RESTORATIVE JUSTICE AS RESTORING THEIR HUMANITY

"I believe restorative justice is a way of returning men to society in a meaningful way. I've heard it said that one of the ways of looking at restorative justice is taking soil and turning it over to restore that soil so that something can grow, and I like that concept because it talks about how we can work with men to help them change."

- Deacon George Salinger

INTRODUCTION
Aims and Definitions
Definitions of restorative justice vary greatly. Some suggest that it a philosophy leading to processes; others speak of restorative justice as the process itself. However, all of these definitions converge on the recognition of the goal of either replacing or augmenting our concept of 'justice' as a legal system whose sole purpose is to decide on and administer punishment, with a process for redressing the effects of the offence and increasing the probability of a future for all which is characterised by human dignity.

For example, Marshall (1999) suggests that the adoption of restorative justice as a process whereby all the parties with a stake in a specific offence collectively resolve how to deal with the aftermath of the offence is the most appropriate alternative to traditional models of justice focused and dependent solely on retribution. These stakeholders include not only the individual victim(s) and the offender(s) but also the families and communities who were, and may continued to be, affected by the offence (Restorative Justice Bill 2004 Explanatory Statement, p 2). Further, the outcomes of a successful process of restorative justice must include not only the resolution of immediate issues and emotions experienced by these stakeholders (The Legislative Assembly for the Australian Capital Territory, 2004) but must also restore the inherent *humanity* of all those who are party to a conflict (Tutu, 2007). It is this outcome, the restoration of the innate human dignity of all stakeholders, victims and offenders, which is the central focus of this paper.

In many of the models and resultant processes, there can be an inherent assumption that restoration is equivalent to return to the *pre-offence* state of the victim and the offender. However, this paper will argue that the pre-offence state may not reflect those stages of moral development associated with the maximisation of the human potential of either offender or victim.

For the offenders the pre-offending state is most often not consistent with their potential to be the fully functioning moral human that they should or could be. That is, there is almost always a long history of losing or failing to maximise their moral development as a tool for expressing their humanity prior to the offence (Liska & Reed, 1985, Palmer & Hollin, 1996; 1998; 2001) associated with a long history of poor moral choices (Luna, 2000).Consequently, they see themselves as loathsome, reprehensible caricatures of what they might have been. For example, the drug dealer who sells a teenager a hit

which leaves him/her unconscious may, at one level see themselves as an 'entrepreneurial business woman/man' for whom he merely provided a product and a choice. At the same time, the dealer sees themself described by the media as 'scum', 'a dealer in death'. Restorative justice, when achieving its full mandate, should not only help the dealer to feel contrition for their act but to more fully understand how their choice to sell those drugs has ultimately diminished their own humanity.

Barton (2000) rightfully suggests that a deep approach to restorative justice must empower the victim(s), that they have the opportunity and support to speak their minds truthfully and without fear about their emotional experiences, anger, devastation and fear. However, what is not made explicit is the need to promote within victim a search for their own strengths for doing this based on the benefits that such a search may yield for them. Thus, the victim(s) are encouraged to vent and to work towards accepting an apology or offer of 'restitution' as a balm for the pain suffered. However, unless the victim is supported in the re-discovery and exercise of those qualities which characterise and give dignity to their own humanity, the apology may do little to ease their pain and the search for restitution may degenerate into retribution.

Restitution, like restoration, implies acts which can somehow repair the damage done. This can never be made equivalent to 'undoing' or 'making up for' the offence. Nothing that any offender can offer will ever achieve this. Therefore, unless the victim him/herself has the readiness to accept that the offender is truly aware of what damage they have done, is truly sorry and is willing to engage in whatever positive steps are required to ease the deep hurt they have caused, the act of 'restitution' can easily become just another form of retribution. Consequently, the restorative process must offer the victim the opportunity to explore, develop and express their highest degree of humanity, not because it benefits the offender, but because it is vital for the healing of the hurt they themselves are enduring.

While this expression of victim expression of their humanity is not always an outcome of the restorative process, the testimonials of those victims who have used the restorative justice experience to build on their own humanity, minimising bitterness and hatred, show people who not only enjoy reduced their own (dis)stress levels by letting go of their anger, but also people who are able enjoy their own lives to a greater extent than they did prior to the hurtful experience. Unfortunately, the converse is also true in that those who are unable to rise to the occasion and let go of bitterness find that no amount of retribution satisfies them or helps them to heal.

