

## Mind the Gap: Restorative Justice in Theory and Practice

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# *Mind the Gap: Restorative Justice in Theory and Practice*

KATHLEEN DALY

## INTRODUCTION

*Mind the gap.* The words crackled over a speaker in a London tube station in 1980. As an American unfamiliar with British terminology, I recall laughing at the time. The warning by a stern male voice to 'mind the gap' was repeated as my train pulled into the station and the doors opened. My initial amusement turned to concern and some anxiety. What should I be minding? What was the nature of this gap? When the doors opened, I spied the gap. It was a step up from the platform to the train floor, and there was a space to negotiate before stepping onto the train. I made it into the train with some relief.

The same year Abel (1980) was marking the death of 'gap studies' in socio-legal research. He said that like legal realists, social scientists were often 'forced to adopt a debunking posture' (p. 808). The result was 'studies of impact, efficacy, the "gap"' (p. 821) between ideals and practice, 'image and reality' (p. 810). He proposed a shift away from an instrumentalist model of law, where

Effectiveness [is] construed in a narrowly instrumental fashion as an examination of whether the declared goals of a law or legal institution (usually one that is new or reformed) have been attained. *Yet we know they never are.* We should ask instead: what are its inadvertent consequences or symbolic meanings? What are its costs? For whom *does* it work? What are the fundamental structural reasons why it does not work? (Abel, 1980: 828; my emphasis line 3)

Nelken (1981: 44, 60) countered Abel by saying that critiques of gap studies 'went too far' and 'were exaggerated'. 'There is nothing invalid about a focus on the discrepancy between legislative promise and performance', provided that both the claims and the evidence are treated as 'data worthy of investigation in their own right' (p. 45). Abel and Nelken remind us that we should not be astonished to discover gaps in ideals and practices or in 'promises held out for law and its actual effects' (Nelken, 1981: 41). They invite us to 'mind the gap' in a theoretical sense, that is, not only to observe the space between the platform and the train,

but also to ask why the space is there. Gaps may signal something more profound than meets the eye.

For restorative justice, one reason we should expect to see gaps in theory and practice is that most people do not fully understand the idea. By this I mean that unlike interactions with the police in the street or station, or interactions with lawyers and judges in the courtroom -- for which many images are available in popular culture -- most people do not have a mental map of what this justice form looks like, how they are to act in it, nor what the optimal result is. And yet, they are expected to come into a room, know what to say, and be affected by the encounter. A second reason is that restorative justice advocates assume that everyone has the requisite skills and desire to participate. However, effective participation requires a degree of moral maturity and empathetic concern that many people, especially young people, may not possess.

#### RESTORATIVE JUSTICE AND CONFERENCING IN THEORY

What then is the 'ideal' restorative justice practice? I list a set of activities and behaviours that are to occur in one practice: conferences used as a diversion from court for admitted juvenile offenders. Conferences take diverse forms and have different purposes, depending on the jurisdiction. In Australia, there are differences in the kinds of offences that can be conferenced and in the volume of cases disposed (Daly, 2001a; Daly and Hayes, 2001). This paper utilises data from the South Australia Juvenile Justice (SAJJ) project on conferencing. South Australia was the first Australian jurisdiction to introduce a statutory-based conferencing scheme, with passage of the *Young Offenders Act* in 1993 and conferencing begun in February 1994. It is a high-volume jurisdiction that conferenced more serious kinds of cases.<sup>1</sup>

My analysis of the SAJJ data focuses on these conference components<sup>2</sup>: the conference process, its legal context, conference outcome and compliance, and conference effects:

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<sup>1</sup> By high volume, I mean that conferences are used routinely and frequently. In South Australia, there are 1400 to 1600 conferences per year, and they are 18 percent of youth dispositions. While some jurisdictions exclude selected offences from conferencing (e.g., sexual assault), South Australia does not. It has the highest maximum number of community service hours (300) and the longest period of time to complete an undertaking (12 months) than any other Australian jurisdiction.

<sup>2</sup> My depiction is of New Zealand model conferencing, which has two professionals present (a facilitator and police officer). This differs from the Wagga model, which has one professional present (a police officer), uses a scripted conference underpinned by reintegrative shaming theory, and is more prevalent in North America and the UK.

(1) Conference process. A victim and an *admitted* offender and their supporters come together to discuss the offence, its impact, and an appropriate penalty (agreement or outcome). The discussion evokes feelings of remorse<sup>3</sup> in the offender, which leads to a genuine apology and a desire to repair the harm. All conference professionals and participants are treated fairly and with respect. Participants then discuss an appropriate penalty (or agreement or outcome). Everyone has a say, and participation by the professionals is kept to a minimum. The police officer and coordinator ensure that elements of the agreement are not excessive.

