope stave off future violence.\textsuperscript{103} If the sexual assault was between partners, the situation becomes even more complex. If they share children or one or the other have a desire to preserve their relationship, the victim might further compromise her wishes in the agreement.\textsuperscript{104} Even if the victim wishes to end the relationship, critics of restorative justice fear that the “approach is anti-divorce” and will pressure woman into agreeing to continue the relationship against her wishes.\textsuperscript{105} Another potential problem is that a victim who has been through traumatic sexual abuse might not be able to articulate her needs and the “communication resources could be unequal.”\textsuperscript{106} This would skew the power imbalance between the victim and the offender further towards favoring the offender, which is absolutely contrary to the goal of restorative justice. If the form of restorative justice used involves more than just the victim and the offender and includes their families or members of the community, more opportunities for pressure on the victim can occur. If the victim and offender are a part of the same family, family members might pressure the victim to agree to less stringent terms in the agreement.\textsuperscript{107} This can also lead to complicated family dynamics and mixed family loyalties.\textsuperscript{108} Finally, some critics are concerned that the apology that many find to be such an important and healing part of restorative justice is actually coercive.\textsuperscript{109} If the victim and offender have a relationship of some sort, “survivors are often persuaded by these apologies that [the offender] is truly remorseful and dedicated to change.”\textsuperscript{110} Some offenders might be genuinely sorry and might truly stop the abusive behavior. However, other offenders may feel only “transitory remorse for their actions . . . when these apologies are echoed following second, third, or fourth incidents of violence, their function in manipulating the survivor to return to the relationship becomes patent.”\textsuperscript{111}
The agreement is an important step in the restorative justice process so concerns about its appropriateness are important to take into account.

Critics of restorative justice are also concerned about its effectiveness. Many fear that restorative justice is seen as the “soft option.” Since restorative justice is often a diversion program, away from the criminal justice system, some may perceive that sexual assaults are not treated as seriously as other crimes. If restorative justice is perceived in this way by the offender or the community, it can reinforce for offenders that the crimes that they have committed are either not wrong or at least are justifiable. The “penalties” imposed can also reflect this idea. The penalties are often monetary reparations, community service or service to the victim. These are seen by many as not serious enough to punish crimes like sexual assault. All of these concerns assume the presence of a more basic premise: that the community is willing and committed to disciplining the offender. If the offender’s family and friends are unwilling to punish the offender, the restorative justice model “will simply reinforce and support traditional patriarchal power, misogyny and victim blaming.” Some victims might similarly fear that their family and friends will not believe their accusations and will engage in victim blaming. This is of special concern when the victim and the offender are either from the same family or are closely linked, such that the victim’s family members might side with the offender. Some victims might also be apprehensive about the lack of privacy in the process and being forced to disclose personal information. Finally, some critics worry that proponents of restorative justice promise things they cannot deliver: that the ideals “are incapable of being translated into practice.” A good deal of the literature on restorative justice is not based on hard research. The empirical research that is
available is in its beginning stages and is at best inconclusive and is often contradictory. This results in proponents of restorative justice painting a “caricature” of the criminal justice system without necessarily having a viable alternative at the ready. Concerns about the effectiveness of restorative justice must be addressed before it can actually replace the criminal justice system, particularly for crimes of sexual violence.

There is some limited empirical research available on the effectiveness of restorative justice. The empirical research available is from Australia and involves youth victims and offenders. What has been published thus far shows that victims are mostly satisfied with the process. The Sexual Assault Archival Study (SAAS) researched how restorative justice worked in sexual assault cases. It compares youth sex offense in both conference and court situations. The dataset include over 230 variables. Beginning with case features and demographics, offenders who had offended before were more likely to be in court; from disadvantaged areas; sought legal advice; and were less likely to be characterized as “cooperative or remorseful.”

Offenders who assaulted members of their families were more likely to be in restorative justice (40%) than in court (18%) or formal caution (5%). Overall, both victims and offenders were younger in cases that were referred to restorative justice than the victims or offenders who were referred to court or formal conference. The SAAS found that the factors associated with referral to court rather than conference were: “(1) the [offender] made no admission or refused to comment to the police; (2) the offense was more serious; (3) the [offender] had one or more cautions, conferences, or proved cases
before the SAAS case; (4) the offense was extra-familial; and (5) the [offender] was older.”

Case disposition varied based on where the cases were sent. All the cases that went to formal caution ended with an admission of a sexual offense; 94% of the cases that went to restorative justice ended with an admission, but only 51% (115) of court cases ended with an admission or proof of a sexual offense. Only 8% (18) of the court cases ever reached trial: four pleaded guilty; eight were dismissed; three were found not guilty at trial and three were proven guilty at trial. Court also was more protracted; taking twice as long as restorative justice cases. While the court cases began as more serious than the restorative justice cases, by the time of disposition, they were of similar seriousness. For example, accusations of rape were 38% of the court cases and only 7% of the restorative justice cases, but only 8.5% of the rape cases were proven at trial and 5% were admitted in restorative justice.

Of the 51% of court cases that ended with proof of a sexual offense, many involved a guilty plea. There were three factors associated with this result: “(1) the [offender] made an admission to the police (fully or partly; immediately or later); (2) the offense was less serious (based on offence elements); and (3) the offense was intra-familial (i.e. between siblings or other family members, or the [offender] was caring for the victim.”

These 115 court cases ending with proof of a sexual offense yielded different consequences. Only 32% resulted in a recorded conviction. The other 68% resulted in “no conviction – a form of sentencing leniency that protects a youth’s chances for further employment or international travel.” Thirteen percent were disposed of without any
penalty. Seventy-five percent of the cases resulted in an order to “be of good behavior” in combination with supervision by a Family or Youth Services worker or counseling. The length of supervision ranged from three months to three years. Actual detention only occurred in 18% of the cases. The median length of detention was one year. However, the offenders rarely served full terms. In almost all of the cases, “the detention term was suspended, and the youth was typically given a good behavior bond and placed under the supervision of a Family or Youth Services worker.”

In restorative justice programs, there were also a variety of outcomes and punishments imposed. Five percent of the cases were disposed of with just formal cautions. In 11% of the cases, the only consequence was that the offender had to make a formal apology, either verbally or in writing. In 23% of the cases, the offender was asked to perform community service. In 81% of the cases, the offender was required to receive some sort of counseling.