Moral Reasoning
One of the most significant characteristics of being 'human' is the development and subsequent expression of moral reasoning. Kohlberg's research (1969, 1984) has provided an invaluable tool for characterising these levels of development. While

Kohlberg has demonstrated that the evolution of these stages are in part are age related, he acknowledges that the achievement of these stages is influenced by not only age but culture (Miller, 2005; Miller, 1992; Bersoff, 1993), family environment (Berkowitz & Grynch 1998 Adalist-Estrin, 1999; White, 1996; *Kochanska,; Aksan,; Nichols, 2003; .Berkowitz&Bier,.2005*) and peers (Berkowitz, 1980; Walker, Hennig & Krettenaur, 2000; Amonini and Donovan 2005; Bukowski & Sippola ; 1996)

Kohlberg (1984) suggests that those who are at the higher levels of moral development will judge things to moral or immoral based on an understanding of the broader principles underlying social laws. In terms of their humanity, these people are making decisions about the 'rightness' of these alternatives relative to the *universal needs*, *wants and wishes of other humans.* Thus, they are making and acting out decisions which reflect the best characteristics of human thinking and behaviour.

Gilligan (1982) and other researchers interested in the relationship between gender and moral reasoning (Tronto, 1987; Walker, de Vries & Trevethan, 1987; Heckman, 1995; Jaffee & Hyde, 2000), while agreeing that moral reasoning is developmental and responsive to the aforementioned variables, contend that the way men and women reach their decisions about the rightness or wrongness of alternatives or behaviours is likely to be different. They contend that men are more likely to look for universal needs, wants and wishes of humans while women are more likely consider to the needs, wants, and wishes of other individuals. For men, the rightness of a decision is based on fairness in treating everyone the same; for women the decision is about how to achieve connections with others. These differences can be summarised as in Table 1

However, the research of Gilligan and subsequent researchers, while demonstrating that women are *more likely* to use a different approach to moral reasoning also indicate that reasoning processes are far from mutually exclusive and predetermined by the sex oof the individual. Rather, they conclude that the degree to which males or females favour one style of moral reasoning over the other depends as much on the culture in which they have been raised as their chromosomes. Therefore, in this paper I have elected not to use the terms, male/female reasoning but rather a more masculine/feminine emphasis in reasoning. This perspective is consistent with the evidence that, in societies where feminine values are encouraged, males will be more likely to choose 'feminine' solutions; and in societies which elevate masculine values, there will be a greater tendency for women to apply masculine moral reasoning.

TABLE ONE MORAL REASONING AND GENDER EMPHASIS		
	MASCULINE EMPHASIS	**FEMININE EMPHASIS**
Desired outcome	Protect and enforcing legal rights	
Method	Sameness in treatment	
Basis of 'fairness' Judgments	Revered for impartiality Prescriptive, universal or abstract	
Code of conduct	Individual and hierarchical Restitution of relationships and connectedness	
Decisions Payment for errors (retribution)	Provide social and emotional recourse to reduce emotional suffering. Recognition of individuality Embedded in individual circumstances. Suggestive and based on individual case. Cooperative and consensual.	

Thus, in any given population, there will be an anticipated nexus between a culture which is more masculine in its values and the adoption of not only more masculine rationales for determining moral dilemmas but also a greater tendency to adopt policies which support this reasoning; more masculine discipline policies. Thus, when dealing with offences masculine societies will encourage masculine reasoning which will lead to masculine discipline. These are summarised in Table 2.

TABLE TWO
MASCULINE AND FEMININE DISCIPLINE POLICIES

MASCULINE DISCIPLINE POLICY FEMININE DISCIPLINE POLICY

Time served, detention, lines…

Consequence for breaking rules as punishment and exclusion.

No mitigating circumstances

Prescriptive, universal or abstract codes of conduct. Everyone must ….

Teacher judges misbehavior and administers punishments
Apology and 'make-up'.

Consequence of obeying rules the reward of relationships.