(2) Legal context. Young people (YPs or offenders) understand their legal entitlements, which includes an understanding of what is happening in the conference, when they can end it, and the consequences of disagreeing with the outcome.

(3) Conference outcome and compliance. The young person signs an agreement, a legally binding document, which itemises the group's outcome decision. It describes what the YP must do and completion dates. The YP completes the agreement, which may include an apology letter, work for the victim or others, or compensation. In so doing, the YP assists in 'repairing the harm' for the victim.

(4) Conference effects. From their experience attending the conference and meeting the offender, and the offender's completing the agreement, victims recover from the disabling effects of the offence. From their experience meeting victims and seeing the effects of crime on them, offenders are less inclined to commit another offence.

## RESTORATIVE JUSTICE AND CONFERENCING IN PRACTICE

### **The SAJJ project**

SAJJ had two waves of data collection in 1998 and 1999 (Daly et al., 1998; Daly, 2001b). In 1998, the SAJJ group observed 89 conferences in metropolitan Adelaide and two country towns. The sample was selected by offence category: eligible offences were violent crimes and property offences having personal or community victims, such as schools or housing trusts. Excluded were shoplifting cases, drug cases, and public order offences. Here are highlights of the conference sample<sup>4</sup>:

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<sup>3</sup> Wagga model conferencing gives more emphasis to inducing 'shame' in offenders, drawing on Braithwaite's (1989) theory of reintegrative shaming (Harris and Burton, 1998).

<sup>4</sup> These are conference-based percentages, not offender-based.

- 44 percent dealt with violence (mainly assaults) and 56 percent, property offences (mainly breaking and entering, property damage, and theft of a motor vehicle).
- In 68 percent, the victim was a person; 20 percent of victims were organisations, and 12 percent, a combination.
- In 28 percent, the victims were under 18 years of age.
- Of violence victims, nearly half required medical attention and 35 percent 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.
- In 15 percent, there were two or more offenders at the conference.
- The number of conference participants (*excluding* the coordinator and the police officer) ranged from 1 to 12, with a median of 5.
- Of primary offenders, 76 percent were male; 12 percent, Aboriginal; and 8 percent, members of other racial/ethnic minority groups; .

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 YP, SAJJ observations focused on a designated primary YP. 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 percent) in 1998; of that group, 94 percent were again interviewed in 1999. The interview had open- and close-ended items.

## **1. Conference process**

*1(a) Victim and offender come together to discuss an offence.*

In the SAJJ sample, 74 percent of conferences had a victim present, and an additional 6 percent had a representative from the Victim Support Services. Figures from South Australia and New Zealand (both high-volume jurisdictions) show that victims are typically present in half of conferences (Wundersitz, 1996: 109; South Australia Office of Crime Statistics, 1999: 131; Maxwell and Morris, 1993: 118). If victimless offences are excluded, victim presence would likely increase by about 8 to 10 percentage points. Based on these figures, let us assume that in high-volume jurisdictions, victims and offenders come together no more than

60 percent of the time.<sup>5</sup> This suggests a gap in ideals and practice. Can we (or should we) expect any of the claimed benefits of conferences to occur if victims are not present?

Relatedly, do victims and offenders know what to do when they 'come together'?

In 1998, the 93 young people were asked to think about the time before the conference and how much they knew about the process. About half or more said they had been given 'none' or 'not much' information on what would happen (47 percent), possible outcomes (54 percent), and what was expected of them (61 percent). We asked, 'what did you think would happen at the conference?' Some 27 percent had been to a conference before. An additional 40 percent, who had not been to a conference before, said they had some idea, and they most frequently mentioned penalty outcomes: 'We thought, we knew we had to do community service' or 'Um, well, I thought it was basically going to be a way of working out how I compensate for damages' or 'That I'd have to pay a fine'. The rest (33 percent) said they had no idea what would happen.<sup>6</sup> Half said they felt scared about what would happen at the conference, but it wasn't meeting the victim that frightened them: rather, they worried about the sanction they'd receive. A telling indicator was their response to the question, 'Before the conference, did you think about what you wanted to do or to say to the victim?' Over half (53 percent) said 'no, not at all'. These results suggest that when young offenders enter the conference room, they are concerned with what penalty they may receive. How they relate to victims is relatively less important.

For the 79 victims interviewed in 1998, a substantial share said they were given 'none' or 'not much' information on what would happen (40 percent), what was expected of them (46 percent), or outcomes (52 percent). The victims' replies to 'What did you think would happen at the conference?' show that most had some idea (83 percent), and they most often mentioned discussion of the outcome alone, or in consort with discussion of the offence impact. Therefore, like the YPs, victims are also oriented toward the sanction an offender might receive.