These results demonstrate that more offenders who went through restorative justice received some kind of counseling than those offenders whose cases went to court, 79% in restorative justice cases and only 49% in court cases. Victims were also more likely to receive an apology in a restorative justice case than in a court case. The focus of the punishment is also different in restorative justice cases than in court cases. In court cases, when the offender receives the instruction to “be of good behavior,” the offender is subject to future penalties if he is not. In this way, the court cases primarily emphasize deterrence from future offensive behavior. While the court cases are focused on rehabilitation secondarily, the primary concern is on preventing future offending.
Restorative justice cases, on the other hand, are principally concerned with “rehabilitation and self-reformation, through counseling, together with verbal or written apologies to victims (or their supporters), with secondary attention to community service as a form of punishment.”

This begs the question: is restorative justice or criminal justice more effective at preventing future offending? Overall, offenders whose cases went to court had higher rates of reoffending. Sixty-six percent of offenders from court cases reoffended. Forty-eight percent of offenders from restorative justice cases reoffended. However, there was a more significant factor than where the case was disposed of: participation in some form of counseling. Offenders who went to court, but received counseling through the Mary Street Programme only reoffended 50% of the time, far lower than the reoffending rate for court cases overall. Offenders who were referred to a restorative justice program had a lower reoffending rate than those who did not go through a restorative justice program. Offenders from restorative justice programs who went through Mary Street Programme counseling only reoffended 43% of the time. In both court cases and restorative justice cases, when the intent was to punish or threaten the offender, reoffending rates were significantly higher. In court cases, when the offender received detention as a punishment, there was an 81% chance of reoffending. In restorative justice cases, when the offender received community service as a form of punishment, the rate of reoffending was 56%. Therefore, whether the case went to court or through restorative justice, the offender was far less likely to reoffend if he went through some sort of counseling.
There are also some individual case studies available about the use of restorative justice in sexual assault cases. Kathleen Daly and Sarah Curtis-Fawley tracked a set of conference cases from July to December of 2001 and interviewed two out of eight victims from sexual assault cases within six weeks of their conference. The first case involved twelve year old Rosie, who was sexually assaulted at an army cadet training camp by seventeen year old Rick. Rick assaulted Rosie during a training exercise and Rosie reported it immediately. A police officer came to the camp to interview Rosie and arrest Rick, who admitted to sexually assaulting her. According to the case study, Rosie reported feeling as if she had personally done something wrong when the Army camp held her there the day after the assault and required her to speak to several Army officials about what had happened. Rosie also reported experiencing “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.” Rosie’s case took 15 months to reach the conferencing stage and in that time Rosie and Rick each spoke with conference counselors over the phone. Rosie reported feeling apprehensive before the conference because she feared she would have to give evidence against Rick and was anticipating a court-like process. However, she reported feeling hopeful that she would be able to get her story across and make others listen to her story.

Before the conference, Rosie said she had several expectations. She hoped to be able to express to Rick how she had been affected by the assault; hear his account; get answers to some of her questions; receive an apology and be reassured that he would not assault her again.
Finally, the day of the conference arrived. Rosie traveled to the conference with her grandmother and they paid their own travel expenses. This was one of several imbalances that existed during Rosie’s conference. There was also an imbalance in who Rosie and Rick each had supporting them. Rosie only had her grandmother supporting her at the conference, whereas Rick had both of his parents in attendance as well as his counselor from the Mary Street Programme. A police officer was also present at the conference to assure Rosie’s safety and the conference counselor ran the meeting. Initially, Rick disagreed with some elements of the police report, which reportedly angered Rosie. She also reported feeling upset when Rick’s parents and counselor acted as though he was the victim. However, Rosie reported being surprised to see how much the incident really had affected him, saying afterwards that she felt that he “showed heaps of remorse” through his body language and the way he talked” and that she was “definitely able to say everything that she wanted and said she never felt controlled or frightened by Rick during the conference, [finding him] ‘very placid,’ . . . [and] like a ‘gentle giant.’” During the conference, the counselor made Rick take accountability for his actions. According to the counselor, Rosie was able to maintain her confidence throughout the conference and did not back down. She was reportedly the more powerful one throughout. Although Rick did not apologize directly, Rosie was able to say that he would no longer affect her. She said she found that she was no longer afraid of him and told him, “I’m not afraid of you anymore, I accept your apology and I know you’ll never do this to anyone again.” She reported that the conference was very important for her and that her only problem was feeling that his plan was too lenient. She reportedly wanted him to do community service, but the plan instead
required him to give her a written apology and to continue counseling through the Mary Street Programme.\textsuperscript{190} After the conference, Rosie reported feeling happier and satisfied with the outcome.\textsuperscript{191} The conference allowed her to tell her story.\textsuperscript{192} Overall, it was an empowering experience for her.

Another young girl named Tanya had a less positive experience with the conferencing program. When Tanya was twelve, she was sexually assaulted by her seventeen year old step brother, Zac, who was diagnosed with bi-polar disorder.\textsuperscript{193} Zac claimed the sexual encounter was consensual and the incident divided their family.\textsuperscript{194} Tanya’s family thought that she played a role in the assault: “in [their mind[s]], there was mutual culpability for the sexual activity and the fallout it caused in the family.”\textsuperscript{195} The conference counselor visited the home before the conference. She learned that Tanya’s grandparents believed her story, which reportedly validated her.\textsuperscript{196}

Before the conference, Tanya reported that she hoped the case would go to court. She said she feared that going to conference would minimize what Zac had done to her and she wanted him to be punished.\textsuperscript{197} She even reported toying with not attending the conference, but ultimately decided to attend so that she would have input into his restitution plan.\textsuperscript{198}

Before the conference, it was reported that emotions were high within their family. Tanya reported feeling angry and frightened of Zac.\textsuperscript{199} She believed he was not taking responsibility for what happened and that he viewed her as a willing participant.\textsuperscript{200} Zac’s family was also reportedly concerned for his mental well-being and the effect of Mary Street Programme counseling on his mental health.\textsuperscript{201} Zac got into a physical fight with his father, but apologized to his step-mother for all of the trouble he was causing the
Although Tanya’s mother still admitted partially blaming her daughter before the conference, she did agree to “go to bat for her daughter.” The family saw the conference as more of a process of “clearing the air” than a legal process.