Consequences mitigated by individual circumstances

Codes seen as suggestive and based on individual case. It is expected that…

Group judges misbehaviour, decides the consequences .

This is not to argue that either masculine or feminine societal values are superior and more than it would be argue that masculinity or femininity is 'better'. Rather, it is to suggest that there be an effort to integrate and accommodate both *feminine* and *masculine* approaches to moral reasoning in order to create and apply a more comprehensive, approach to social justice as a way of restoring the humanity of both victims and offenders.

RESTORATIVE JUSTICE AND MORAL DEVELOPMENT

As a tool for resolving the hurt that has occurred between people Barton (1999) suggests that the success of restorative justice practices depends on four factors; reversal of moral disengagement, re-integrative shaming; promotional of moral reasoning, and moral and psychological healing.

Reversal of Moral Disengagement

According to Barton, the first factor in a successful restorative justice process is reversal of moral disengagement whereby individuals silence their conscience using one or more of Bandura's psychological mechanisms of disengagement. All of these require a denial of the humanity of the other person. Through such disengagement the perpetrator may rationalise about the consequences of their act, i.e., "The victim is wealthy and can afford to lose a little of that extra money….), lessen personal responsibility for their own actions, i.e., "If she hadn't …", or dehumanising the individual(s), i.e., "gays/insurance companies/

rich people deserve…" Similarly, there may be moral disengagement by the victim or the community who demonise the perpetrator. Statements like, "Beasts like you…", deny the humanity and potential for moral growth of the offender. This in turn, leads to the conclusion, "What can you expect from an animal like….".

As a reversal of behaviour deemed to be morally inappropriate by society depends on moral reasoning the individuals, Barton suggests that the restorative justice process must actively promote the required moral development. Offenders stuck at Stage 1 of Kohlberg's stages due to growing up in an environment in which survival is predicated on a 'dog-eat-dog' or 'do them before they do you' philosophy, will judge the offence in terms of punishment for disobedience of laws. Thus, moral judgement is in terms of whether or not the crime is likely to be gotten away with and, if caught, being able to withstand the punishment.   At Stage 2 the perpetrator begins to see that the punishment may be just according to the code applied but that the reasonable the aim of the game is to minimise the personal pain to be endured even if it means offering a token apology. At Stage 3 or 4 the perpetrator may is more likely to realise that their behaviour was reprehensible in the eyes of others in society and therefore make a public show of atonement in order to regain community approval. However, this apology will more than likely lack any understanding or empathy with the victim. It is simply a recognition that society frowns on the behaviour and that socially acceptable thing to do is to make a show of atonement. It is only at Stage 5 that the offender recognises that both s/he and the victim both belong to the universe called humanity, and as such have shared needs and feelings which then entitle each of them to dignity and fair treatment.

On the other hand, the victim who is at Stage 1 or 2 may be unable to move beyond a desire for retribution. They often feel that the law has not done enough to punish the perpetrator for their offenses. Unfortunately, this desire for massive retribution rarely leads to the healing required by the victim. Rather, more often it leaves the victim strangled with unresolved angry and feelings of personal impotency. Victims at Stage 3 or 4 may accept the sentences given to the perpetrator, not because they believe that such penalties redress the act, but only because they are the 'law' and therefore should be accepted. While operating at these stages the victim is deprived of an opportunity to truly engage in their own restorative process. Ultimately, they frequently find themselves revisiting the offense and wondering whether some greater punishment might have been better and may even begin to campaign to have the laws made more stringent for the offense. It is only when victims are able to operate at the highest stages of moral development that are they able to see the all events as part of the 'human condition', acknowledge the actions of the offender as an example of 'human weakness', and look toward that human as capable of redressing that weakness and functioning at a higher/more humane level. This is not the same as offering 'forgiveness', and not the same as 'letting it go'. Rather, it is finding within oneself the necessary power to see the offense as separate from the perpetrator and condemning the act rather than the person.

The reversal of moral disengagement, while facilitated by the process of dialogue, depends on the individual's stage of moral development, the criteria upon which they conclude that choices are 'right or wrong'. Where individuals fail to adopt criteria which conform to those of their society they, "become sources of danger and misery to others as well as themselves (Barton, p. 6). Therefore, it is the responsibility of society to provide those who have a propensity to commit morally reprehensible acts with morally formative experiences which converts the individual to the acceptance of new moral criteria and the adoption of new behaviours consistent with these criteria (Von Willigenburg, 1996, p. 137-139).