A guiding presupposition in the literature is that victims are curious to meet the offender and to find out why s/he victimised them. But is this the case? Excluding victims who already knew the offender, and analysing the 'stranger' and 'known only by sight' cases (N=50), 36 percent said that they were *not at all* curious to find out what the offender

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<sup>5</sup> In low-volume jurisdictions such as Queensland, which emphasise victim presence, the proportion is much higher, at over 90 percent.

<sup>6</sup> Those saying they had 'some idea' (even if their idea was inaccurate) were coded having had some idea. Those coded as having 'no idea' said 'I had no idea', 'I didn't have a clue', and the like.

was like, and 32 percent said they were *not at all* curious to find out why the young person victimised them or their organisation.

*1(b) The conference discussion evokes feelings of remorse and shame in the offender ...*

A complex sequence of actions, words, body language, and symbolic exchanges occurs in the course of a YP's 'taking responsibility for an offence', 'showing remorse', and wishing to 'repair the harm', and the victim's ability to explain the impact of the offence and to 'read' the YP's sense of contrition and the genuineness of an apology. For victims, an added complexity is that the outcome is a promise by a YP to do something; thus, repairing the harm for victims is *contingent* on whether a YP makes good on a promise.

Several gaps are evident. One is how victims and offenders interpret each other's actions and words. Another is what we expect should occur and what does occur in a conference. I focus on the second, with some attention to the first, analysing in sections *1(b)* to *1(d)* a subset of cases in 1998 (N=53) and in 1999 (N=47), in which victims were present at the conference and both the primary YP and victim were interviewed in that year. Although the number of cases is reduced, it permits comparison across three perspectives (the SAJJ researcher's, the victim's, and the primary YP's) for the same set of cases.

SAJJ observers said that 77 percent of the YPs were actively involved in the conference,<sup>7</sup> 66 percent gave a clear story of how the offence came about, 60 percent accepted responsibility for the offence, and 53 percent were remorseful. Three-quarters of victims were effective in describing the impact of the offence on them. Half of the YPs (53 percent) understood the impact of the offence on the victim, whereas a lower share of victims (36 percent) understood the YP's situation. There was positive movement, in the form of words spoken, between the victim and offender in a minority (34 percent) of conferences.<sup>8</sup> Just over 40 percent of the YP subset apologised spontaneously to the victim at the conference, but for 28 percent, the apology had to be drawn out, and in 30 percent, there was no apology made at the conference at all. Verbal apologies may have been made before or after the conference or an apology letter written because in almost all cases (96 percent) the YP made an apology of some sort.

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<sup>7</sup> Unless otherwise indicated, these percents are of the researchers' judgments that the YPs or victims 'mostly' or 'fully' did something, with the rest in the 'somewhat' or 'not at all' categories.

<sup>8</sup> By positive movement, I mean the expression of a mutual understanding or regard for the other, which develops over the course of the conference. To illustrate, when recording positive movement between the victim and YP, a SAJJ observer wrote: "The victim started asking caring questions about the YP's friends and her parents and life. The YP says "I can see why you're upset, the photos cannot be replaced". ... The victim sees the YP as a victim of peer group pressure. The YP starts crying when the victim cried about his parents'.

How do the YPs regard saying sorry to victims? In the 1998 interviews, 74 percent said they felt sorry for what they had done. However, somewhat fewer said they felt sorry for the victim (56 percent before and 47 percent after the conference). While a substantial minority (43 percent) said that the victim's story had an effect on them, most said that it had little or no effect. When the YPs were asked what was important for them at the conference, 'repairing the harm' to victims was less important than clearing their name and reputation or being viewed by others in a more positive light. In identifying what was most important from a list of items, three we might consider to be restorative -- to make up by doing work or paying money, to apologise, and to let people know the behaviour won't happen again -- were 43 percent of responses. More often the YPs selected items concerning their own reputation and their account of events, including 'to let people know that I can be trusted', 'I don't usually do things like this', and 'to tell people what happened'. In 1999, when we asked why they decided to say sorry, 27 percent said they didn't feel sorry but thought they'd get off easier, 39 percent said to make their family feel better, and a similar percent said they felt pushed into it.<sup>9</sup> However, when asked what was the *main reason* for saying sorry, most (61 percent) said they really were sorry.

The victim interviews in 1998 reveal that most were unmoved by the offender's story at the conference, with 36 percent saying that it had some or a lot of impact. When asked what was most important for them at the conference, victims said they wanted to be reassured that the offender wouldn't re-offend (32 percent) and they wanted to tell the offender how the offence affected them (30 percent). From the 1999 interview, we found that most victims thought that the YP's motives for apologising were not sincere. To the item, the YP wasn't sorry, but thought they'd get off easier if they said they were, 36 percent of victims said 'yes, definitely' and another 36 percent said 'yes, a little'. The main reasons victims gave for why the YPs said sorry were the YP thought they'd get off easier (30 percent) and the YP was pushed into it (25 percent). *Just 27 percent believed that the main reason that YP apologised was because s/he really was sorry.* It is not surprising, then, that half the victims said the YP's apology did not at all help to repair the harm.