At the conference, things went slightly better than the conference coordinators expected. A police officer attended the conference to ensure Tanya’s safety. Also attending were the conference coordinator, Tanya, her mother and social worker, plus Zac and his father. Zac was reportedly manic and intense throughout the conference, and Tanya said she was intimidated at first. Zac continued to see himself as the victim, but Tanya wanted to make him understand what he did to her and to assure her that it would never happen again. Despite Zac’s victim-blaming, Tanya reported that she felt supported throughout the conference by the coordinator and social worker, who defended her. Eventually, Zac expressed remorse. Tanya’s mother and step-father were also more supportive during the conference than they had been previously. During the conference, Tanya was a passive participant, but was reasonable about Zac’s plan for retribution. Zac agreed to: “(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 a gift for Tanya, including a hand written apology, (5) obey house rules when visiting his parents’ home, (6) not to 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 reported feeling somewhat disappointed in the results of the conference. She stated that she felt Zac’s apology was insincere and she was disappointed that he would not be doing any community service. She reported being unsatisfied with the
process and felt that the consequences of the conference were too lenient on Zac. She stated that she felt that the agreement was “really crap” and that court would have yielded a better agreement. She expected harsher penalties from the conference agreement and said that she “wanted him to do community service so, like, he could pick up rubbish on the roofs.” However, Tanya reported that she was ultimately glad that she attended the conference, because she felt otherwise “everyone would have talked about her without knowing what she thought.” After the conference, she reported still having negative feelings towards Zac as well as “a variety of negative psychological and emotional effects (e.g. fear of being alone, lack of self confidence, among others) but did feel slightly better after attending the conference. Ultimately, she was only marginally empowered by the conference.

What is obvious from both the SAAS and case studies above is that the effectiveness of restorative justice varies from situation to situation. It depends on what the victim is hoping to gain from the experience. If a victim needs an apology in order to heal, she is much more likely to have her needs met through restorative justice than in the criminal justice system because restorative justice requires an admission of wrongdoing. If the victim wants answers to her questions, she is much more likely to have her needs met through restorative justice. If the victim wants to know that the offender will not offend her or any other victim again, she is more likely to have her needs met if the offender goes through counseling, which is not exclusive to restorative justice. However, if the victim wants the offender locked up and incapacitated, she will not have her needs met through restorative justice. Unfortunately, if this is the case, that victim will not necessarily have her needs met through the criminal justice system
either. Because the effectiveness of restorative justice is so dependent upon the individual wishes and needs of each particular victim, the entire displacement of the criminal justice system with restorative justice in sexual assault cases would not be wise. This is especially true when there is so little empirical research at this time, especially in the United States.

One restorative justice program for sexual assault in the United States is gaining attention. RESTORE is a pilot program in Pima, Arizona. The Southern Arizona Center Against Sexual Assault, the Pima County Attorney’s Office (Sex Crimes Specialized Prosecution Unit), the University of Arizona College of Public Health and the Washington and Lee School of Law sponsor the program. The program “is designed for first-time offenders who are accused of raping someone they knew, and for those charged with misdemeanor sex offenses (such as exposing their genitals or looking in windows without permission) and various other forms of public indecency. The program is set-up for crimes involving adults over age 18, and for offenders (male and female) who have no record of previous arrests for felonies, interpersonal violence, or domestic violence.” Offenders must also acknowledge that the sexual assault occurred. Offenders pay for the program based on a sliding scale fee. RESTORE has been seized upon by many of the top scholars and writers in the field as a new and exciting program to watch in the United States. It emphasizes “accepting responsibility, making things right, fixing what is broken and earning redemption.”

There are four stages of the RESTORE program. The program begins with the referral stage. RESTORE determines certain criteria that the offender and the assault must meet to be eligible for referral. Because there are not enough resources for every
crime to be prosecuted in the criminal justice system, law enforcement officers decide to refer some eligible cases. If a case meets RESTORE’s eligibility requirements, the Sex Crimes Unit meets separately with both the victim and the offender to explain what crime will be charged and what participation in the RESTORE program would mean. The police officers meet with the victim first and her agreement is necessary before the RESTORE program can be discussed with the offender. If the victim does not agree, the offender is not eligible to participate in the program. However, if the victim does agree, then the Sex Crimes Unit meets with the offender separately to discuss participation in RESTORE. While RESTORE does not grant the offender the many constitutional protections the criminal justice system does, there are many potential benefits for the offender: “entering RESTORE (1) removes the risk of incarceration; (2) removes risk of mandatory sex offender registration; (3) promises no criminal record if the perpetrator completes the program; and (4) offers confidentiality unless the participant reoffends.”

If both the victim and the offender agree to participate in the RESTORE program, the process moves on to the preparatory stage. During this stage, RESTORE coordinators meet with the victim and the offender separately. The meeting with the victim occurs first and the victim goes through an intake assessment. This includes an assessment of her safety, discovery of who will attend the meeting with her, assisting her in identifying the trauma she has gone through during and since the assault and helping her formulate her desired reparations. Suggested reparations often include “payment of direct expenses including lost time from work, medical and counseling expenses for the victim, evaluation of the perpetrator by a state licensed sex offender treatment
provider and if indicated, intervention targeting alcohol/drug use, anger, violence and sexual offense.”239 Other reparations could be “stay away agreements, community service, service to surrogate victims, formal apology and answers to victim’s questions such as ‘Why did you choose to do this? or ‘Was there something about me?’”240 Often those who will accompany the victim to the meeting with her offender also attend this meeting.241 A separate meeting is held with the offender and a different coordinator.242 During this meeting, the offender also goes through an intake assessment, including “a threat assessment and measurement of individual differences that could predict program outcome.”243 The offender also identifies who will attend the conference with him and is instructed on what will occur in his meeting with the victim, how he should behave and what he will likely be asked to do for reparations.244

The process then moves to the conferencing stage. The actual conference takes place in a “secure location (i.e. with weapons screening and availability of armed response to err on the side of caution)” like a police station.245 It is facilitated by those RESTORE coordinators who have already met with the victim and the offender. What happens in the conference is confidential: each person signs a confidentiality agreement and there is no record kept of what transpires during the conference.246 The offender begins by admitting what he has done.247 Then the victim discusses the trauma she has experienced during and since the assault.248 Next, the family and friends of both sides described how each has been affected since the incident and what they have gone through as friends and family since the assault.249 The offender is then expected to “acknowledge[] and respond[] to what he hears.”250 Then the conferences moves on to discussing the retribution or Redress Plan.251 The victim proposes what she would like
the offender to do and the other conference participants also share ideas. The plan is primarily “victim-driven,” but also incorporates these other ideas as well as the input from the RESTORE coordinators. Once the plan is finalized, both the victim and the offender sign it and determine what exactly the offender must do and by when.