Reintegrative Shaming

Barton suggests that for restorative justice to be satisfactorily achieved there must be 'reintegrative shaming'. This requires that the offending *behaviour* be condemned and renounced while both the offender and the victim are simultaneously recognised and affirmed as valued individuals. However, in order to value someone, there must be criteria for value. If one accepts that each human has within them the innate *capacity* to evolve standards of moral reasoning which are more than the animalistic responses of seeking rewards and avoiding punishment, then this innate human capacity can become the basis for valuing each individual. Each person's development of this capacity is then similar to the inheritance of a diamond which may be of varying size, purity, cut and polish.

Failure to achieve the appreciation of the *potential* of the individual while condemning the act which is keeping them from discovering, developing and expressing their potential, is likely to result in the offender further rejecting not only the harm done to the victim but also the moral rationale which has labelled them as a person not worthy or redemption or forgiveness. Therefore, it is essential that the criteria for rejecting offending behaviour be separate from legal consequences. That is, the rationale must go beyond the Stage 1 punishment avoidance of legal consequences and the use of other people to satisfy one's own needs, but rather incorporate the Stage 2/3 recognition of the needs of others, the Stage 4 establishment of an orderly society wherein all individuals are protected but also move toward an understanding of the Stage 5/6 reasoning which place responsibility for making decisions with the individual. In this final stage the rationalisation that "I come from …." simply doesn't work to justify offensive behaviour, nor does it allow the victim to abrogate all responsibility for either the offence or their subsequent feelings or behaviours.

According to Barton (2000. p10) the journey to emotional and moral psychological healing for both the perpetrator and the victim means moving from positions of self-protection to a state of genuine remorse, empathy and willingness perform differently in the future. This success of this change depends on the moral reasoning of the individuals. For example, if they are stuck at the stage of 'rule driven' decisions associated with reward and

punishment, it is less likely that they will be able to move from a position of 'guilt' as a perpetrator or 'punishment' as the victim.

Promotion of Moral Development

For Barton, successful restorative justice must involve the promotion of social and moral development. However, it is only when the restorative justice processes create, for both the victim and the offender, an environment which maximises the expression of higher moral reasoning that individuals will feel comfortable to choose a higher level of moral reasoning rather than one which is more typical of their reasoning or even less than their normal level. (Walker, Hennig & Krettenauer, 2000). Despite the desirability of creating social environments which facilitate the choice of higher order choices, the legal system generally provides environments and expectations that are best described as 'masculine' in that they reinforce moral choices associated with retribution for offences, meeting the letter of the law and making judgements which exclude emotionality. What is needed for restorative justice environments is the creation of social milieus' which might be described as 'feminine' as they are more likely to emphasise caring for individuals, making connections, interpreting outcomes in terms of individual circumstances. This 'feminine' climate may better foster outcomes more congruent with the aims of *restorative* justice by encouraging recognition of both the individuality of people and their common links as part of humanity.

Moral and Psychological Healing

According to Barton (2000), successful restorative justice promotes emotional and moral psychological healing. Because of an offence, both the victim and the perpetrator have become "wounded". For the victim this may be related to a loss of self-efficacy or personal power, for the perpetrator the offence may result in the loss of self-esteem, social standing or even self-loathing. Both of these wounds need healing.

This concept of joining of justice and healing is not entirely new. In the *Republic* Socrates defines that the 'just man' as one who 'does no harm'. This tradition of just practice as related to harm continues today with the Restorative Justice Centre defining restorative justice as a "process that addresses the repercussions and obligations created by harm…" This concept of addressing harm as a part of healing is similarly embedded in the medical model with physicians taking their Hippocratic Oath pledging that their first duty is to, 'do no harm'. Thus, those charged with care of promoting justice as social health and those promoting physical health both have as a first or central concern, the prevention or redress of harm.

In 14th century Europe there appeared an even more tangible product of convergence of legal and medical collaboration to prevent harm; the drinking stein. Until then, tankards of

beer were open or 'topless' allowing for the possibility that disease carrying flies might, having shared in the inebriating experience, fall into the brew taking with them the diseases which literally plagued the times. However in an effort to prevent harm from such insect borne diseases, laws were passed which required the addition of a lid to such tankards; thus, the creation of the stein.