These results show a gap between the ideal and the reality of conferences. From the victims' perspectives, less than 30 percent of offenders were perceived as making genuine apologies, although from the offenders' perspectives, just over 60 percent said their apology

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<sup>9</sup> Of the 18 in the subset who felt pushed into saying sorry, the sources of pressure were the coordinator, police officer, or both (7); the 'whole situation' (7); a family member (3); and one couldn't remember.

was genuine. More generally, young people and victims orient themselves to the conference and what they hope to achieve in ways different than the advocacy literature imagines. The stance of empathy and openness to the 'other', the expectation of being able to speak and reflect on one's actions, and the presence of new justice norms (or language) emphasising 'repair' -- all of these are novel cultural elements for most participants. These elements and expectations may be even harder to grasp for adolescent than adult participants. For the young people, repairing their reputation to others, including promises of not getting into trouble again, are what's most important to accomplish at the conference. For victims, telling the story of the offence and its impact, along with being reassured by the offender that it won't happen again, are what's most important.

*1(c) Conference participants are treated fairly and with respect.*

On measures of procedural justice (Tyler, 1990), offenders and victims rate the conference very highly, a result found in other research on conferencing (Daly, 2001a). Of the victim and YP subsets, 90 to 98 percent said they were treated fairly by the coordinator and police officer, that the coordinator was impartial and seemed to treat everyone fairly, and that they were treated in a respectful manner. Some negativity was evinced by the YPs, with 28 percent saying that other people's ideas were favoured over theirs (compared to 13 percent of victims), and with 26 percent saying they were pushed into things (compared to 9 percent of victims). One-fifth of victims (21 percent) said that when they left the conference, they were upset by what the offender or his/her supporters said.

*1(d) In discussing the sanction (or agreement), everyone -- offenders, victims, and their supporters -- has a say about what the offender should do ...*

Two variables characterised the agreement discussion: *who proposed ideas*, and *who participated in working out the ideas* in the agreement. For the conference subset, there is an even distribution across the groups. For proposing ideas, the average (mean) percentages were coordinator (22 percent), police officer (13 percent), YP (19 percent), YP's supporters (17 percent), victim or supporters (26 percent), and other professionals (3 percent). For working the ideas out, the averages were coordinator (27 percent), police officer (13 percent), YP (18 percent), YP's supporters (19 percent), victim or supporters (20 percent), and other professionals (3 percent). A third variable described the relationship between the police officer and YP in deciding the outcome. At a minimum, the two must agree, although the

expectation is that ideally all those in the room should agree.<sup>10</sup> SAJJ observers said that agreements were reached by 'genuine consensus' in 60 percent of the conference subset, but for about 20 percent each, the YP accepted the police officer's modification as 'OK' or accepted it reluctantly.

Haines (1997) anticipates that conference dynamics will produce a 'powerless youth in a roomful of adults'. SAJJ observers believed that this phrase did not apply to 55 percent of conferences, but was applicable to some or a fair degree in 41 percent, and to a high degree in 4 percent. Items from the YP 1998 interviews show that 'powerlessness' is variably experienced. We asked the YPs, which people were involved in deciding the agreement? Similar proportions mentioned themselves (77 percent) and the victim (81 percent). Most said that *the way* the agreement was decided was fair (81 percent) and that they had some or a lot of *say* in it (74 percent). However, fewer said they had *control* in what was in the final agreement (43 percent saying some or a lot). Most thought the agreement was about right (68 percent) or too easy (17 percent); 15 percent said it was too harsh.

Victims' perceptions were identical to those of the YPs in characterising who was involved in the agreement (80 percent each). High proportions said that the *way* the agreement was decided was fair (87 percent) and that they had some or a lot of *say* in it (91 percent). Like the YPs, the victims' sense of outcome control was relatively lower (77 percent), although higher than that of the YPs. Victims were twice as likely as the YPs to say that the outcome was too easy (36 percent); 62 percent thought it was about right; only one victim viewed the outcome as too harsh.

These results show that conference penalty discussions are occurring as they were imagined. The coordinators and police officers are stepping back, allowing the participants room for decision-making. Young people said they were less able to control what was in the agreement than did victims, but ultimately, few YPs felt that the outcome was onerous.