Finally, the process ends with the accountability and supervision stage. The RESTORE coordinators must supervise the offenders for twelve months after the conference. This supervision involves “weekly telephone and monthly face-to-face contact, receiv[ing] the documentation from [offenders] as stipulated in their Redress Plans, and track[ing] it against their timelines.” The offenders must additionally comply with the conditions of the Adult Probation Department requiring that the offender “participates in treatment, does not possess or have contact with sexually-stimulating or sexually oriented materials, will not pick up hitchhikers, will not enter or travel past the premises where the victim resides, and will be responsible for personal appearance and wear appropriate clothing including undergarments both at home and in public places.” The RESTORE coordinators, in turn, report to a Community Accountability Board once a month. The Board determines how the offender is coming along with his plan. If the offender is not making sufficient progress, he will have to appear before the Board, who will provide him re-direction. Once the offender completes the plan, he can “appear personally before the Board, with the victim and her community attending, if desired, for closure and reintegration into the community.” This final step “promotes reintegration [into the community for both the victim and the offender] by preserving relationships, involving an extended community circle, and providing the [offender] with the means to make amends and reach an endpoint where he has earned the privilege of placing the
offense behind him.”

Unfortunately there is a lack of empirical research on RESTORE’s effectiveness but given the results of the SAAS and the case studies, it is likely that the effectiveness and victim satisfaction varies from situation to situation.

Given the many valid concerns about supplanting the criminal justice system with restorative justice altogether, this paper proposes that restorative justice programs should supplement the criminal justice system in sexual assault cases. This would give restorative justice programs access to the same level of resources that the criminal justice system has. It would also help emphasize the seriousness of the offender’s behavior and serve the dual purpose of “demonstrating that [sexual assault] is disapproved [of] by society in its official mode [through the criminal justice system] as well as by friends and supporters of the victim [through restorative justice.”

Victims would report the crime to the police in the usual way. After apprehending the offender, he would be given the opportunity to take part in restorative justice by acknowledging his wrongdoing and taking accountability for his actions. This acknowledgement would take the form of a guilty plea. If the offender pled guilty, police officers would then speak with the victim about the possibility of diverting the case to restorative justice. If the victim agreed, the police officers would speak to the offender and secure his agreement to participate in restorative justice. If both parties agreed, restorative justice would supplement any punishment imposed by the judge, with the understanding that the offender agreeing to restorative justice could entitle him to a more lenient sentence. However, even if the judge gave the offender the maximum available sentence, restorative justice should still be available to the parties. It is still important to give the victim the option of this beneficial dialogue. However, it is also important to
include safeguards to protect the victim from re-victimization. The most important safeguard is to have the Victim-Offender Dialogue be voluntary. If the victim does not want to participate, she should be not forced to take part in it against her will. Further, a police officer should be present during the dialogue and the meeting should take place in a safe and secure location to assure the victim’s physical safety. The victim should also have a counselor or social worker with her as an advocate in case the offender engages in victim-blaming in the course of the conversation. If he did, the counselor or social worker would force the offender to take accountability for his actions. With these measures in place, helping to ensure the physical and emotional safety of the victim, participation in the dialogue should go a long way towards restoring the victim.

Incorporating restorative justice programs like Victim-Offender Dialogue or a conferencing model into the criminal justice system after a plea would give the victim access to the many advantages restorative justice offers. The victim would have the advantage of getting an apology from the offender, resulting in reducing resentment and anger and helping to restore the power imbalance initially created by the assault. The victim would also be given a voice through the Victim-Offender Dialogue or the conference and the ability to participate more meaningfully in the process. The victim would have a role in crafting the restitution plan, leading to more victim empowerment and satisfaction than had the victim gone through the criminal justice system alone. The victim would be given the ability to have her questions answered by the offender and have her experience validated through her dialogue with the offender. The restorative justice program itself would also be flexible and adapt to the needs of the specific
The victim would still experience most of the advantages of restorative justice, even if it did not entirely replace the criminal justice system.

Supplementing the criminal justice system with restorative justice after the offender pleads guilty, instead of replacing it all together would also eliminate many of the critics’ concerns. The concern for the victim’s physical safety would certainly be diminished if restorative justice supplemented criminal justice. If the Victim-Offender Mediation or conference took place in the prison in which the offender was incarcerated, or in the treatment center to which the offender was ordered, a police officer or other security officer could easily be present at the meeting to assure the victim’s physical safety. While there would still be some concern about the victim’s mental and emotional safety, these concerns would be mitigated by the victim choosing to participate and having a counselor or advocate at her side. If the victim knew that the offender was also being imprisoned for his actions, she might not feel as though she had to participate if she did not want to or did not feel stable enough to do so. The next concern to address involves victim blaming. It is important to bear in mind that no restorative justice would be possible in the first place unless the offender first acknowledged his wrongdoing and expressed a willingness to accept responsibility. Theoretically, this should not lead to any victim blaming since the offender has already accepted responsibility. Unfortunately, even after the offender has admitted his guilt, he may still engage in some victim-blaming during the dialogue itself if he feels defensive. This victim-blaming behavior, however, could be reduced by the other participants in the conference, like the mediator or the victim’s social worker or counselor reminding the offender of that he is responsible for the crime and forcing him to take accountability. The concern about the
restitution agreement being inadequate would also be mitigated by supplementing the criminal justice system with restorative justice.275 If the restitution plan was not the only way the offender was making amends, but instead was also either imprisoned or ordered to seek treatment, there would be less of a risk that the victim would compromise her needs. The offender would not have the opportunity to pressure her into accepting a compromised restitution plan if he were incarcerated or confined in a treatment center. Finally, critics’ concerns about restorative justice being a “soft option”276 would certainly be addressed by having it supplement the criminal justice system, rather than replace it all together. If the offender was also being punished through the traditional channels, the restorative justice would not be the only form of restitution. If restorative justice were to be added to every sexual assault case where the victim desired it, punishment would actually be harsher. Not only would the offender be required to serve whatever sentence or other punishment the court imposed, but the offender would also have to complete whatever restitution plan was developed as the result of the restorative justice conference or mediation.