These letters, STEIN can also be used to illustrate the use of restorative justice to heal those involved in offences which have resulted in pain and suffering. Further, the STEIN acronym can be used to illustrate how incorporation of both 'masculine' and 'feminine' approaches to moral reasoning can not only support the minimisation of harm but also maximal healing.

THE STEIN AS A MODEL

Safety. The first duty of care by those in the medical professions is to protect the patient from further harm. Thus, any treatment which could put them at further risk must be rejected in favour of those which pose less risk even where the benefits could be better. Similarly, those entrusted to facilitate the process of Restorative Justice have, as their first responsibility, the requirement to prevent mental or psychological harm to either the perpetrator or the victim. Consequently, they are mandated to provide an environment which protects both the victim from and the offender from deprecation or intimidation and which will foster mutual healing not only of the immediate damage but also the past weaknesses in the offender and potential recurrent problems of the victim.

Drawing on the 'masculine' perspective, restorative justice must provide clear, specified and abundant assurances that the individual will, at all times, be protected from further harm. This protection will define what is acceptable and what is not, who may speak and when, etc. The consequences of breaking these rules need to be spelled out and, if broken the consequences applied. Drawing on a 'feminine' perspective, restorative justice must enjoin the participants to openly acknowledge their wounds, their weaknesses and areas of social disease, to accept the wounds of others and to engage in mutual 'bandaging'.

Treatment. Those attended by a physician expect their health problems to be subject to treatment which can involve having to take some bitter medicines or, where necessary for the health or survival of the individual, endure surgery to remove the elements which are diseased. The treatment selected is generally based on normative data. Similarly, treatment within the justice system involves a 'bitter pill' or excision of privileges or rights based on normative expectations. The outcomes from such treatments are often merely the basis of further statistical data with case histories seen as 'anomalies' or 'exceptions'.

Feminine approaches to medical treatment focus on the individual, their special needs and potential to respond to treatment. Further, there is an emphasis on not only putting

the individual through a course of treatment but of following them up to ensure that good health is maintained in the future. Similarly, in the restorative justice model, requires that treatment or healing be based on the individual circumstances of both the victim and the offender. Furthermore, there should be commitment to maintaining moral advances made during the restorative justice sessions rather than assumptions that the meetings will 'cure' the problems and that the individuals will then be able to continue 'pain free' in the future. \

Education. The good physician examines the lifestyle which is causing the individual to suffer ill health and will educate the person on how they can change so as to enjoy a richer, pain-free life. A masculine approach might consist of providing literature which presented the consequences of continuing with their current lifestyle but providing little in the way of guidance in how that literature could be translated into an improved lifestyle. Further, the 'educative' process would end with the first signs that the patient was able to function without support.   In a restorative justice setting, the provision of readings, lectures or similar input could be considered a masculine approach. Alternately, a more feminine medical approach might be provision of life coaching which would provide the individual with the necessary emotional support to make the changes necessary to improve their lives. In the restorative justice setting this might mean the formation of self-help groups, access to bloggs or other online sharing; all of which would be supported over a much longer period of time.

Isolation. There are times when a patient's illness presents a threat to others. In these cases they are quarantined until such time that it is safe to release them back into the larger society. A masculine approach would be, as we had done with some HIV patients, treat their exclusion as punishment for their 'sins'. A more feminine approach would be to use the removal as a time for treatment and more intensive support from professionals, friends and family with the expressed hope that the sufferer would someday be well enough to return to society.

Nurture. Today there is a dearth of information that patients who feel that their physicians communicate with them have better recovery rates than those who do not. Masculine nurturing and communication would focus primarily on the progress of the disease or the effectiveness of the treatment. In contrast, the more feminine form of communication would not only monitor the disease and treatment but the feelings of the person.

Thus, the **STEIN model** becomes the *vessel* for delivery of the treatments required for restoration of both health through a blending of the essences of both masculine and feminine reasoning. This blended brew not only eases the stresses which exist between people but may stimulate feelings of goodwill which can be the basis for building better bonded communities

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