*1(e) The police officer and coordinator ensure that elements of the agreement are not excessive.*

Like other Australian jurisdictions, in South Australia, conferencing is the second level in a hierarchy of responses. The first level is a police caution. The less serious form is an informal caution, which is a warning given by an officer in the street and is not recorded as

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<sup>10</sup> If the YP and police officer cannot agree, the case goes to a magistrate to 'referee' it. Most participants wrongly interpret this to mean that the 'YP's case will go to court' when, in reality, it is treated as a conference disposition.

an official police action. The more serious is a formal caution, which is issued when an offence is 'more than trivial', the YP has already received an informal caution, and the offence has no victim; or if there is a victim, the value of lost or damaged property does not exceed \$5,000. With a formal caution, a police officer can require an offender to pay compensation to a victim not to exceed \$5,000 (set by policy), to carry out community service not to exceed 75 hours (set by statute), apologise to a victim, or 'do anything else that may be appropriate under the circumstances'. The maximum length of an undertaking is 3 months. Undertakings agreed to in a family conference have higher maxima: compensation not to exceed \$25,000 (set by policy) and community service not to exceed 300 hours (set by statute). The maximum length is 12 months. The third level, the Youth Court, has the most severe array of penalties, including detention, not to exceed 3 years. Compensation can exceed \$25,000 (no maximum is specified in the statute), and community service hours may not exceed 500 hours (set by statute).

The conference maxima are very loud barks compared to the bites agreed to in conferences. Of all the YPs (N=107), 28 percent were to pay compensation, which ranged from \$4 to \$1,089; the median was \$112. Some 27 percent were to do community work, which ranged from 6 to 240 hours (median was 20 hours); and 18 percent, to do work for the victim, which ranged from 2 to 80 hours (median was 20 hours). The most frequent agreement element was an apology, which nearly all the YPs in the full sample (93 percent) did in some way before, during, or after the conference. Other elements include attending counselling for anger management, sex abuse, and the like (13 percent); other forms of counselling (14 percent) or educational programs (8 percent); and miscellaneous other things such as being of good behaviour, not harassing the victim, staying away from a school's grounds, and abiding by a curfew (28 percent). The median time to complete the undertaking was 3 months; few YPs (13 percent) had the 12-month maximum. Contrary to concerns that conferencing will lead to greater penalties for young people, I see little evidence of this in South Australia.

## **2. Legal context**

*The process takes place in a context where young people understand their legal entitlements ...*

Observations of the content and quality of legal information given at the conference, coupled with the YP interviews, show gaps in ideals and practices. This section utilises data from all the conferences observed (N=89) and YPs interviewed in 1998 (N=93).

Just over 30 percent of the YPs said that being at the conference was their own choice; 22 percent said that they had some choice, but were under pressure, and 47 percent said it was not their own choice. For the latter two groups (N=64), the most frequent reasons given were that the police or their parents 'said I had to go' (63 percent) or if they didn't go, they'd have to go to court (25 percent). Although going to a conference was not perceived as freely chosen by most young people, they recognised it as preferable to going to court because they knew it could impose more serious sanctions.

In the conference opening, the coordinator sets out the ground rules and explains people's roles and the legal context. SAJJ observers recorded their understanding of the ground rules and roles, assuming this was the first conference they had observed. Most said they understood the coordinator's role (80 percent), the police officer's role (70 percent), and what was supposed to happen (85 percent). For legal information, in 83 percent of conferences, the coordinator said the YP had a right to end the conference any time, and in about 70 percent, that the YP had a right to seek legal advice at any time. In only half (46 percent) was it clear what the consequences were if the young person and police officer failed to reach agreement on the outcome. Depending on the item, for 22 to 30 percent of conferences, the legal information conveyed was inadequate.<sup>11</sup>

The YP 1998 interviews confirmed these observations for some variables and revealed deficits in legal knowledge for others. Some 30 percent said they had 'no idea' how the police officer's job differed from the coordinator's job at the conference, and most (close to 60 percent) wrongly believed that the coordinator had more power to decide what was in the agreement. This latter finding is not surprising because the coordinator manages the discussion. The YPs recognised this orchestration as being 'the power' in the conference more so than the police officer's ability to veto the agreement. About half (46 percent) said they had 'no idea' what would happen if they decided not to finish the conference, and over half (56 percent) said they had 'no idea' what would happen if they and the police officer couldn't agree on the final agreement.