Admittedly, this is not a perfect solution. It does not completely address each concern and still leaves the victim susceptible to some emotional abuse as well as some manipulation in the restitution plan by nature of the face to face meeting with offender. Although these concerns should be mitigated by the voluntary nature of restorative justice, in the case of acquaintance assault, one will never be completely sure whether the victim is volunteering to participate in restorative justice of her own volition or whether the offender is pressuring her to participate. However, by incorporating restorative justice into the criminal justice system after the offender pleads guilty, but before the case...
moves to a contested trial, many of the underlying problems involved with testifying are addressed. 277

While many of the problems associated with testifying might be addressed by incorporating restorative justice into the criminal justice system before a contested trial, some might not be. The first problem of the crime never being reported to the police in the first place because of fear of having to testify might be addressed through supplementing the criminal justice system with restorative justice. 278 If the victim knew that reaching a restorative justice process would be possible if the crime was reported to the police, the victim might be more willing to do so. However, the next problems, that many offenses never reach a prosecutor and those that do are not prosecuted, might not be remedied by adding restorative justice to the current system. 279 The presence of restorative justice would probably not affect what cases are passed along to prosecutors by the police. Although prosecutors might be more likely to pursue sexual assault cases in the hopes of getting more guilty pleas, there is no way to know this for sure. The presence of restorative justice might also not affect the low conviction rates that plague so many sexual assault cases. 280 Although it is possible that more defendants might plead guilty in the hopes of going through restorative justice and receiving a lighter sentence, many defendants will probably still proclaim their innocence and will not be entitled to this option. Supplementing the current system with restorative justice, however, would combat the lack of control by the victim. 281 By the offender pleading guilty, the victim would have control over the restorative justice process and would not be subjected to a contested trial and would not experience the trauma of testifying. 282 While not all of the problems associated with the criminal justice system would be adequately remedied
through the addition of restorative justice, the problems most costly to the victim would be.  

There is a possibility of improvement for victims by supplementing the criminal justice system with restorative justice. It would address many of the problems of the criminal justice system without causing the concerns raised by using restorative justice processes alone in sexual assault cases. While it is not a perfect solution, it is a workable one. It would also allow for more empirical research to be conducted about the effectiveness of restorative justice. This way, if research continues to show that restorative justice is an effective mechanism for restoring victims and offenders back to society after a sexual assault, it could one day supplant the criminal justice system.

---


2 Mary P. Koss et al., *An Innovative Application of Restorative Justice to the Adjudication of Selected Sexual Offenses*, CRIME PREVENTION – NEW APPROACHES 5. [hereinafter Innovative Sexual Application]

3 *Id.* “New data projected that between 20-25% of the more than 8 million women students will be raped while attending university and within the past seven months, 5% (approximately 400,000 women) had someone expose their sexual organs to them, 5% received obscene telephone calls and another 2/5% were observed naked without their permission.” *Id.*

4 For example, “40% had watched people naked or having sex without their permission, 20% had exposed themselves and another 23% had masturbated in public, 22% had made obscene telephone calls. Likewise, 14% of college student rapists admitted other sexual assaults. Experts conclude that most perpetrators are involved in multiple acts of sexual deviance, with multiple victim types.” *Id.* at 6.

5 Both men and women can be victims of sexual assault and the Restorative Justice programs that deal with sexual assault do not discriminate based on the gender of the victim or the offender. See, e.g., RESTORE FAQ, http://restoreprogram.publichealth.arizona.edu/questions/eligibility.htm#elig5 (last visited February 14, 2009). However, this paper deals exclusive with female victims of sexual assault.
It is estimated that only between 5 and 30 percent of offenses are even reported to the police. Kathleen Daly and Sarah Curtis-Fawley, *Justice for Victims of Sexual Assault*, 2004 GENDER, OFFENDING, AND VICTIMIZATION, 2. [hereinafter *Justice for Victims of Sexual Assault*].


*Justice for Victims of Sexual Assault*, supra note 6. “This figure includes guilty pleas and lesser included offenses . . . and is typically 10 to 15 percent of cases,” not 10 to 26 percent. However, because of the “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.” *Id.*


*Id.*

*Id.* When victims want their cases to proceed, “2 out of 3 rape victims had their cases turned down for prosecution, and 8 of 10 turn downs were against the victims’ expressed wishes.” *Id.*

*Id.*

* Justice for Victims of Sexual Assault, supra note 6.

*Id.* at 2-3.

Barbara Hudson, *Restorative Justice and Gendered Violence*, 42 BRIT J. CRIMINOLOGY 616, 624 (2002). “She must be unprovocatively dressed; sober; in her own home, or on a well-lit street preferable in daylight; she must never have associated intimately with the rapist previously; she must have refused sexual relations loudly and clearly, and it helps to have been physically injured in resisting.” *Id.* Unfortunately, this requires many women to accept a “victimized” identity. *Id.*
In fact, a recent Australian study demonstrated 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.” \textit{Id.}

\textit{Expanding Community’s Response, supra} note 11, at 1442.

“Testifying was 1 of 4 significant predictors of post-traumatic stress disorder symptoms among adult survivors of child rape.” \textit{Id.}

Id. at 1442.

Id.

\textit{Blame, Shame and Community, supra} note 9, at 6.

Id.

Id.

Id.

Id.

Id.