These findings are in line with research on adolescents in court (O'Connor and Sweetapple, 1988) and young people's understanding of their legal rights. Ruck, Keating, Abramovitch, and Koegl (1998) suggest that young people have difficulty 'reasoning about' and 'making use of rights they have in a legal context' because they are not 'aware that they possess such ... rights' (p. 286), and that most young people 'see their rights as capable of

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<sup>11</sup> Some coordinators consistently gave legal information more accurately than others.

being revoked' typically by adults in authority (p. 285). Observation and interview data from SAJJ suggest that legal entitlements are what the *adults are telling young people they have*. Absorbing this knowledge is difficult for young people, in part because they do not yet see themselves as rights bearing subjects, and in part because if legal rights *are given* to the YPs by adults, then they can just as easily be taken away. Experience from their daily lives leads them to expect this behaviour from parents and adult authorities. The distinction between 'rights in their own lives' versus 'abstract principles' is vital, Ruck et al. (1998) argue, to understanding how rights are understood from a young person's perspective.

### 3. Outcome and compliance

*The young person (offender) signs an agreement .... In completing the agreement, the offender assists in 'repairing the harm' s/he caused the victim ...*

Of the 107 YPs in the full sample, 6 percent had no agreement elements to complete (they may have apologised at the conference or received a formal caution). Most (80 percent) were officially classified as having completed all agreement elements, and another 2 percent partly completed the agreement and the rest was waived. Relatively few (12 percent) of the YPs didn't finish the agreement and were breached.<sup>12</sup>

While there is generally high agreement compliance by the YPs, the degree to which this is perceived by victims to be 'reparative' is moderate. One reason is that there may be no nexus between the offence and agreement elements. Another is that the agreement, though technically completed, is not perceived by victims to have been completed sincerely (e.g., an insincere apology letter). Of the 1999 conference victims for whom the YP had completed the agreement (N=41),<sup>13</sup> 51 percent said it helped to put the offence behind them, and 49 percent said it helped to repair the harm ('a little' or 'definitely'). Put another way, half said that the YP's completing the agreement did not at all assist them in repairing the harm or their recovery from the offence.

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<sup>12</sup> These percents are similar to figures reported by the South Australia Office of Crime Statistics of 84 to 85 percent (1998: 120; 1999: 126; and 2000: 130).

<sup>13</sup> For the 57 conference victims interviewed in 1999, the outcomes were apology in conference or no further agreement elements (4), YP completed the agreement (41), and YP did not complete it (12). Two of 57 victims said the YP did not complete the agreement, even though it was 'officially' completed. I use the victim's view rather than the official determination here and in section 4.

#### 4. Conference effects

*From their experience attending the conference, victims recover from the offence and an offender is less inclined to commit another offence ...*

For victims, I analyse the interview results for all those attending the conference (61 and 57 in 1998 and 1999, respectively); and for the YPs, I highlight results from observations and official police data for the 89 primary offenders. There are myriad conference effects that could be explored, but I restrict my analysis to victim recovery and young people's re-offending.

*4(a) Effects on victims.* Over 60 percent of the victims in 1999 said they had 'fully recovered' from the offence, that it was 'all behind me'. In cross-tabulating victim recovery by whether the YP completed the agreement, recovery was higher when YPs completed the agreement (69 percent) than when they didn't (42 percent). This result would seem contrary to what I reported above; however, each analysis taps different things. One asks victims whether certain things happened (recovery and repairing the harm) when YPs completed agreements, whereas the other compares victim recovery across two groups of YPs. When we asked victims what was most significant in aiding their recovery, the majority (about 60 percent) cited the passage of time, their own resilience, and support from family and friends. Participation in the conference process, including meeting the YP and contact with the coordinator and police officer, were mentioned as most significant by about 30 percent. However, when asked generally about the relative importance of the conference process and things they could do for themselves, victims were divided, with half citing their participation in the justice process as being important in getting the offence behind them. A prudent interpretation of these varied responses would be that while conferences do assist victim recovery, victims also rely on personal resources and support from others.

Conferences can have benefits in reducing victims' anger and fear. Over 75 percent of conference victims felt angry toward the offender before the conference, but this dropped to 44 percent after the conference and was 39 percent a year later. Close to 40 percent of victims were frightened of the offender before the conference, but this dropped to 25 percent after the conference and was 18 percent a year later.

*4(b) Effects on offenders.* As others have said (Levrant, Cullen, Fulton, and Wozniak, 1999: 17-22), great faith is placed on the conference process to change offenders, when the conditions of their day to day lives, which may be conducive to getting into trouble, may not

change at all. To analyse re-offending, a colleague and I asked if things that occurred in conferences could predict re-offending, over and above known predictors such as previous offending and social marginality (Hayes and Daly, 2002).