\textit{Id.} Many states do not allow the defendant to use these defenses, but “third party tortfeasors have unlimited access to the defense of victim fault.” \textit{Id.} Examples include: a gang rape of a 13 year old by three 17 year olds and she was found 12% responsible because she was drinking with them; a rape victim being held 30% responsible for being in the street at 3 AM; and a woman being held 51% responsible for going to a bar with the man who raped her. \textit{Id.} Other “unreasonable behaviors” include “going outside alone at night to hail a cab, walking to a car in a hotel parking lot, taking five steps inside a door before closing it, and failing to double check door or window locks.” \textit{Id.} Interestingly, not wearing a seatbelt does not constitute comparative fault in car accident cases. \textit{Id.}

34 Id.

35 Blame, Shame and Community, supra note 9, at 6.

36 Id.

37 Restorative Justice Responses to Sexual Assault, supra note 33, at 4.

38 Id.

39 Id. at 5.

40 Mary P. Koss, et al., Disposition and Treatment of Juvenile Sex Offenders from the Perspective of Restorative Justice, THE JUVENILE SEX OFFENDER, 4.


42 Id.

43 Id. at 388.

44 Id.

45 Expanding Community’s Response, supra note 11, at 1442.

46 Blame, Shame and Community, supra note 9, at 7

47 This includes “traumatizing investigatory, charging and trial procedures, and apply only to the fraction of reported crimes that survive the attrition process.” Id.

48 Id.

49 Id.

50 Id. Acquaintance rape is much more common and so this program is not able to help the vast number of victims. “Fewer than 10% of all child molestations are committed by strangers. The majority of sex crimes are committed against victims by fathers (20%), stepfathers (29%), other relatives (11%) and acquaintances of the family (30%).”

Leonore M.J. Simon, Sex Offender Legislation and the Antitherapeutic Effects On
Victims, 41 ARIZ L. REV. 485, 2. (1999). Sex Offender Legislation targets stranger rape, but in reality over 80% of rapes are committed by acquaintances. Id. at 3. Further, many women do not consider rape by a family member or acquaintance rape and so do not report it. Id. at 3, 8. Police are also more wary to investigate and pursue rape claims by family members or acquaintances. Id.

51 Blame, Shame and Community, supra note 9, at 7.

52 For example, one judge required an offender convicted of aggravated battery to post a sign in his yard that stated, “Warning: A Violent Felon Lives Here.” Id. Other judges have required “college date rapists . . . to wear bright orange armbands broadcasting their offenses and listing all affiliations, including sports fraternities, as well as to make public apologies in classrooms.” But the potential affects of shaming can be devastating. The batterer’s wife divorced him because “she could not live with the humiliation” and shaming can have the effect of making some “perpetrators more violent.” Id. Braithwaite argues that while stigmatizing shaming is harmful, reintegrative shaming can be good for the offender. Anne-Marie McAlldinden, The Use of “Shame” With Sexual Offenders, 45 BRIT. J. CRIMINOLOGY 373, 376 (2005). Reintegrative shaming involves: “(1) the overt disapproval of the delinquent act (shaming) by socially significant members; and (2) the on-going inclusion of the offender within an interdependent relationship (reintegration). Thus, shaming is reintegrative when it reinforces an offender’s membership in civil society.” Id. It must “(1) maintain[] bonds of love or respect between the person being shamed and the person doing the shaming, (2) [be] directed at the evil of the act rather than the evil of the person, (3) [be] delivered in a context of general social approval, and (4) [be] terminated with gestures or ceremonies of acceptance and forgiveness.” Id. Unfortunately, the kind of shaming that is associated with the criminal justice system is stigmatizing shaming. Id.

53 Blame, Shame and Community, supra note 9, at 7.

54 Id.

55 Id.

56 Repairing Victims, supra note 41, at 386. While “this rate is lower that the rates for nonsexual criminals (61-83%), . . . it must be interpreted with caution because many sexual offenses are never reported to police and those that are reported frequently are not adjudicated or are downgraded to nonsexual offenses.” Id.

57 Id. According to Koss, “this difference could reflect the community’s success in reporting law violations,” but that notification or the lack thereof does not lower the rate of reoffense. Id.

58 Id.
Mary P. Koss, et. al., *Disposition and Treatment of Juvenile Sex Offenders from the Perspective of Restorative Justice, The Juvenile Sex Offender, 5.* [hereinafter *Disposition and Treatment of Juvenile Sex Offenders*.]

*Repairing Victims*, supra note 41, at 388.

*Disposition and Treatment of Juvenile Sex Offenders*, supra note 60, at 8. See also Joseph A. Scalise Jr. MSW/LCSW, Address at Washington University School of Law (March 2, 2009) emphasizing that restorative justice addresses “need that were not being met in the usual justice process,” encourages “offender accountability,” strives to prevent “victim frustration and alienation,” addresses the “failure of increasing punishment to change behavior [and] the skyrocketing cost of punishment and system overload.” *Id.*

Victim-Offender Mediation or Victim-Offender Dialogue is a direct meeting between the victim and the offender and usually takes place in a prison pre-release. *Restorative Justice Responses to Sexual Assault*, supra note 33, at 5. Often, the victim initiates the process and informs the appropriate authorities of the desire to meet and then the offender must agree. “The agenda of the dialogue is determined by the survivor/victim and may include stating the impact of the crime, asking questions, and seeking acknowledgement of responsibility.” *Disposition and Treatment of Juvenile Sex Offenders, supra*, note 60, at 8. Through Victim-Offender Mediation, victims are able to have lingering questions answered, such as why the offender targeted them. *Id.* at 6. They are also able to express the impact the offense has had on their lives. *Id.* Finally, they “experience a more human interaction with the offender” and are finally able to heal. *Id.*

Some people take issue with the use of the word “mediation.” Mediation implies that the two parties have equal bargaining power and that there is a conflict that must be resolved. *Id.* However, a sexual assault is often a “gendered crime that challenges the assumption of equal resources to speak and be heard. In addition, crimes are not conflicts; there is an injured party and a wrongdoer.” *Id.*

Sentencing Circles gather a large group of people who want to resolve a crime situation. *Id.* Together they create a plan for the offender. *Id.* Sentencing circles are
very common in Native American communities. *Id.* Circles might include “survivor/victims, offenders, their family/friends, . . . criminal justice personnel (judges, prosecutors, defense attorneys, and police), social service providers, and community members.” *Id.* To avoid chaos and confusion, sentencing circles usually designate an item to be the “talking piece” and whoever is holding the piece is allowed to speak. *Id.* at 6-7. This theoretically “allows expression of a broader range of views than in traditional sentencing.” *Id.* at 7. One benefit to sentencing circles is that many people are given a voice as well as “a stake in justice, the context of mutual respect, and renewed community and cultural pride.” *Id.* However, sentencing circles also raise several concerns, including “lack of privacy, embarrassment working with family and close friends, unprofessional conduct, coercion of survivor/victims because they are outnumbered, deferral to professionals by Native people, and class, gender, culture and race bias.” *Id.*