We defined offending as detected illegalities by the police, to which the YP admitted, and which were dealt with by formal caution, conference, or court. Before the offence that led to the SAJJ conference, 57 percent of the primary YPs had offended at least once. During an 8- to 12-month window of time post-conference, 40 percent of the YPs offended at least once. We analysed re-offending using a logistical regression analysis, where the dependent variable was dichotomous (1 = re-offended); our measure is therefore of prevalence, not incidence. We identified four 'control' variables: the YP's race-ethnicity (Aboriginal or non-Aboriginal), sex, whether s/he offended prior to the offence leading to the SAJJ conference, and the number of distinct addresses for the YP on the police files, a measure of the YP's residential instability and marginality. Over and above these factors, two conference variables were significant: when YPs were remorseful and when outcomes were achieved by genuine consensus, they were less likely to re-offend. The control variables were the strongest predictors of re-offending, accounting for most of the explained variation; however, the two conference variables had significant effects. The SAJJ results are remarkably similar to those of Maxwell and Morris (2001) on conferencing and re-offending in New Zealand. They found that while prior offending and negative life experiences had the strongest influences, re-offending was less likely when young people felt remorseful, were involved in the decision-making, and agreed with conference outcomes.

## DISCUSSION

Based on research in South Australia and other jurisdictions in the region, gaps in ideals and practice are evident in many, but not all components of the conference process. Practices are occurring as imagined in the degree of participation in the outcome (penalty) discussions, in which the professionals do not dominate; in the degree to which victims and offenders say the coordinators and police officers treat them fairly and with respect; and in the limits placed on penalties imposed. Gaps more often arise in areas outside the control of the coordinators and police officers, where organisational, cultural, and individual constraints place limits on what can be achieved. I turn now to discuss these gaps: (1) the containment of justice ideals by organisational routines, (2) new justice scripts and the legal consciousness and moral development of participants, (3) the comparative ease of achieving fairness over restorativeness, and (4) moderate positive effects and the nirvana story.

### **Containment of Justice Ideals by Organisational Routines**

Reaching justice ideals is costly, organisationally and economically. With insufficient time to attend carefully to all cases, the justice system sieve filters out many of them. Victims want more information about their cases than justice system workers can provide. The postponement and rescheduling of cases means that defendants return to court many times before their case is disposed. Justice ideals take second place to organisational routines and professional interests. The same phenomena occur in restorative justice practices, although the bar is raised even higher. The time and labour to organise a conference is even greater than that for a court case. The coordinator is not only expected to identify all the relevant people who ought to be there, but also speak to each of them individually about what the conference is, what participants' roles are, and what might be achieved. It is unrealistic to reach that ideal in a high-volume jurisdiction that uses conferences as a matter of routine. Organisational shortcuts are inevitable. Not everyone can be contacted and spoken to, especially young people who are often not at home; and even if they are contacted and the conference process is explained, one cannot be sure that participants understand it. Coordinators are selective, giving more time to some cases than others, just as court workers do. Conference participants may have raised expectations about the quality and frequency of information they will receive that are difficult to meet in practice. If jurisdictions want to introduce conferencing as a high-volume activity, we should expect to see organisational routines, administrative efficiency, and professional interests trumping justice ideals.

### **New Justice Scripts and the Legal Consciousness and Moral Development of Participants**

The irony in educating citizens about new justice scripts is that the conference proceeding is 'confidential': it is closed from public view and by invitation only. Compounding the problem, some coordinators and police officers misconstrue confidentiality, applying the term too broadly. For example, in one conference, a teacher suggested that as part of the YP's outcome, she could describe her conference experience to a group of her classmates. The coordinator quickly vetoed the idea, saying that the conference was confidential. In another, the coordinator told the YP not 'to talk about what happened here' to his friends because the conference was confidential.

In the *Young Offenders Act 1993*, confidentiality is discussed in Division 4, Section 13, 'Limitation on publicity', where it says that 'a person must not publish, by radio,

television, newspaper or in any other way, a report of any action or proceeding taken against a youth ... that identifies the youth ...[or] identifies the victim'. This would *not* prohibit a young person who has been to a conference to discuss what happened to him or her. The key point is publicly naming a person, and surely, young people or victims should be free to name themselves. Invoking confidentiality, particularly, an over-broad interpretation, serves to maintain the public's ignorance about what happens and what people do.

Because there is little to go on, except their experience in a previous conference, many young people and their parents do not know what's expected of them. The potential for restorativeness is greater when participants, and especially offenders, have taken the time in advance to think about what they want to say. Yet, as we learned from the interviews, over half the YPs hadn't *at all* thought about what they'd say to the victim. While most YPs know that a conference is different from a court proceeding, they adopt a similar posture toward both: it is a place they've been made to go to because they have done something wrong. It is a place where, as the young people said, 'something would happen to us', 'an agreement would be made ... to decide on my punishment', '[I'd] speak and answer their questions', and 'they were just going to talk to me about what happened and make me apologise and say I knew it was wrong ... My mum told me "just be good and tell the truth"'.