71 *Id.* at 5-7. Finally, conferencing or family conferencing involves a meeting between the victim, offender and their friends and family. *Id.* at 7. At the meeting, the offender is expected to take responsibility or his or her actions. *Id.* Before the meeting takes place, however, weeks or months are spent preparing both the victim and the offender for what will transpire. *Id.* When the meeting actually take place, it is facilitated by a trained mediator. *Id.* To assure that the victim is safe, meetings usually take place in police stations. *Id.* Typically, a conference involves “the offender describing his/her acts and taking responsibility for them, the survivor/victim voicing the impact of the crime, followed by family and friends of both the survivor/victim and the offender.” *Id.* After they have all spoken, “the offender then acknowledges and responds to what he/she has heard about the harm that resulted from the acts.” *Id.* Finally, “the meeting concludes with discussions formalizing the programmatic and survivor/victim-driven components of a plan that the offender accepts to make amends, repair harm to the survivor/victim, family/friends and community, and undertake personal changed to prevent reoccurrence of similar acts.” *Id.* The plan is based on input from the victim and is customized to the individual offender. *Id.* Conferencing can occur throughout the justice process and can be used either to supplement to criminal justice system or to supplant it. *Id.*

72 *Disposition and Treatment of Juvenile Sex Offenders, supra,* note 60, at 9. In restorative justice proceedings, a study showed that 72% of victims received an apology. Only 19% of victims in court received an apology. *Id.* Further, 77% of victims in restorative justice proceedings viewed the apology as sincere while only 41% of victims in criminal justice proceedings saw the apology as a sincere expression of remorse and regret. *Id.*

73 *Id.* at 10 “Among offenders who participated in the victim-offender mediation model of restorative justice, 9 of 10 listed apologizing to the victim as one of the four most important issues to be dealt with in the process.” *Id.* In fact, “apology was the most frequent reason chosen by perpetrators for participating and afterwards virtually 100% of offenders felt it was ‘important’ or ‘very important.’” *Id.*

74 *Id.* at 8.
See Scalise, Address at Washington University School of Law, supra note 64.

Id. at 9.

Id. “Anger in victims was dissipated when the offender was seen as responsible.” Id.

Kathleen Daly and Sarah Curtis-Fawley, Justice for Victims of Sexual Assault: Court or Conference, GENDER OFFENDING AND VICTIMIZATION, 4 (2004). [hereinafter Justice for Victims of Sexual Assault: Court or Conference].

Id.


Id. In court, an arbitrary punishment is imposed that is not as meaningful to the victim. Id.

Id. An additional benefit to having the victims and offenders “draw up their own restitution agreements is the high rate of agreement adherence.” Id.

Justice for Victims of Sexual Assault: Court or Conference, supra note 78.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.


Id.

Id.

Id.

Id. at 709.

Blame, Shame, and Community, supra note 9, at 9.

Hopkins, supra note 89, at 709.
Without appropriate security, conferencing raises safety issues, as women could be vulnerable to revictimization in their vehicle or in the parking lot where the meeting is held.” *Id.*

Hopkins, *supra* note 89, at 710.

*Id.*

*Id.*

*Id.*

*Blame, Shame, and Community, supra* note 9, at 9.

*Id.* *See supra* notes 15-25 and accompanying text.

*See Hopkins, supra* note 89, at 712.

*Id.* “[T]hese power dynamics can skew bargaining power in a community conference and thus yield an agreement that does not adequately or accurately reflect the survivor’s interest or wishes.” *Id.*

*See Id.*

*Id.*

*Id.*

*Blame, Shame, and Community, supra* note 9, at 9.

*Id.*

*See Justice for Victims of Sexual Assault: Court or Conference, supra* note 78, at 17 where in an in-depth case study, the “power imbalance between [what the victim] felt was not only between her and [the offender] but also between her and the other adults in the room.” *Id.*

*Id.*

*See Hopkins, supra* note 89, at 713.

*Id.* This is especially true in cases that also involve domestic violence. “Domestic violence offenders often apologize for their violence afterward and ask for forgiveness from and reconciliation with their partner.” *Id.*

*Id.*

*Justice for Victims of Sexual Assault: Court or Conference, supra* note 78, at 4.

114 Justice for Victims of Sexual Assault: Court or Conference, supra note 78, at 4. This can also “lead to more entrenched behavior on the part of the offender.” Cossins, supra note 113.

115 Id.

116 Blame, Shame, and Community, supra note 9, at 9.

117 Id.

118 See Justice for Victims of Sexual Assault: Court or Conference, supra note 78, at 3.

119 Blame, Shame, and Community, supra note 9, at 9.

120 Cossins, supra note 113.

121 Id. at 362.

122 Id.

123 Id. at 361. “Restorative justice scholarship . . . fail[s] to give recognition to innovative programs and practices, such as the protective and empowering effects of vulnerable witness protections.” Id.

124 One “difficulty with restorative justice assessments, is . . . that they may not be measuring the effectiveness of the proceedings, but the effectiveness of rehabilitative as opposed to non-rehabilitative measures.” See Hudson, supra note 17, at 627. In general, when empirical research is done it speaks vaguely about the punishments imposed in the criminal justice process and “it may be that the educative impact of the proceedings themselves plus the restorative and safety-orientated measures that are agreed on in conference are more effective than either non-interventive penalties such as fines, or shorter custodial sentences.” Id. However, these concerns about the effectiveness of restorative justice generally are beyond the scope of this paper.


127 Id. “The research team gathered data and documents in the Adelaide Youth Court over three months – October – December 2005.” Id. Next, “over the next year-and-a-
half, three researchers read the documents, coded them and prepared them for analysis.” *Id.* Each case was a “youth case in South Australia having at least one sexual offense at the start of the criminal process, which [was] finalized by police formal caution, family conference or in the Youth Court.” *Id.* Being “finalized means the case is finished, having been disposed by formal caution, conference or in court by a range of possibilities (dismissed, withdrawn, proved (with or without conviction) and found not guilty at trial).” *Id.* The study includes “365 different young people associated with 385 cases: 226 court cases (59%), 118 conference cases (31%) and 41 formal cautions (10%).” *Id.*

128 *Id.* There were variables “relating to the youth, the offense, the victim, the seriousness of the charge(s) and case, circumstances of reporting the incidents(s) to the police, the legal journey of the court case and how it was finalized, the participants in the conference, the penalties and other elements.” *Id.*

129 *Id.* at 342.

130 *Id.*

131 *Id.* The offender’s median age at the time of the offense was between 14.1-15.6 years and the victim was between 8.6 – 13 years. *Id.*

132 There were four factors that were predictive of offenders not admitting the offense to the police: “(1) the [offender] sought legal advice before or during questioning by the police; (2) the offense was more serious (based on offense elements); (3) the [offender] had one or more cautions, conferences, or proved court cases before the SAAS case; and (4) the offense was extra-familial (boyfriends/girlfriends, friends, casual acquaintances or others known or unknown.” *Id.* at 345. The extra-familial factor might “be easier for [the offender] to deny because unlike the intra-familial cases, there is no other family member or adult to witness the behavior or to ask questions.” *Id.* Similarly, it would be harder for the offender to argue that the victim consented in intra-familial cases. *Id.*

133 *Id.* at 344.

134 *Id.* at 342. “Four percent of the cases were proved of a non-sexual offense, but the rest were dismissed or withdrawn.” *Id.*

135 *Id.*

136 *Id.* Court cases took a median of 5.7 months from report to the police to the finalization; where as restorative justice took 2.5 months. *Id.*

137 *Id.*

138 *Id.*
Id. at 346.

140 *Id.* Interestingly, the factors making it more likely for a case to end up in court are the opposite of those making it more likely that a case will be proven in court. *Id.*

141 *Id.* at 347.

142 *Id.*

143 *Id.*

144 *Id.*

145 *Id.*

146 *Id.* I realize these percentages add up to more than 100 percent, but these are the numbers in the literature. The literature did not clarify which cases resulted in duplicate punishments, creating this result.

147 *Id.* The maximum length a court is able to impose is three years. *Id.*

148 *Id.*

149 *Id.*

150 *Id.*

151 *Id.*

152 *Id.* Fifty-two percent of the counseling was from Mary Street Adolescent Abuse Prevention Programme and the remaining twenty-nine percent was some other kind of counseling. *Id.* Mary Street Adolescent Abuse Prevention Programme is a counseling program that has been in operation since the mid 1990s. *Id.* It is an “intensive therapeutic-counseling intervention, typically of one-year’s duration, to address adolescent sex offending by young people aged 12 through 17 years.” *Id.*

153 *Id.*

154 *Id.*

155 *Id.*

156 *Id.*

157 *Id.*
Id. at 347-48.

Id. at 347.

Id. at 348.

Id.

Id.

Id.

Id. Contra Scalise, Address at Washington University School of Law, supra note 64 (asserting that offenders who completed certain community service projects in their communities had lower rates of recidivism than those who did not. Those projects include “mentoring and intergenerational service [where] youth and adults work together to improve their communities; economic development [where] . . . projects . . . have a maximum visible impact on the quality of life in the community; citizenship and civic participation; helping the disadvantages; crime prevention projects [and] giv[ing] back [to other offenders] (e.g. providing educational presentations for other offenders.” Id.

Restorative Justice and Sexual Assault, supra note 126, at 350.

See Justice for Victims of Sexual Assault: court or conference, supra note 6, at 6.
Tanya even moved out of her mother and stepfather’s house and moved in with her grandparents, while Zac moved in with his mother. Id.
His father felt that Zac was too mentally unstable to do community service. Id.

See supra note 72-77 and accompanying text.

See supra text accompanying notes 150, 154 and 158.

See supra text accompanying note 64, 78.

See supra text accompanying notes 162-169.

See supra notes 6-10 and 35-44 and accompanying text, discussing the problems with convicting sexual offenders and supra notes 139-48, discussing the SAAS study that disclosed actual results in court cases.

Innovative Application, supra note 2, at 9.

See RESTORE FAQ, supra note 5.
Innovative Application, supra note 2, at 9.

Id.

See, e.g., Innovative Application, supra note 2, at 9; Repairing Victims, supra note 41, at 389; Hopkins, supra note 89, at 697.

Innovative Application, supra note 2, at 10

Id. at 9.

Id.

See text accompanying notes 224-25.

Innovative Application, supra note 2, at 10.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.
Sometimes the offender will even be asked to take a polygraph test to ensure that he is “fully disclosing” his behavior. *Id.*

This can happen up to three times. *Id.*

See, e.g., Kathleen Daly, *Setting the Record Straight and a Call for Radical Change: A Reply to Annie Cossins’ on ‘Restorative Justice and Child Sex Offenses,’* 48 BRIT J. CRIMINOLOGY 557, 560-61 (2008). [hereinafter *Setting the Record Straight.*]

See Hudson, *supra* note 17, at 628.

See *supra* notes 72-88 and accompanying text.

See *supra* notes 72-77 and accompanying text.

See *supra* notes 78-79 and accompanying text.

See *supra* notes 80-82 and accompanying text.
269 See supra notes 83-84 and accompanying text.

270 See supra notes 85-87 and accompanying text.

271 See supra notes 89-123 and accompanying text.

272 See supra notes 92-95 and accompanying text.

273 See supra notes 96-101 and accompanying text.

274 See supra notes 99-100 and accompanying text.

275 See supra notes 102-111 and accompanying text.

276 See supra notes 112-123 and accompanying text.

277 See supra notes 6-44 and accompanying text.

278 See supra note 6 and accompanying text.

279 See supra notes 7-9 and accompanying text.

280 See supra note 10 and accompanying text.

281 See supra notes 11-14 and accompanying text.

282 See supra notes 15-25 and accompanying text.

283 This proposal does not address the problems of civil remedies for victims. The proposal would not affect how civil trials are conducted because there is no possibility of a guilty plea. Some might propose an analogous solution involving incorporating restorative justice into civil processes after a settlement. However, this is problematic because settlements do not involve an admission of fault. In fact, one important benefit of settlements for defendants is that there is no requirement to admit liability. Therefore, without an admission of wrongdoing, the civil settlement would not eligible for restorative justice.