Few YPs saw the conference as an opportunity to take an active role in speaking to a victim. A handful edged toward this idea, saying 'we would just sit in a room and talk about it' or 'come face to face with the victim and see what would happen'. Most YPs were not there to 'repair the harm', but rather to answer questions and hope they didn't get too many hours of community service or a good behaviour bond. Most did not think in terms of what they might *offer victims*, but rather what they would be *made to do by others*. Until the argot of restorative justice and the expected script between victim and offender in a mediation-like setting is known to a broader audience, offenders, victims, and their supporters are feeling their way through an unfamiliar justice terrain (see also Levrant et al., 1999: 11-12).

The fact that all the offenders are under 18, but most victims are over 18 creates added problems in enacting this justice form. Many young people may not yet have the capacity to think empathetically, to take the role of the other (Frankenberger, 2000); they may be expected to act as if they had the moral reasoning of adults when they do not (Van Voorhis, 1995).

### **The Comparative Ease of Achieving Fairness over Restorativeness**

Why is fairness easier to achieve than restorativeness? Fairness is largely, although not exclusively, a measure of the coordinators' and police officers' behaviour and words in the conference. As the professionals, they are polite, they listen, and they establish ground rules of respect for others and civility in the conference process. Whereas fairness is established in the relationship between the professionals and participants, restorativeness emerges in the relationships between victim, offender, and their supporters. Being polite is easier to do than saying you're sorry; listening to someone tell their story of victimisation is easier to do when you're not the offender. Indeed, understanding or taking the perspective of the other may be easier if you're not the actual victim or the offender in the justice encounter. Restorativeness requires a degree of empathic concern and perspective-taking; and as measured by psychologists' scales, these qualities are more frequently evinced for adults than adolescents.

While most YPs said that they apologised because they were genuinely sorry, most victims did not think the young people's apologies were genuine. It is uncertain how to resolve these contrary views. Are victims not reading the YP's apologies correctly? Have the YPs not apologised genuinely enough (whatever this means)? Or have the victims correctly sized up a non-apologetic attitude? Whatever the answer, the gap in the perceived genuineness of the apology itself reflects problems in achieving restorativeness.

Restorativeness cannot be forced or scripted in the way that fairness can. Restorativeness works with emotions and feelings, with anger and shame, with feeling harmed and feeling bad. Fairness works with established roles and procedures, and at times with deceit, as for example, when judicial officers and police officers *must appear* to be fair, polite, and respectful toward offenders, when in fact they have a low opinion of them. In short, it is easier *to pretend* to be fair and polite than it is *to pretend* to act in ways we may think of as 'restorative'.

That such high proportions of young people perceive the conference process and outcome to be fair, and at the same time, know less about its legal context or their rights, is not surprising. Being treated fairly and with respect by decision-makers, who do not seem to show favouritism toward others, is more salient to young people than is knowledge and understanding of their legal rights. For most young people, the meaning of 'fair treatment' was that decision-makers did not come down hard on them and the penalty was not onerous.

### **Moderate Positive Effects and the Nirvana Story**

From the SAJJ project, we see that many positive things happen during and after the conference. That genuine apologies are made and accepted some of the time is a good thing, as are reductions in victims' fear toward offenders. That conferences are viewed as contributing to victims' recovery and that certain conference elements may engender law-abiding behaviour for YPs are also positives. What requires attention is, how often do such positive things need to occur before conferencing is seen as viable? Ten percent of the time? A third of the time? More often? Conversely, what is the maximum threshold for negative things that may occur? What if we learn that victims are 're-victimised' by the conference process about 20 to 25 percent of the time? Should this dissuade us from moving the idea forward?

The nirvana story of restorative justice helps us to imagine what is possible, but it should not be used as the benchmark for what is practical and achievable. The nirvana story assumes that people are ready and able to resolve disputes, to repair harms, to feel contrite, and perhaps to forgive others when they may not be ready and able to do any of these things at all. It holds out the promise that these things *should happen most of the time* when research suggests that these things can occur *some of the time*. How often depends on what kinds of cases (or crimes) are handled, what precisely the justice activity is and where it sits in the criminal process, and what criteria and measures are used for judgment.

### **A BRIEF CLOSING**

There are limits to the idea of restorative justice, which stem in part from organisational constraints on what can be achieved, and in part, from popular understandings of what 'getting justice' means to people. It will take time for people to imagine that they can have their day in conference rather than in court. It will take time, perhaps a very long time, for people to become familiar with new justice scripts and social relations in responding to crime. Moreover, there will be variation in people's capacities to enact and read the scripts. We know that the space between the platform and the train is a gap that once we are warned of it, we can traverse with ease. The spaces between older and newer understandings of justice produce gaps of an entirely different order, gaps that will be difficult to traverse. It is that knowledge we need to be most mindful of.

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